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CALIFORNIA REPORTER

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CALIFORNIA REPORTER

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208 Cal. 205

IMPERIAL LIVE STOCK & MORTGAGE CO. v. TRACY. (L. A. 9192.)

Supreme Court of California. Sept. 26, 1929.

1. Corporations 🔑92—Recovery cannot be had on renewal note, based on stock subscription agreement, where prescribed amount of purchase price was not paid in cash (Corporate Securities Act, § 12).

Recovery cannot be had on renewal notes, based on subscription agreement for purchase of stock in plaintiff corporation, where twenty-five per cent. of purchase price was not paid in cash, as required by Corporate Securities Act, § 12 (Deering's Gen. Laws 1923, Act 3814, § 12), since renewal note given in lieu of previous note based on illegal contract is unenforceable in hands of parties participating in acts which render original note invalid.

2. Trial 🔑252(15)—Submission of issue as to illegality of stock subscription for failure to make required cash payment held erroneous under evidence (Corporate Securities Act, § 12).

In action on notes based on subscription agreement for purchase of stock, the submission of issue as to illegality of subscription under Corporate Securities Act, § 12 (Deering's Gen. Laws 1923, Act 3814, § 12), because of failure to pay 25 per cent. of purchase price in cash, *held* erroneous, in view of evidence showing without substantial conflict that required payment was in fact paid at time subscription was made.

3. Corporations 🔑92—Purchaser of stock could not resist payment of note given therefor without offering evidence that stock was entirely without value.

Purchaser of stock was not entitled to resist payment of note given therefor in full for lack of consideration without offering evidence to show that stock was entirely without value, particularly in view of clear inference from the evidence that stock had considerable value.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by the Imperial Live Stock & Mortgage Company against William Tracy. Judgment for defendant, and plaintiff appeals. Reversed in part, and affirmed in part.

For opinion of District Court of Appeal, see 272 P. 600.

Fredericks, Hanna & Morton, of Los Angeles, and C. V. Anderson, of Bakersfield, for appellant.

Dorsey & Campbell and Emmons, Aldrich & Mack, all of Bakersfield, for respondent.

PRESTON, J. We agree with the conclusion of the learned District Court of Appeal announced in this case, and, as to the questions raised by the appeal as to causes of action 2, 3, 4, and 5, we adopt a portion of the opinion of Mr. Justice Plummer, as follows:

This action was brought to enforce payment of five promissory notes, set out in plaintiff's complaint in five separate causes of action. The defendant had judgment, and the plaintiff appeals.

The first cause of action is based upon a promissory note in the sum of $7,500, executed by the defendant on May 20, 1922. The second cause of action is on a promissory note in the sum of $1,875, executed by the defendant on May 20, 1922. The third cause of action is based upon a note executed by the defendant in a like sum of $1,875, dated May 20, 1922. The fourth cause of action is based upon a promissory note executed by the defendant in the sum of $7,500, dated May 20, 1921. And the fifth cause of action is based upon a promissory note executed by the defendant in the sum of $3,750, on May 20, 1921. These notes were all executed for and on account of original subscription agreements of the defendant to purchase shares in the capital stock of the plaintiff corporation. These subscriptions are dated as follows: One for 250 shares of the capital stock of said company dated February 5, 1920; one for 250 shares of the capital stock of said company, dated November 16, 1920; one for 500 shares of the capital stock of said company, dated January 27, 1921; one for 1,000 shares of the capital stock of said company dated March 16, 1921; and one for 1,000 shares of the capital stock of said company, dated April 7, 1921. The note based upon the subscription agreement for 1,000 shares of the capital stock of the plaintiff corporation, dated April 7, 1921, appears in the complaint in the form of a renewal note, for the same sum set forth in the first cause of action.

By way of defense to the plaintiff's action, the defendant set forth in his answer that the notes were obtained by fraudulent representations, and also that the subscription agreements upon which the original notes were given were void under the Corporate Securities Act, and that the notes sued upon are simply renewals of the original void obligations. The subscription agreements were all in similar form, and, among other items, contained the following:

> "I hereby subscribe for, and agree to purchase —— shares of the capital stock of the Imperial Live Stock & Mortgage Company, a corporation organized and existing under and by virtue of the laws of the state of California, and agree to pay therefor $10.00 per share, payable as follows: Not less than one-fourth cash accompanying this obligation, and the balance thereof as evidenced by a promissory note of even date herewith bearing interest at the rate of 6 per cent. per annum."

The permit issued by the commissioner of corporations permitting the plaintiff corporation to take subscriptions for shares of its capital stock, specified that not less than 25 per cent. of the par value of the stock should be paid for in cash, and that the remainder, or 75 per cent. of the amount agreed to be paid, might be evidenced by a promissory note or promissory notes bearing 6 per cent. interest.

In so far as the agreements to purchase shares of the capital stock of the appellant corporation are concerned, upon which the renewal note set forth as the second, third, fourth, and fifth causes of action in the plaintiff's complaint are based, the record shows beyond controversy that no part of the 25 per cent. of the par value of the shares of the capital stock subscribed for by the defendant was paid in cash. In each instance, so far as the agreements to purchase shares of the capital stock which lead to the giving of the renewal notes set forth in said causes of action are concerned, what are called in the transcript "myself notes" only were given; that is, the defendant, when subscribing for shares of the capital stock, instead of paying 25 per cent. in cash, drew a note payable to himself for 25 per cent. of the par value of the shares of stock subscribed for, and delivered the same to the plaintiff, and then, at the same time, and as a part of the same transaction, executed a promissory note payable at a definite time, some months after the date of the execution of the note, for 75 per cent. of the par value of the stock subscribed for. The record shows that prior to the 20th day of May, 1921, these "myself notes" had all been taken up by the defendant by the payment in cash of the 25 per cent. of the value of the shares of stock theretofore subscribed for by the defendant; that on said 20th day of May, 1921, renewal notes were given in lieu of the former notes, representing 75 per cent. of the purchase price of the shares of stock mentioned in the subscription agreements; that at said time the shares of capital stock subscribed for were issued and assigned to certain persons as trustees for the benefit of the plaintiff, to be held as security or until the 75 per cent. notes were fully paid, trust certificates representing the shares of stock called for in each subscription being delivered to the defendant, evidencing the number of shares assigned by him, and to be held in trust for the benefit of the corporation.

The court instructed the jury to find in favor of the defendant as to the second, third, fourth, and fifth causes of action alleged in plaintiff's complaint. With this summary we may proceed to consider the appellant's contentions, which are as follows:

(1) That the court erred in directing the jury to return a verdict in favor of the defendant on the second, third, fourth, and fifth causes of action.

(2) That the issue of fraud should not have been submitted as a defense to the first cause of action set forth in the plaintiff's complaint.

(3) That the defense of illegality, based on the use of "myself notes," should not have been submitted as a defense to the first cause of action.

[1] As heretofore stated, all the notes sued on by the plaintiff in the second, third, fourth, and fifth causes of action set forth are renewal notes, based upon subscription agreements for the purchase of shares of stock, under a permit from the commissioner of corporations, providing that at least 25 per cent. of the purchase price should be paid in cash, whereas in truth and in fact no cash was paid, and only "myself notes" were given for the 25 per cent. of the purchase price, which notes were subsequently taken up by the defendant.

Section 12 of the Corporate Securities Act, usually referred to as the "Blue Sky Law," reads as follows:

> "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by any company, with the authorization of the commissioner but not conforming in its provisions to the provisions, if any, which it is required by the permit of the commissioner to contain, shall be void." Deering's General Laws 1923, part 1, p. 1414.

The receipts issued by the appellant corporation at the time of taking subscriptions to purchase shares in its capital stock were in the following form, one of which will suffice:

> "November 16, 1920. Received of William Tracy, of Buttonwillow, California, the sum of $2,500.00, cash, $625.00, note $1,875.00, payable to Imperial Live Stock & Mortgage Company as payment for 250 shares of the capital stock of the Imperial Live Stock & Mortgage Company, as set forth in this subscription contract, numbered the same as the receipt and bearing even date herewith.
>
> "Imperial Live Stock & Mortgage Company,
> "L. V. Moron, Special Agent."

No mention being made in the receipts that the 25 per cent. of the subscribed cost of the shares of stock was in fact evidenced by "myself notes," and not really paid in cash at the date of the subscription. Upon this state of facts the appellant contends, upon the authority of Moore v. Moffatt, 188 Cal. 1, 204 P. 220, that the renewal notes, though based upon void contracts, became valid obligations upon the date of renewal, the issuance of the certificates, and the assigning of them by the defendant to trustees for the benefit of the corporation, under the theory that the agreement was a continuing offer on the part of the corporation for the sale of its stock, and was accepted in a valid manner at the date of the issuance thereof, ratified by the defendant as evidenced by his having taken up and paid the "myself notes," and the then giving by him of notes evidencing the remaining 75 per cent. of the value of the respective purchases.

In the case of Moore v. Moffatt, supra, the action was brought by a trustee in bankruptcy to recover the difference between the sums paid on a subscription agreement for stock in a corporation, and the par value of the stock. In that case it appears that the amount agreed to be paid had all been paid. The defense to the action was based upon the fact that at the time the money was paid, the corporation had no valid permit to sell shares of its capital stock. The court, in discussing the issues involved in that case, used the following language:

> "Conceding, for the purposes of discussion and decision, as is contended in support of the judgment, that the subscription agreement was in its inception void and incapable of acceptance by the corporation because executed, in contravention of the provisions of the Investment Company's Act (Stats. 1913, p. 715), prior to the procurement of a permit from the corporation commissioner authorizing a sale of the corporation's stock, and therefore could not have been legally made the basis of an action against the defendants upon the theory that they were stockholders in the corporation, still we have the admitted fact in the plaintiff's case that no stock of the corporation was in fact issued in response to any agreement of the parties until after an admittedly regular and valid permit had been granted by the corporation commissioner. This being so, the subscription agreement, even though it may have been void and incapable of acceptance in the first instance, should, in the light of the subsequent conduct of the parties to the transaction, be considered and construed as a continuing offer to subscribe for the stock in question, pending the procurement of a permit from the corporation commissioner, which ultimately became the embodiment and expression of a new agreement to purchase the stock entered into at a time when the only legal obstacle in the way of a valid agreement had been overcome. The agreement, so considered, and having been in fact ultimately accepted by the corporation after the required permit had been procured, * * * the validity of its making and accept-

ance must be measured and tested by its character as revealed by the circumstances and conduct of the parties with relation thereto at the time of its ultimate acceptance rather than by the circumstances attending its mere physical making in the first instance."

The court in that case then goes on to hold that the acts of the parties were tantamount to an adoption by them of the terms and conditions of the subscription agreement as of the date of its ultimate acceptance, and that the defendants were liable for the unpaid portion of the capital stock, and reversed the judgment of nonsuit entered by the trial court. If the circumstances of the instant case were identical with the case of Moore v. Moffatt, supra, the contentions of the appellant would have to be accepted as decisive, and the ruling of the trial court reversed. As we regard the transaction, however, a different principle is involved. In the Moffatt Case the trustee was not suing upon a tainted contract affecting its validity. In the case at bar there can be no doubt that the original 75 per cent. notes, of which the notes represented in causes of action set forth in plaintiff's complaint numbered 2, 3, 4, and 5 are renewals, were invalid.

In the case of Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467, 209 P. 36, in an action to cancel certain promissory notes given to represent 75 per cent. of the purchase price of shares of the capital stock of the corporation which is the appellant in the present action, where "myself notes" were given for 25 per cent. instead of cash, just as in the case at bar, the court held as follows:

> "The entire transaction was an attempt to circumvent the law. The notes and agreements were each of them made in violation thereof and are therefore against the policy of the law, * * * and void."

No relief, however, was given for the following reason, as was there said speaking of the plaintiff:

> "He was a party to them and is equally guilty with the defendant. In such a case the court will give no relief even if the point is not raised by either party."

The contract being void, the promissory notes were held void and each party was left in the condition in which the court found him. The receipt given by the defendant, the appellant here, in the Domenigoni Case was identical in language with the receipts given to the defendant in the instant case.

In the case of Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, a case having to do with a renewal note given in place of a prior note based upon an illegal contract, it was held as follows (we quote from the syllabus):

> "Any renewal notes given in place of the original notes based upon an illegal consideration are affected with the same illegality. Merely repeating a promise based on an illegal consideration cannot give it validity."

It is further said in the opinion in that case, quoting from a former opinion of Kreamer v. Earl, 91 Cal. 112, 27 P. 735:

> " 'It is not for the sake of the party who is benefited by the intervention, but for the sake of the law itself,' that a court refuses to allow the law and the machinery of the courts to be made use of for the enforcement of illegal contracts, and leaves the parties precisely where it finds them."

Quoting, also, from the case of Hill v. Kidd, 43 Cal. 615:

> "It is equally well settled that no action in affirmance of an illegal contract can be maintained."

A long list of citations supporting the rules of law just set forth may be found in 11 Ann. Cas. on page 612, following the opinion in the Buckman Case. The authorities there set forth are so numerous as to prevent repetition here, but all hold that a renewal note, given in lieu of a previous note based upon an illegal contract, partakes of the same tainted character, and is unenforceable when in the hands of the parties participating in the fraud, or in the acts which render the original note invalid. In 19 California Jurisprudence, 1006, we find the following statement supported by authorities:

> "A renewal note given in place of the original one based upon an illegal consideration, is affected with the same illegality; merely repeating a promise based on an illegal consideration cannot give it validity."

It is but trite to say that:

> "Commercial paper cannot be based on any consideration which is in violation of an express statutory provision." 8 Cal. Jur. 243.

Again:

> "If the instrument or contract is declared void by statute, it cannot be enforced; in some states, even by a bona fide holder." 8 Cal. Jur. 768.

The latter statement is not involved here, the original parties only being before the court.

In the case of Reno v. American Ice Machine Co., 72 Cal. App. 409, 237 P. 784, in an action based upon a void contract for the purchase of stock, an attempt is made to distinguish between actions where the original parties are involved, and actions where a representative of one of the parties appears, as was the case in Moore v. Moffatt, supra, where a trustee in bankruptcy was one of the parties, and in so doing, referred to the case of Moore v. Moffatt in the following language:

> "That was not an action between the parties to avoid contract, but an action by a trustee in bankruptcy of a corporation to recover the unpaid subscription price of stock for the benefit

of creditors. That situation presents an exception to the rule above announced, which rule is suspended in the interests of innocent third persons who have relied upon the contract."

Although this statement is relied upon by respondent and vigorously assailed by the appellant, we do not feel called upon to either approve or disapprove the language there used, save and except to state that in the Moffatt Case the circumstances are readily distinguishable from the circumstances characterizing the transaction in the cause now before us. The contract, which really was a contract created by law to pay the unpaid portion of capital stock issued to, and accepted by the defendants in the case of Moore v. Moffatt, only, was involved, whereas in the instant case the attempt is made to give vitality and validity to tainted and void contracts by renewals thereof.

The issues presented in this cause relate to matters of public policy. If no other persons were involved, and the principle reached no farther than the respective parties to this cause, we might consider seriously the contention of the appellant that the renewal notes, instead of being considered on the same basis, should be treated as a new subscription for the shares of stock in the plaintiff corporation, and valid and enforceable obligations. To do so, however, would be to open the door to all the illegal practices condemned by the Corporate Securities Act. If a scheme or a plan to avoid the provisions of that act, and of the requirements inserted in the permit issued to the corporation by the corporation commissioner, relating to its sale of stock, can be accomplished by the subterfuge of the issuance and taking of "myself notes" for 25 per cent. of the value of the stock and ordinary notes for 75 per cent., then and in that case the requirement for the payment of a certain portion of the subscription in cash, in order that the corporation may have assets to meet its obligations, would simply be to render nugatory, not only the requirements of the corporation commissioner, but also the act itself. Public policy, which led to the enactment of the Corporate Securities Act, forbids the approval of any such transactions, and we think the trial court properly excluded from the jury consideration of the second, third, fourth, and fifth causes of action tendered by the plaintiff's complaint, by instructing the jury to find for the defendant.

[2] Respecting the first cause of action, the court submitted to the jury two defenses: The illegality of the subscription for shares in part payment of which the note in question was given, and the claim that the subscription was induced by the false representations of plaintiff's agent. In this connection we agree also with the learned District Court of Appeal in holding that the evidence shows without substantial conflict that the 25 per cent. payment required by the permit issued by the corporation department was in fact paid in cash by the defendant on the day the subscription was made; hence the submission of this issue to the jury was unwarranted. Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243; Idemoto v. Scheidecker, 193 Cal. 653, 226 P. 922. Error of this character is often prejudicial. Eppinger v. Kendrick, 114 Cal. 620, 46 P. 613; Bosqui v. Sutro R. R. Co., 131 Cal. 390, 63 P. 682; Wallis v. Southern Pac. Co., 184 Cal. 663, 195 P. 408, 15 A. L. R. 117; Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 212 P. 913.

But we need not determine the question of prejudice, for, if it is conceded that the permit was not violated, then the judgment must be reversed for another reason. The issue of illegality of the stock certificate being out of the case, the evidence was clearly insufficient to support a verdict for the defendant, as will appear from the following observation:

[3] The court properly held, upon the issue made by the cross-complaint and answer thereto, that defendant was not entitled to a rescission of the contract, the basis of the note in question, upon the notice of rescission made December 29, 1924. Not being entitled to a rescission and not having sued for further affirmative relief by way of damages, defendant had left but the single remedy of recoupment by way of an offset in toto or pro tanto against the promissory note sued upon. While it is true that the answer pleaded that no consideration passed for execution of the note, yet defendant offered no proof to show that the stock was valueless. On the contrary, the clear inference from the evidence is that it is of considerable value. Under well-settled rules of law, defendant could not keep the stock and resist payment of the note in toto without offering evidence to show that the stock was entirely without value. Toby v. Oregon Pac. R. R., 98 Cal. 490, 499, 33 P. 550; Field v. Austin, 131 Cal. 379, 382, 63 P. 692; Paolini v. Sulprizio, 201 Cal. 683, 686, 258 P. 380.

This conclusion renders unnecessary a consideration of the contention of appellant that a fraud was not shown, or, if shown, that the evidence shows same was waived.

In so far as the judgment appealed from relates to the first cause of action, it is hereby reversed. Otherwise, as to all other matters, the judgment is affirmed; neither party to recover costs.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

208 Cal. 303

SCOTT et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO. (S. F. 13495.)★

Supreme Court of California. Sept. 28, 1929.

Rehearing Denied Oct. 28, 1929.

1. Attorney and client ⚷155—Fee of attorney of majority members of dissolved lodge could not be paid from lodge funds, where minority members claimed funds.

Fee of attorney of majority members of dissolved lodge, who claimed all members were entitled to participate in lodge funds, could not be paid out of common funds of lodge paid into court, where minority members, who voted against dissolution and formed new lodge, claimed that entire fund should be paid to them, and thus the services sought to be compensated were performed in behalf of an adverse interest.

2. Appeal and error ⚷1194(1)—Appellate court's judgment that fund be distributed among lodge members after deducting costs of suit gave lower court right to determine deductions.

Provision in judgment of appellate court that trial court should distribute funds of dissolved lodge among all members of lodge, after deducting therefrom the costs of suit and other charges and fees properly chargeable against the trust fund, did not purport to be an adjudication that one suing on behalf of majority members was entitled to demand deduction for attorney's fee, but left with lower court right to determine what deductions, if any, could properly be made.

In Bank.

Writ of Mandate to Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Application by Robert C. Scott, in behalf of himself and all other members in good standing of San Francisco Lodge, No. 198, of the Brotherhood of Railroad Trainmen, for writ of mandate to be directed to the Superior Court of the State of California in and for the City and County of San Francisco, to require respondent to fix attorney's fee. Petition denied, and writ dismissed.

George D. Collins, Jr., of San Francisco, for petitioners.

SEAWELL, J. Petition for writ of mandate to compel the superior court of the city and county of San Francisco to fix a reasonable attorney's fee for services performed by one George D. Collins, Jr., in certain litigation instituted by petitioner herein, and to order said fee paid from a fund which has been decreed to be the property of all who were members in good standing of San Francisco Lodge, No. 198, of the Brotherhood of Railroad Trainmen, at the time of the dissolution of said lodge, before said fund is distributed on a pro rata basis among the members of said dissolved lodge.

The charter of said local lodge was revoked by the grand lodge for disobedience of the rules of the grand lodge. Thereafter Robert C. Scott, petitioner herein and a member of said local lodge, purporting to sue on behalf of himself and all members of said lodge, brought two actions in the superior court of the city and county of San Francisco to procure a pro rata distribution of the assets of said lodge, consisting of four Liberty bonds and $1,500 in cash, among the members of good standing of the local lodge at the time of its dissolution. The Grand Lodge, through its appropriate officer, filed a cross-complaint, wherein the claim was asserted that upon dissolution the assets of the San Francisco local lodge were forfeited and became the property of the Grand Lodge. One Wrinkle, also a member of the local lodge, filed a complaint in intervention on behalf of himself and those minority members of the local lodge who had voted against the majority upon the issue which led the Grand Lodge to revoke the charter of the local body. Said minority members later associated with local lodge No. 947, a new lodge organized under the sanction of the Grand Lodge. Their claim was that the property constituted a trust fund for those members who had remained faithful to the parent organization, to the exclusion of other members.

Before the trial of the actions the treasurer of the dissolved lodge deposited the bonds in court, and the bank in which the funds of said lodge were deposited paid the amount thereof into court. The trial court found in favor of said minority members, that the property constituted a trust fund for the benefit of the minority only. Upon appeal, the District Court of Appeal reversed the judgments in said two actions, and directed the trial court to appoint a suitable person to sell the bonds and distribute the proceeds and the cash on hand "equally among *all* the former members of local 198 who were in good standing upon the rolls at the time of dissolution, *after deducting therefrom the costs of suit and other charges and fees properly chargeable against the trust fund.*" (Italics supplied.) Scott v. Donahue (Cal. App.) 269 P. 455; Scott v. Donahue (Cal. App.) 269 P. 458.

Throughout the trial, and upon appeal, petitioner Scott and the majority members upon behalf of whom he sued were represented by Attorney George D. Collins, Jr. After the going down of the remittiturs in said two actions, petitioner Scott, relying on the above italicized provision in the judgment of the District Court of Appeal, and what he conceived to be the law of this state, made a motion in the trial court that said court determine a reasonable fee for the services of Collins, and deduct and pay to Collins the amount thereof from said funds of the dis-

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★Rehearing denied.

solved lodge, before distribution to the members thereof. The court denied the motion, whereupon petitioner sought by mandamus to compel said court to fix said fee and deduct it from the fund on hand for distribution.

As sustaining the right to compel an allowance and deduction, petitioner relies upon such cases as Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157, wherein it is held that, where one jointly interested with others in a common fund in good faith maintains the necessary litigation to save it from waste and secure its proper application, an allowance of costs, including attorney's fees, will be made out of the fund. Conceding that this equitable principle is consonant with the statutory provisions of this state regarding the allowance of attorney's fees, the instant case does not present a situation permitting its application.

As against the minority members, on behalf of whom intervener Wrinkle sued, petitioner Scott and the majority members of the local lodge, who joined in the employment of Collins as their attorney, cannot be said to have discovered, preserved, or created a fund. The bonds were deposited in court by their custodian, the treasurer of the dissolved lodge, before the trial of the action, and the funds of the lodge on deposit in the bank were paid into court. Although Scott purported to bring the representative action instituted by him "in behalf of himself and all members of San Francisco Lodge 198 of the Brotherhood of Railroad Trainmen," upon the filing of the complaint in intervention the action became a contest between the majority members, who claimed that all members in good standing were entitled to participate in the fund, and the minority members, who claimed the fund to the exclusion of all other members in good standing, by virtue of the circumstance that they had voted against the local lodge taking the action which led to the dissolution.

[1] The minority members, throughout the proceedings in the trial court and upon appeal, were not represented by Attorney Collins, employed by Scott and other majority members, but by an attorney of their own selection, whom they have no doubt agreed to compensate. The equitable principle contended for by petitioner Scott is not applied to render persons who have employed and been represented by an attorney of their own choice indirectly responsible for the fee of an attorney hired by others.

Furthermore, the majority, and minority members were adverse claimants of said assets. The minority members sought to exclude the majority members absolutely from any participation in the fund, and in this were successful in the lower court. The minority members cannot be compelled to contribute, through a deduction from the fund, to the payment of counsel fees for services rendered in behalf of another group, who disputed their claim to the entire fund, and on appeal were successful in procuring an adjudication denying the right of the minority members to the whole fund. The equitable rule relied upon by petitioner Scott does not authorize a deduction from the fund where the services sought to be compensated by a deduction from the fund have been performed in behalf of an adverse interest. County of Tulare v. Dinuba (Cal. Sup.) 270 P. 201.

[2] The provision in the judgment of the District Court of Appeal, that the trial court should distribute the fund equally among all members *after deducting therefrom the costs of suit and other charges and fees properly chargeable against the trust fund*, did not purport to be an adjudication that petitioner was entitled to demand the deduction here claimed, but left with the lower court the right to determine what deductions, if any, could properly be made. There is nothing inconsistent with this view in Scott v. Donahue (Cal. App.) 271 P. 1100, in which case the court did not decide that the allowance here claimed was proper, but only that the minority members could not assert the right to have their costs on appeal deducted from the fund.

Having determined that there was no authority in the trial court to grant the allowance and deduction claimed, it becomes unnecessary to here decide whether a proceeding in mandamus would have been the appropriate method to compel such an allowance, had the court erroneously refused to grant it.

Petition denied, and writ dismissed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

208 Cal. 282

In re JOHNSON et al. (L. A. 11346.)

Supreme Court of California. Sept. 27, 1929.

Schools and school districts 🔑101—District tax levies by board of supervisors for high school purposes exceeding 75 cents on $100 assessed valuation held valid; "proviso" (Pol. Code, §§ 1612a, 1755).

District tax levies by board of supervisors for high school purposes, exceeding 75 cents on each $100 of assessed valuation, *held* valid under Pol. Code, § 1612a, since proviso in section 1755 limiting "total tax for high school purposes" to 75 cents on $100 assessed valuation was not intended to have general effect; usual office of "proviso" being to qualify enacting clause.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Proviso.]

In Bank.

Application of James Hervey Johnson and another for a writ of review to review a resolution providing for tax levy for high school purposes made by the Board of Supervisors of the County of San Diego. Resolution affirmed.

For opinion of the District Court of Appeal, see 273 P. 1091.

Earl H. Miller, of Los Angeles, and Jesse George, of San Diego, for petitioners.

Stephen Connell, Dist. Atty., of San Diego, for respondents.

PER CURIAM. Application for hearing in this court after decision by the District Court of Appeal in and for the Second District, Division 2, was granted, in order that we might make a careful examination of the provisions of the Political Code applicable to taxation for high school purposes. Upon such examination we are satisfied with the correctness of the reasoning and conclusion of the appellate tribunal, and hereby adopt the same as the decision of this court, to wit:

This is an original proceeding wherein the petitioners seek by the writ of review to annul district tax levies by the board of supervisors of San Diego county for high school purposes. It appears from the pleadings that the petitioners reside, the one in the San Diego high school district and the other in the Sweetwater union high school district, and that they each pay taxes in their respective districts. On the 4th day of June, 1928, the boards of education of these two districts submitted to and filed with the county superintendent of schools, school budgets showing the purposes for which and the amount of money needed by each of the districts, together with the total estimated receipts, and the remainder necessary to be raised by a tax levy. On June 20, the county superintendent approved the budget of the Sweetwater union high school district and submitted it to the board of supervisors. On June 26, she followed a like procedure with the budget of San Diego high school district. Both of these budgets indicated that it would be necessary to fix a rate in excess of 75 cents on each $100 of assessed valuation in order to raise the requisite funds. On September 1, 1928, the respondent board fixed the rate of San Diego high school district at 85 cents and of Sweetwater union high school district at 94 cents, and it is the resolution of the board fixing these rates which petitioners claim is beyond its jurisdiction.

Their contention in this behalf is based upon section 1755 of the Political Code, which section makes it "the duty of every high school board to make and file with the Board of Supervisors of each county in which any part of their high school district is situated, on or before the first Monday of September next succeeding the formation of said district, an estimate of the cost of *purchasing a suitable lot, of procuring plans and specifications and erecting a suitable building, of supplying* the same with furniture and necessary apparatus, and of fencing and ornamenting the grounds, for the accommodation of the school," unless the board shall have secured temporary quarters or a bond issue has been voted. (Italics ours.) The section further provides that, if the board has leased temporary quarters, they shall either secure a renewal of the lease before the first Monday in September, or submit the estimate mentioned above, and, in the event of their failure to submit such a budget to the board of supervisors, makes it the duty of the county superintendent of schools to supply the omission before the second Monday in September. In 1913 there was added to the section this sentence: "Provided, the total tax for high school purposes shall not exceed seventy-five cents on each one hundred dollars assessed valuation, exclusive of bond and interest rate." It is this concluding language which petitioners say prohibits a levy for the maintenance and support of high schools in excess of 75 cents. Section 1756 of the Political Code, enacted at the same time as section 1755 (i. e., 1909), provides that the board of education of each high school district shall file with the county superintendent of schools an estimate of the total amount necessary to support the high schools of the district, including the amounts necessary for "(a) Teachers' salaries; (b) current expenses; (c) books, magazines and apparatus; (d) sites, buildings and furniture; (e) other miscellaneous expenses." There is no limit designated by this section. In 1921 a new section was added to the Political Code, numbered 1612a, by which it is made the duty of all boards of education both elementary and high school, to prepare a budget showing all the purposes for which they will need money during the next ensuing school year, the amount of which shall be submitted to the county superintendent of schools for approval. When he has approved it and determined the amount of money (by subtracting from the total estimate the income to be received from other sources) which must be provided by a district school tax, he is required to file it with the board of supervisors, whose duty it then becomes "to fix such a rate for such district tax as will produce at least the amount of district tax money requested by the particular district." No limitation of rate is fixed by this section. It does, however, say that "all acts and parts of acts not in harmony with this section are hereby repealed."

Assuming, solely for the purposes of this opinion, that review will lie to test the validity of a resolution such as the one here in question, we are convinced that the levy must be sustained. The usual office of a proviso is to "except something from the enacting clause, or to qualify or to restrain its generality." 25 R. C. L. 984. The United States Supreme Court, speaking through Mr. Justice Story in the case of Minis v. U. S., 15 Pet. 423, 10 L. Ed. 791, states the rule in this manner: "It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment." The concluding sentence of this quotation is especially apt in its application to our problem. The learned jurist, in speaking for the same tribunal in U. S. v. Dickson, 15 Pet. 141, 10 L. Ed. 689, throws still further light upon the functions of a proviso by the use of these words: "* * * We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. *In short, a proviso carves exceptions only out of* the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof." (Italics ours.) Our own Supreme Court, in considering the interpretation to be given to a proviso in the case of People v. Morrill, 26 Cal. 336–355, says: "This proviso is to be read in the light of the subject-matter," using the expression "subject-matter" as synonymous with the legislative field occupied by the enacting clause.

No doubt this general rule of construction is from time to time modified by other rules of construction when necessity arises. But is there such necessity in the present instance? We think not. * * * If it were intended that the proviso should have a general effect, the Legislature would undoubtedly have enacted it as a general and independent section rather than to have tied it to a section adopted for very limited purposes. Inferentially, at least, the views we have expressed find support in the case of Esberg v. Badaracco, 202 Cal. 110, 259 P. 730, wherein it was said that the provisions of 1612a, made it mandatory that the board of supervisors raise the amount of money found to be necessary by the estimate prepared under its provisions, and the board was required by the decision to fix a rate of $.97338 on each $100 valuation, instead of that previously determined by the board of supervisors to be sufficient, to wit, $.84729. It is stated in the case just cited that "the law prescribes a tax limit for school purposes," and this is undoubtedly true, but it seems impossible to escape the conclusion that section 1755 does not restrict the kind of a tax here levied.

"These conclusions render it unnecessary to determine whether the writ of review will lie."

Resolution affirmed.

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208 Cal. 308

EGGERS et al. v. NATIONAL RADIO CO. et al. (S. F. 12596.)

Supreme Court of California. Sept. 30, 1929.

1. Appeal and error 🔑151(2)—Corporate stockholders aggrieved by order vacating new trial awarded corporation and re-entry of judgment were entitled to appeal.

Where granting of new trial had inured to benefit of corporate stockholders seeking to intervene in proceeding, they were aggrieved by subsequent action of court in vacating order granting new trial and re-entering judgment which had been previously set aside and were entitled to appeal.

2. Corporations 🔑202—Application by corporate stockholders for leave to intervene after granting of motion for new trial was timely (Code Civ. Proc. § 387).

Application for leave to intervene filed by corporate stockholders after granting of motion for new trial as to corporation was timely within Code Civ. Proc. § 387, in that cause at such time was at issue and ready for retrial.

3. Corporations 🔑202—Stockholders have no cause for complaint as long as corporation is willing to institute and conduct in good faith necessary legal proceedings.

A corporation represents and binds its stockholders in all matters within limits of its corporate powers when acting in good faith and without fraud on their rights, and, so long as corporation is willing to perform its duty toward stockholders by instituting and conducting in good faith necessary legal proceedings, stockholders have no cause for complaint.

4. Corporations 🔑206(1)—Stockholder on proper application showing failure of corporation to defend action may become party and defend on behalf of corporation.

Where corporation refuses to defend an action, or, having begun a defense, does not press it in good faith, a stockholder may on proper application showing the facts be allowed to become a party and defend on behalf of corporation, but he must show that he cannot induce those in control to do that which is fair and right.

5. Corporations 🔑206(2)—Demand on board of directors to defend action is not necessary for intervention by stockholders under circumstances rendering request useless.

Requirement that demand must first be made on board of directors to defend or continue defense in action pending against corporation is not a necessary prerequisite to an intervention by stockholders, where facts alleged in complaint and intervention are such as to render such a request useless.

6. Corporations 🔑206(1)—Failure of corporation to defend action after order granting new trial held to authorize intervention by stockholders under circumstances.

Failure of corporation to defend pending action after having secured an order granting a new trial, together with showing made on hearing of motion by stockholders for leave to intervene, *held* such as to present proper case for intervention by stockholders opposed to stand of governing body of corporate entity.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Herman C. Eggers and others against the National Radio Company, in which Alma Anfinger and others sought to intervene. From the judgment and certified orders therein, Alma Anfinger and others appeal. Reversed.

Superseding opinion in 274 P. 997.

Geo. M. Naus, Eugene F. Conlin, and Grant & Zimdars, all of San Francisco, for appellants.

James H. Boyer, of Oakland, and Milton Shepardson, R. M. F. Soto, and J. Clark Benson, all of San Francisco, for respondents.

WASTE, C. J. This action, commenced by five stockholders of the defendant National Radio Company, an Arizona corporation, on behalf of themselves and all other persons similarly situated, terminated in the court below with the entry of a judgment, as prayed in the complaint, decreeing illegal each and every certificate of stock issued by the corporate defendant, and all assessments theretofore levied thereon to be void, appointing a receiver to take possession of all the books and records of the corporation, and decreeing, further, that certain real property situate in the city and county of San Francisco is the property of the holders of such void certificates of stock, the corporation defendant merely holding the naked record title thereto in trust for such persons. On May 31, 1924, a new trial was granted on motion of the defendant corporation.

A subsequent change in the personnel of the board of directors of the corporate defendant was followed by a substitution of attorneys representing that defendant, and the substituted attorneys, purporting to act for and on behalf of the corporation, stipulated with plaintiffs' counsel that the order granting a new trial might be vacated and set aside. Acting on this stipulation, the trial court, on September 29, 1924, approximately 4 months after granting a new trial, vacated and set aside its previous order. Thereupon the appellants, representing some 292 persons claiming to hold a majority of the stock of the defendant corporation, appeared by counsel and moved the court for an order setting aside the order vacating the order for a new trial, and setting the cause at large and at issue upon the pleadings, and reinstating the cause for a new trial. They also sought an order allowing them to intervene and to assume charge of the defense of said action on behalf of the corporation. After a hearing, the trial court, on April 13, 1925, set aside the order vacating the order granting a new trial, but denied the motion to reinstate the cause for a new trial. The motion to intervene was heard and denied on the same day, and another motion for permission to intervene, made on April 14, was likewise denied on April 27. On May 7 following, a new judgment in terms of the former judgment was entered, as stipulated, in favor of the plaintiffs, and counsel for the corporation thereafter filed a further stipulation waiving its right of appeal therefrom. The appellants thereupon gave notice of appeal from the judgment, from the order denying their motion to reinstate the cause for a new trial, from the order denying their application to intervene, and from the order directing the entry of the former judgment. By stipulation, the several appeals have been consolidated and are presented upon one transcript.

[1] Appellants, among other things, now claim that the mere recital of the facts shows that there was complete harmony between

said five stockholders, plaintiffs and the directors; hence the stipulation to enter judgment as prayed for in the complaint, ordering sale of the corporate assets, and in effect dissolving the corporation, with distribution of the proceeds among stockholders only after payment of a large attorneys' fee. In other words, they contend that the proffered complaint in intervention alleged collusion between plaintiffs and defendant corporation, supported by the apparent fact that the corporation made no defense, and, even after the trial court set aside the judgment and granted a new trial, the corporate attorneys stipulated, upon authority of its directors, that this action be set aside and said new judgment, in terms of the old, be entered upon the findings made in favor of the plaintiffs, and waived the corporation's right of appeal. The situation, then, is this: After the order of September 29, 1924, was set aside, and the case was again at large, the stockholders, other than the plaintiffs, were endeavoring to put themselves in position to protect their rights, which were vitally affected by the litigation. The granting of the new trial had inured to their benefit, and they had the right to believe that the trial court would not deprive them of the advantage thus gained. After they had asserted their rights, the trial court attempted to further deprive appellants of them by reentering the judgment which had been previously set aside when the motion for a new trial was granted. They were aggrieved by this action of the court, and we think they are entitled to appeal from the judgment.

[2] Respondents argue that, assuming the appellants had a right to intervene, their application, not having been interposed before trial (Code Civ. Proc. § 387), was made too late. It necessarily follows, however, from the granting of the motion for a new trial, that, when the appellants appeared in the court below and, among other things, moved the court for permission to file a complaint in intervention, the cause was at issue and ready for a retrial, and the application was timely. In Paine v. Copper Belle Mining Co., 13 Ariz. 406, 114 P. 964, 965, where there existed a statute similar in effect to our section 387, supra, requiring applications in intervention to be made "before trial," the court declared that, "upon the judgment being vacated and a new trial ordered, applications to intervene are to be determined by the same rules as if no judgment had been theretofore rendered."

This brings us to a consideration of the reasons advanced by the appellants in support of their application for leave to intervene. Among other things, the proffered complaint in intervention avers that certain named persons, constituting a majority of the board of directors of the defendant corporation, had procured their appointment as such directors in order that they might cause a substitution of attorneys for the corporation in this action, and thus procure the restoration of the judgment theretofore entered in favor of the plaintiffs, but set aside by the order granting the corporation's motion for a new trial; that in so conducting themselves said majority members of the board of directors were acting in furtherance and consummation of a conspiracy with plaintiffs' counsel looking to "the destruction of said defendant corporation and the sale and distribution of the assets thereof among certain of the stockholders, without the consent or agreement of the stockholders of said corporation to such dissolution and destruction and distribution of the assets." It is also alleged that the plaintiffs own less than one per cent. of the outstanding capital stock of the corporation, and that "it would be useless and of no avail for these interveners * * * to apply to or make demand upon the board of directors of said defendant National Radio Company or upon its attorneys of record in the above-entitled cause to make defense to the claims of these plaintiffs," for they are "endeavoring to wind up the affairs of the corporation and dispose of all of the assets of said corporation and sell the same and upon such sale to distribute the proceeds to so many of the stockholders of said defendant and no more as can succeed in tracing their money as aforesaid. * * *"

[3-5] It is the settled rule, as contended by the respondents, that "a corporation represents and binds its stockholders in all matters within the limits of its corporate powers when acting in good faith and without fraud upon their rights. So long as the corporation is willing to perform its duty toward stockholders by instituting and conducting in good faith the necessary legal proceedings the stockholders have no cause for complaint; with the right of the corporation to sue and be sued concerning corporate rights or liabilities the stockholders cannot interfere, except when the governing directors or trustees refuse to act or are guilty of fraud in the maintenance or defense of an action." Difani v. Riverside Oil Co., 201 Cal. 210, 215, 256 P. 210, 212, 213. However, "where a corporation * * * refuses to defend an action, or, having begun a defense, it is made to appear that the corporation will not press it in good faith, a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation, but he must show that he cannot induce those in control to do that which is fair and right." Difani v. Riverside Oil Co., supra; Favorite v. Superior Court, 181 Cal. 261, 184 P. 15, 8 A. L. R. 290. The requirement that a demand must first be made upon the board of directors to defend, or continue the defense, of an action pending against a corporation, is not a necessary prerequisite to an intervention by the stockholders, where, as here, the facts alleged in the complaint in intervention are such as to render such a request useless.

Wickersham v. Crittenden, 106 Cal. 329, 331, 39 P. 603; Ashton v. Dashaway Ass'n, 84 Cal. 61, 69, 70, 22 P. 660, 23 P. 1091, 7 L. R. A. 809; Whitehead v. Sweet, 126 Cal. 67, 73, 58 P. 376; Shively v. Eureka Mining Co., 129 Cal. 293, 295, 61 P. 939, 940.

[6] The peculiar nature of this action and the failure of the corporation defendant to defend against it, after having secured an order granting a new trial, together with the showing made upon the hearing of the motion for leave to intervene, are such, in our opinion, as to make this a proper case for an intervention by those stockholders opposed to the passive stand of the governing body of the corporate entity. Moreover, at least two of the three members of the board of directors charged by the appellants with having conspired with plaintiffs' counsel to secure a judgment favorable to the plaintiffs are stockholders of the corporation, and have paid their proportionate part of all assessments levied. A judgment for the plaintiffs would therefore redound as well to their benefit. In such a case, and particularly when the corporation neglects and fails to defend against the plaintiffs' claim, "there can be no doubt of the right of a stockholder to intervene." Shively v. Eureka Mining Co., supra. It would be a reproach to the law if the stockholders in such a case as this were remediless. In Morrill v. Little Falls Mfg. Co., 46 Minn. 260, 266, 48 N. W. 1124, 1126, it is stated that "the right of a stockholder to take means to preserve the corporate property, to prevent its loss to the corporation, or the impairment of its value" proceeds "upon the principle that whatever is or may be inimical or injurious to the corporation is or may be an injury to the stockholder, and he is therefore entitled to equitable relief." The appellant stockholders are unquestionably "aggrieved" by the judgment entered herein against the corporation, and, as parties to the record, they may properly appeal therefrom. Coburn v. Smart, 53 Cal. 742, 745.

The judgment and several orders appealed from are, and each is, reversed.

We concur: RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

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208 Cal. 193

BAUER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(S. F. 13357.)

Supreme Court of California. Sept. 24, 1929.

1. Appeal and error ⇨907(5)—Appellate court will presume records of former proceedings support court's conclusion that issue had been tried, where they were not part of record.

Appellate court will presume that records of former proceedings supported court's conclusion that issue had been tried in former proceedings, where record of former proceedings was not made part of record on appeal.

2. Executors and administrators ⇨504(4)—Exceptions to final account as to executors' fraudulent acquisition of properties were properly stricken, where they presented same issue presented by petition to remove executors which was dismissed.

Exceptions made to final account as to executors' fraudulent acquisition of properties were properly stricken from pleadings, where they presented the same issue that was presented by petition to remove executors which petition had been properly dismissed because issue had been already tried.

3. Judgment ⇨725(3)—Petitioners held concluded by decision in former proceedings that property acquired by executors did not belong to estate.

Petitioners filing exceptions to account of executors and seeking removal of executors on ground that executors had fraudulently obtained from decedent prior to his death certain moneys and property, and that such property belonged to estate, were bound by decision of probate court in former proceedings that such property did not belong to estate.

4. Mandamus ⇨4(1)—Petitioners held not entitled to writ of mandate, where court's rulings at most constituted mere error (Code Civ. Proc. § 1085).

Petitioners *held* not entitled to issuance of alternative writ of mandate under Code Civ. Proc. § 1085, where rulings and decisions on questions of law and fact at most constituted mere error, and petitioners had plain, speedy, and adequate remedy in ordinary course of law by appeal.

In Bank.

Application by Hamilton A. Bauer and another for a writ of mandate to be directed to the Superior Court in and for Los Angeles County, and Hon. Albert Lee Stephens, Judge thereof, to compel respondent to remove certain persons as executors. Petition dismissed, and writ discharged.

See, also, 196 Cal. 757, 239 P. 49, 40 A. L. R. 1457.

Hamilton A. Bauer, of San Francisco, Crail, Shutt, Penprase & Miller, of Los Angeles, for petitioners.

Morin, Newell & Brown, of Pasadena, for respondents.

SEAWELL, J. Petitioners herein invoke the power of the writ of mandate as the most recent of the several forms of attack made by them during several years last past against the executor and executrix (who will hereafter be referred to as executors) of the estate of Emile Bauer, deceased. Estate of Bauer, 199 Cal. 98, 248 P. 507; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Bauer v. Bauer, 201 Cal. 770, 256 P. 822; Bauer v. Bauer, 201 Cal. 771, 256 P. 822. Other proceedings taken are not included in the above list.

The representatives of said estate, Lily M. Bauer and Lloyd C. Bauer, are, respectively, the stepmother and half-brother of petitioner Hamilton A. Bauer. Petitioner Hambla C. Bauer, a minor, is the daughter of said Hamilton A. Bauer. It has been the insistent claim of petitioner Hamilton A. Bauer since the death of his father, Emile Bauer, that certain stocks, issues of the Union Oil Company of California, Central Oil Company of California, and Occidental Life Insurance Company, formerly owned by him, but transferred by him to his said wife and son Lloyd prior to his death, were procured by them by imposition, fraud, and undue influence practiced by his wife and son Lloyd at a time when the said Emile Bauer was weak and feeble from disease and age. The same claim was made by Hamilton A. Bauer as to the deed of the residence property which Emile Bauer executed to his wife, and which deed remained a matter of public record for a year and eight months prior to the death of said Emile Bauer. The final chapter of this branch of the controversy is written in Bauer v. Bauer, 201 Cal. 267, 256 P. 820, an action at law wherein it was held that the probate court was the proper forum for the litigation of the issue of ownership of property as between the executor and the estate. It is there held that the probate court has jurisdiction to determine as against an executor the amount of money or property of the estate that has come into his hands for the purpose of charging him therewith, and in determining that question to *determine all issues necessarily included therein.*

On June 13, 1927, Lily M. Bauer and Lloyd C. Bauer, as executors of the estate of Emile Bauer, deceased, filed in the superior court of the county of Los Angeles, sitting in probate, their final account, report, and petition for distribution, and also petitioned for extra compensation for extraordinary services rendered by said executors and their counsel in the administration of said estate. On June 29, 1927, Hamilton A. Bauer, who is a son of the decedent and a legatee under his will and a practicing attorney, filed a pleading which he denominated "Exceptions to final account," in which he objected to and contested the legality of a long list of items therein presented for allowance, and alleged that said executors had fraudulently obtained from decedent prior to his death certain moneys and property, and had failed and refused to account for the same, and prayed that they be charged with the value of said omitted property and moneys, approximately $61,000.

On October 21, 1927, Hambla C. Bauer filed a paper similarly entitled and identical in all respects with the one filed by her father in opposition to the settlement of said account. The executors in due time demurred to said exceptions to said account on general and special grounds, and moved to strike out specified portions upon the ground that the matters and things therein referred to and the contentions therein made had been fully and finally adjudicated in other proceedings in which the court had complete jurisdiction of the subject-matter.

A few days prior to the filing of said exceptions and objections to the account and petition for distribution, in which said Hamilton A. Bauer alleged that said executors had by connivance committed a fraud upon said Emile Bauer, and thereby obtained from him moneys and property of the value of approximately $60,000 which they fraudulently withheld from said estate, said Hamilton A. Bauer filed a petition asking for the removal of said executors on the ground that they had willfully and fraudulently refused to return or account for the same property described in said exceptions and objections, and which property was also the same property described in a former proceeding (Estate of Bauer, 199 Cal. 98, 248 P. 507) brought by him and other heirs to remove said executors and to compel them to account for said property. This proceeding was pending at the time said Hamilton A. Bauer filed said exceptions, which were subsequently incorporated by said Hambla C. Bauer in her petition. The executors demurred to said petition, praying for their removal and for an order compelling them to return said property and moneys as properties of the estate, setting forth several grounds of demurrer, one of which was that the issue raised as to the ownership of said property had been theretofore fully determined. They also gave notice that they would move to strike from the files said petition to remove said executors, for the reason that the sole contention of Hamilton A. Bauer in asking for the removal of said executors was based upon the assumption of ownership by the estate of said described property, and that question had been fully and exhaustively contested in said former proceeding, and was res judicata.

[1, 2] Decisions on the motion to strike out and the various demurrers were, by consent of all parties, deferred until the court should have an opportunity to examine all the papers and records used and evidence introduced in all of the several prior proceedings taken in the matter of the estate of Emile Bauer, deceased, with the view of determining whether the issue as to the ownership of the omitted property claimed by petitioners to be the property of said estate had been adjudicated in said proceedings. The court, upon an exhaustive examination and consideration of the pleadings, records, files, and evidence taken in all the proceedings, past and present, in the matter of the estate of Emile Bauer, found that as to the issue whether said properties described in the motion to remove said executors, and again described in the exceptions

to said final account, belonged to said estate, had been thoroughly tried, after issue joined, in said former proceedings, and found by the court to be properties not belonging to said estate. The record of the former proceedings not being made a part of the record in the instant proceedings, it will be presumed that said records support the court's conclusion. The motion to dismiss the petition asking for the removal of said executors was accordingly granted. The exceptions made to the final account as to the executors' fraudulent acquisition of said properties, which were stricken out on motion of the executors, presented the same issue that was presented by said petition to remove said executors, and were properly stricken from the pleadings.

[3] The issue raised by petitioners as to the estate's ownership of said properties had been fully and thoroughly settled in other proceedings, was pressed by demurrer, by motion to strike out, by motion to dismiss, and pleaded in the answer. The question of the estate's ownership of the identical properties was directly and actually put in issue by Hamilton A. Bauer and the other heirs at law in said former suit or proceeding (Estate of Bauer, 199 Cal. 98, 248 P. 507), and was also presented in other forms in other proceedings, and was there judicially passed upon and determined by a probate court vested with jurisdiction to decide said issue and the judgment therein rendered was affirmed upon appeal to this court, and has become final. The facts have not since changed. Not only could the issue presented by this petition have been litigated in the former action, but it was actually litigated and determined therein. That petitioners are concluded by that proceeding cannot be questioned. Price et al. v. Sixth District Agricultural Association, 201 Cal. 502, 258 P. 387, and cases cited and reviewed therein.

The question whether the petitioners are concluded by the settlement of current accounts, to which they had objected, from again bringing before the court upon final settlement the matters which were by said current accounts settled or by necessary implication included in said settlements (Estate of Stott, 52 Cal. 403; Estate of Grant, 131 Cal. 426, 63 P. 731), is of no further importance, in view of what we have already said as to the application of the rule res judicata to the case.

[4] We have given consideration to the questions presented by petitioners for a writ of mandate, not because we were required to do so under the rules of appellate procedure, but only for the reason that the same points are raised in Estate of Bauer (L. A. No. 11405) 204 Cal. —, 281 P. 63, now before us, and which was an appeal from the final decree settling the final account and ordering distribution, and also from the order granting the motion of the executors to strike out and dismiss certain portions of the exceptions to the account. The petitioners were not entitled to the issuance of an alternative writ of mandate upon any conceivable grounds. The trial judge at no time refused to perform any act which the law specially enjoined upon him, or a duty resulting from his office, trust, or station. Section 1085, Code Civ. Proc. Petitioners were dissatisfied with his rulings and decisions on questions of law and fact which at most, if wrong, and we think they are correct, constituted mere error. That petitioners had a plain, speedy, and adequate remedy in the ordinary course of law is demonstrated by the fact that they have brought the same questions before us upon appeal which are this day disposed of by decision upon appeal. If petitioners are entitled to invoke the extraordinary remedy of the writ of mandate in the showing made, then we see no reason why the writ should not be available in all cases where a court is charged with committing error in the most ordinary and commonplace ruling. Clearly such is not the office of the writ.

The petition is dismissed and the writ discharged.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.

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208 Cal. 199

In the Matter of the ESTATE of Emile BAUER, Deceased.

Hamilton A. BAUER, Mrs. John E. Bauer, Charlotte Bauer, as Guardian of the Estate of Hambla C. Bauer (a Minor), Walter J. Dyer, as Guardian of the Estate of Beatrice W. Dyer (a Minor), Ivy F. Derham and Charlotte Bauer, individually and as Legatees under the Last Will and Testament of Emile Bauer, Deceased, Plaintiffs and Appellants, v. Lily M. BAUER and Lily M. Bauer and Lloyd C. Bauer, as Executors of the Last Will and Testament of Emile Bauer, Deceased, Defendants and Respondents. (L. A. 11405.)

Supreme Court of California. Sept. 24, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Crail, Shutt, Penprase & Miller, of Los Angeles, Hamilton A. Bauer, of San Francisco, and Joe Crail and Claude A. Shutt, both of Los Angeles, for appellants.

Morin, Newell & Brown and J. W. Morin, all of Pasadena, for respondents.

PER CURIAM. The appeal in this case is "from the decree settling final account and ordering distribution and the order granting the motion of the executors to strike out and dismiss the exceptions to the final account filed by the contestants."

The primary object of this appeal is to

relitigate the questions decided in Bauer v. Bauer, 201 Cal. 267, 256 P. 820, and Estate of Bauer, 199 Cal. 98, 248 P. 507.

The question considered in said cited cases, to wit, the ownership of certain property omitted from the inventory and final account and claimed by appellants to be property belonging to said estate, and again brought to our attention in Bauer v. Superior Court (S. F. No. 13357) 204 Cal. ——, 281 P. 61, this day decided, is sought to be revived. This cannot be done.

No serious question is raised as to any matter or item of accounting except the main question which is foreclosed by Bauer v. Superior Court, supra. We have examined the account, and feel satisfied that it was justly settled. Many items were examined, passed upon, and allowed or disallowed as the justice of the situation seemed to warrant. The allowances made to the attorney and executors for extraordinary services performed, considering the many proceedings instituted and objections made during the course of administration in an effort to oust them and obstruct them in the settlement of the estate, do not appear to be unreasonable. Neither do we find any error committed in the matter of distribution.

The decree and orders are affirmed.

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208 Cal. 291

RODGERS v. BOARD OF PUBLIC WORKS et al. (S. F. 13427.)

Supreme Court of California. Sept. 27, 1929.

Municipal corporations ⚷217(1)—Civil service commission could not require employee's service for one year to return to position after lay-off, where contrary to charter.

Civil service commission had no power to adopt rule requiring service of employee for one year before he should be entitled to be returned to position after lay-off, in view of charter providing that appointment of employee shall be deemed complete at end of probationary period not exceeding six months, and that any person appointed shall retain position as long as position is maintained unless removed for cause, and hence appointment of one to position of granite cutter was complete, where he served in such position over six months.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Application by James F. Rodgers for a peremptory writ of mandate to be directed to the Board of Public Works and others. Judgment granting the application, and the defendants appeal. Affirmed.

Superseding opinion of District Court of Appeal, 274 P. 1034.

John J. O'Toole, City Atty., and Thomas P. Slevin, Asst. City Atty., both of San Francisco, for appellants.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendants from a judgment granting an application for a peremptory writ of mandate, compelling the defendant board of public works of the city and county of San Francisco to transmit to civil service commission of said city and county a warrant in the sum of $289.75, representing lost wages, and for said commission to approve the same for payment, and compelling the civil service commission to reinstate petitioner's name on the official records of civil service as occupying the permanent position of granite cutter, and by virtue of his reinstatement the board of public works is directed to admit plaintiff to the performance of the duties of said position and to pay him the compensation therefor.

The facts found by the trial court with reference to the controversy are, in substance, as follows:

Subsequent to March 14, 1923, defendant civil service commission, while plaintiff was on the register of eligibles, and in response to a requisition, bearing date July 13, 1925, from the defendant board of public works, certified plaintiff to said board of public works for appointment to the *permanent position* of granite cutter, and thereafter said board of public works appointed plaintiff to a permanent position of granite cutter, from said register of eligibles, and thereafter plaintiff continued to fill and to perform the duties of said position from July 29, 1925, until May 15, 1926, during which period of time plaintiff was actually engaged in the pursuit of his position for 216.31⅛ days. Subsequent to the 15th day of May, 1926, plaintiff was laid off by said board of public works on account of lack of funds for the employment of persons in the position of granite cutter, but said position was never abolished, and on March 1, 1927, the defendant civil service commission, in response to a requisition filed with it by the board of public works, again certified plaintiff to said board of public works, and said board re-employed plaintiff in said permanent position of granite cutter and plaintiff continued to perform the duties of this position from March 1, 1927, to September 30, 1927, during which time plaintiff was actually engaged in the pursuit of his position for 19.37 days. Subsequent to the last-mentioned date, plaintiff ceased to perform the duties of said position on account of lack of funds for the payment of services performed in said position, and plaintiff was purported to have been returned to the list of eligibles, but such position was at no time abolished and is now and at all times mentioned in the complaint in this action was in existence.

The register of eligibles upon which plaintiff's name appeared, by virtue of a provision limiting the existence of said list for a period of four years from the date of adoption of said list by the civil service commission, automatically expired on the 14th day of March, 1927. On the 14th day of November, 1927, a new register of eligibles for the position of granite cutter was adopted by the civil service commission, as the result of an examination therefor conducted by the civil service commission for positions of granite cutter, and on said register of eligibles the name of plaintiff appears in sixth place.

Said civil service commission enacted, adopted, and promulgated section 4 of its rule 22, which was in effect at all the times mentioned in the petition and answer herein and up to the 6th day of September, 1927, which said section of said rule reads as follows: "Section 4. *Hold-Overs.* Whenever, because of lack of work or lack of funds, or for purposes of retrenchment, a person who has served for one year continuously under appointment in an original entrance position that is considered within the meaning of the rules of this Commission as a permanent position, is laid off or separated from such position, he shall, while so separated from such position, be termed a 'hold-over' and shall be preferred for re-appointment in the first vacancy thereafter occurring in the class from which he was so separated; provided that if there be more than one such 'hold-over' in a class, the one having the longest service under permanent appointment for the period of two years next preceding the date of receipt of requisition shall be given the preference, and when ties exist in service during such two-year period the person who was in line first for original appointment shall be preferred. When such 'hold-overs' have not been re-appointed to a permanent position within a period of two years from the date of their last lay-off, their eligibility for reappointment may be cancelled by the Commission. Persons appointed to positions considered as permanent under the rule who are laid off because of lack of work or lack of funds before having served one year continuously under such permanent appointment shall be returned to the existing line of eligibles according to the general average percentage they received in examination and shall be treated as new eligibles."

Plaintiff at no time during the period of time from March 14, 1923, up to and including March 13, 1927, served for a period of one year or more continuously under appointment in the permanent position of granite cutter, from said register of eligibles for such position, but plaintiff did serve, fill, and perform the duties of said position of granite cutter continuously for more than six months' time under appointment to such position and from such register of eligibles; the register of eligibles upon which plaintiff's name appeared expired while plaintiff was under appointment to the permanent position of granite cutter, and while plaintiff was performing the duties of and filling the position of granite cutter.

It was further found by the trial court that, from the 25th day of January, 1928, to the 6th day of March, 1928, the position of granite cutter was filled by a person other than plaintiff and by one not entitled to said position; that during said period of time 30½ working days have elapsed; that, if the defendants civil service commission and board of public works had not refused to permit plaintiff to perform the services and duties of his position as permanent granite cutter, during this period of time, plaintiff would have earned and been entitled to receive $9.50 for each working day and would have been entitled to receive the aggregate sum of $289.75.

As conclusions of law, the trial court determined that the plaintiff was entitled to the writ as prayed, and, further, that the civil service commission was and is without authority of law to pass a rule requiring plaintiff to occupy continuously his position of granite cutter of said city and county of San Francisco for a period of time of one year, or for any other period of time in excess of six months, before his appointment to such position shall be deemed complete.

The latter conclusion of the trial court with reference to the commission's lack of power to make rule 22 is the only point involved upon this appeal, for it is admitted that the procedure of the civil service commission was in accord with said rule.

Appellants vigorously contend that rule 22, section 4 thereof, is not contrary to the spirit of the charter of the city and county of San Francisco, and the contrary is contended by respondent.

Article XIII, section 3, of said Charter, provides: "The Commissioners shall make rules to carry out the purposes of this article, and for examinations, appointments, promotions and removals and in accordance with its provisions may from time to time make changes in the existing rules."

The charter also provides (article XIII, § 10): "The appointing officer shall notify the Commissioners of each position to be filled separately, and shall fill such place by appointment of one of the persons certified to him by the Commissioners therefor. Such appointment shall be on probation for a period to be fixed by the rules of the Commissioners, *but such rules shall not fix such period at exceeding six months* * * * At or before the expiration of the period of probation the head of the department or office in which a candidate is employed, may, by and with the consent of the Commissioners, discharge him upon assigning in writing his reason therefor to the Commissioners. If he is not then discharged, *his appointment shall be deemed complete.*"

There is a further charter provision, as follows: "Any classification or grading may be amended or abolished by the Commission, and classes calling for similar qualifications may be consolidated but persons who have been appointed from any such class *shall retain any position lawfully held thereunder so long as such position is maintained* unless removed in accordance with the provisions of section 12." (Art. XIII, sec. 2.)

We are in accord with the view of the trial court that the commission had no power to adopt a rule requiring service for one year before an employee is entitled to be returned to his position after a "lay-off." As we have indicated, the charter provides that the appointment of the employee shall be deemed complete at the end of the probationary period, "not exceeding six months," and that any person appointed "shall retain any position lawfully held * * * so long as such position is maintained," unless removed for cause, etc. It has been expressly found that the permanent position of granite cutter was maintained during the time involved in this controversy, that the petitioner's appointment was to a permanent position, and that he had served in such position for over six months.

The judgment appealed from is affirmed.

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208 Cal. 350

MAIRO v. YELLOW CAB CO. OF CALIFORNIA. (S. F. 12520.) ★

Supreme Court of California. Oct. 2, 1929.

Rehearing Denied Oct. 31, 1929.

1. Trial 🔑142—Verdict may be directed for defendant only when, giving plaintiff's evidence all value to which it is entitled, no evidence substantially supporting verdict for plaintiff may be found.

Court may direct verdict for defendant only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn therefrom, no evidence of sufficient substantiality to support a verdict for plaintiff, if given, may be found.

2. Automobiles 🔑245(43, 72)—Taxicab operator's negligence in driving at excessive speed and pedestrian's contributory negligence were fact questions for jury.

Whether operator of defendant's taxicab was negligent in driving down center of street at excessive speed, and whether plaintiff, in attempting to cross busy street in middle of the block without due heed for his safety, was contributorily negligent, constituted questions of fact for jury.

3. Release 🔑17(2)—Releases of personal injury claim obtained by taking advantage of plaintiff's ignorance or necessities and misrepresenting true character of releases are void.

If releases of personal injury claim were obtained by taking advantage of plaintiff's ignorance and necessities, and if their true character was misrepresented to him so that he did not know what he was really signing, releases were void.

4. Release 🔑58(6)—Whether releases of personal injury claims were obtained by fraud was jury question, where evidence thereon was conflicting.

Where evidence on issue whether releases of personal injury claim were obtained by taking advantage of plaintiff's ignorance and necessities and by misrepresenting their true character to him was conflicting, such issue should have been submitted to jury, and it was erroneous for trial court to direct verdict for defendant.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Walter Mairo against the Yellow Cab Company of California. From a judgment for defendant, plaintiff appeals. Reversed.

Superseding opinion of District Court of Appeal in 275 P. 468.

Alfred J. Hennessy, of San Francisco, for appellant.

Cooley, Crowley & Gallagher, of San Francisco, for respondent.

PRESTON, J. In this action for damages for personal injuries alleged to have been suffered by plaintiff through the negligence of defendant's taxicab driver, plaintiff appeals from a judgment that he take nothing. The principal question is as to the correctness of the action of the trial court in directing the jury, at the close of the evidence, to render the verdict for defendant upon which said judgment was entered.

[1] The court may direct a verdict only when disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn therefrom, no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if given may be found. Estate of Caspar, 172 Cal. 147, 155 P. 631; Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; Cal. Packing Corp. v. Lopez (Cal. Sup.) 279 P. 664. In this action, viewing the evidence in a light favorable to plaintiff, we find a substantial case is made by him and his witnesses, and it is our opinion that the evidence, sharply conflicting, clearly warranted submission of the cause to the jury for their determination of the several issues of fact involved, as will appear from the following résumé:

On February 12, 1925, plaintiff, a Russian, illiterate, unable to read or even to wholly understand spoken English, while crossing Third street, at about the middle of the

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★Rehearing denied.

block, between Folsom and Harrison, in San Francisco, was hit by a taxicab belonging to defendant. He sustained rather severe injuries, to wit, fractures of three ribs and the collar bone; also puncture of the pleura and contusions and abrasions of the head, trunk, and extremities. Because of his apparent need, he was cared for and rushed to the hospital by defendant, where he was confined for some six weeks and operated upon. He continued medical treatment for some time after his discharge therefrom.

[2] There is evidence pointing to the conclusion that the operator of the taxicab was negligent in driving down the center of the street at an excessive rate of speed. There is also testimony tending to support a finding of contributory negligence on the part of plaintiff in atempting to cross a busy street in the middle of the block without due heed for his safety. Obviously these are questions of fact for a jury.

Defendant introduced in evidence three separate instruments: One dated February 14, 1925, naming a consideration of $1 and medical and hospital care, one dated March 18, 1925, naming a consideration of $25, and the third March 20, 1925, naming a consideration of $14, each of which was signed by plaintiff and purported to release defendant from all liability which it might have incurred by reason of said accident. Defendant claims that out of sympathy for plaintiff in his poverty-stricken state, and despite the fact the injury resulted from his own contributory negligence, it gave him, as a charity, the hospital and medical care and sums stated, in return for which three valid releases were duly executed by plaintiff; that the documents were read slowly and distinctly to him and he thoroughly understood their purport at the time he signed them. There is evidence supporting this claim.

Plaintiff, on the contrary, contends, and his contention likewise has support in the evidence, that he did not at any time understand that he was executing a release of any kind; that he executed the first document upon the understanding and belief that it was a permit to operate upon him; that when he left the hospital he had no money and his clothes were hanging to him by dozens of pins; that the second instrument was represented to him as being merely a receipt for $25 with which he was to buy a new suit to replace the one ruined by the accident; and the third paper he likewise believed was merely a receipt for wages given to help him out until he could find work.

[3, 4] If the said three releases were obtained by taking advantage of plaintiff's ignorance and necessities, and if their true character was misrepresented to him so that he did not know what he was really signing, they are, of course, void. But under the conflicting evidence here it is impossible to tell whether such was the fact. This also was an issue which should have gone to the jury, and it was therefore erroneous for the trial court to direct said verdict for defendant. Much authority can be cited to sustain this ruling, but we deem an extended discussion unnecessary. See, Meyer v. Haas, 126 Cal. 560, 58 P. 1042; Davis v. Diamond C. & L. Co., 146 Cal. 59, 79 P. 596; Smith v. Occidental, etc., S. S. Co., 99 Cal. 462, 34 P. 84; 22 Cal. Jur. § 18, p. 769.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

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208 Cal. 323

LAHANEY v. LAHANEY et al. (S. F. 12775.)

Supreme Court of California. Sept. 30, 1929.

1. Husband and wife ⟹265—Wife's interest in community property conveyed by husband was mere expectancy.

Interest of wife in community property at time of husband's conveyance to sister and wife was mere expectancy and possessed none of attributes of an estate either at law or in equity.

2. Husband and wife ⟹267(7)—Husband's deed of community property conveying undivided one-half interest each to sister and wife vested in each equal undivided one-half.

Under husband's deed of community property, which by its express terms conveyed his entire interest and estate and granted to each of grantees, his sister and wife, "an undivided one-half interest" therein, intention was to thereby vest in each grantee an equal undivided one-half.

3. Husband and wife ⟹267(7)—Husband's deed of community property to sister and wife was valid, subject to wife's right to institute equity action to revoke deed (Civ. Code, § 172, as amended by St. 1891, p. 425).

Husband's deed of community property conveying one-half interest to each of grantees, his sister and wife, was not void under Civ. Code, § 172, as amended by St. 1891, p. 425, requiring wife's consent in writing to husband's gift or conveyance without valuable consideration of community property; but it was a valid deed subject only to right of wife to institute seasonably in equity an action to revoke deed and reinstate property as community property with title vested in husband and subject to sale by him as before.

4. Husband and wife ⟹267(7)—Delivery to sister more than year after execution of husband's deed of community property naming wife and sister as grantees was valid.

Husband's delivery to sister of deed of community property naming wife and sister as grantees more than a year after it was executed was valid, and fact that wife was unaware of making or delivery of deed prior to husband's death could only affect seasonableness of her right to institute an action to set aside deed.

5. **Husband and wife ⚷267(7)—Where husband executed deed of community property to sister and wife and delivered deed to sister, no part of such properties became part of his estate at death.**

Where husband executed deed of community property to his sister and wife, conveying to each an undivided one-half interest, and delivered deed to sister, there remained in him at his death no part of such properties which could or did become part of his estate or that his heirs or personal representatives would have been entitled to recover as such.

6. **Husband and wife ⚷267(9)—Wife receiving her equal undivided one-half of community property by husband's deed could not assail cotemporaneous gift to husband's sister of his undivided interest.**

Where husband executed deed conveying undivided one-half interest in community property each to sister and wife and delivered deed to sister before his death, wife, having by such deed fully received and fully accepted her equal undivided one-half of community property, had no remaining right in law or equity either before or after husband's death to assail his cotemporaneous gift to sister of his own equal undivided interest in same property.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for the partition of real property by Catherine E. Lahaney against Ivy L. Lahaney and others. From an interlocutory judgment, plaintiff appeals. Reversed.

Superseding opinion of District Court of Appeal in 277 P. 317.

Raymond D. Williamson and W. A. Breen, both of San Francisco, for appellant.

Ramsay Moran, M. C. Sloss, Sloss & Ackerman, Louis Ferrari, and Tobias J. Bricca, all of San Francisco, for respondent Bank of Italy.

William A. Kelly, of San Francisco, in pro. per.

RICHARDS, J. On January 27, 1919, Joseph F. Lahaney was, and for more than ten years prior thereto had been, the owner of four parcels of land in the city and county of San Francisco. Two of these parcels of land had been purchased by him in 1909, one in 1913, and one in 1917. They all stood in his name alone, but it is conceded that they were each and all the community property of himself and his wife, Ivy L. Lahaney. On January 27, 1919, Joseph F. Lahaney made and executed a grant deed of each and all of these four parcels of land to the two grantees named therein, viz., his wife, Ivy L. Lahaney, and his sister, Catherine E. Lahaney, granting to each "an undivided one-half interest in and to all his right, title and interest" in said parcels of land. It is conceded that the consideration for this deed was nominal and that in substance and effect it was as to each of said grantees a deed of gift. This deed, while thus executed on the last-named date, was not delivered to either of said grantees until December 27, 1921, when it was delivered to Catherine E. Lahaney, the plaintiff herein and one of said grantees. The deed was recorded on November 19, 1922. Joseph F. Lahaney died intestate on September 9, 1922, and thereafter his widow, Ivy L. Lahaney, was duly appointed and qualified as the administratrix of his estate. Thereafter and on November 18, 1922, this action was instituted by Catherine E. Lahaney to determine the respective interests of the parties thereto in said four parcels of land, and to have a partition thereof accordingly among the persons found to be entitled thereto.

[1-5] At the time of his aforesaid conveyances of said four parcels of land in equal undivided interests to the two grantees named therein, Joseph F. Lahaney was the sole owner of the entire vested estate and interest in said parcels of land. Being community property, the interest of his wife therein at the time of such conveyance was "a mere expectancy, and [possessed] none of the attributes of an estate, either at law or in equity." Stewart v. Stewart, 199 Cal. 318, 335, 249 P. 197, 201, and cases cited. The respondents herein concede that such is the law of this state as declared in our said recent decision and in the long line of cases cited in its support. His said deed, therefore, by its express terms conveyed his entire interest and estate in each and all of said properties. By its express terms, also, he granted to each of his said grantees "an undivided one-half interest" therein. Having thus conveyed to his two grantees the entire estate in said properties in equal undivided shares, it follows irresistibly that it was his intention to thereby vest in each an equal undivided one-half thereof. No other intention can possibly be contorted out of the express substance and terms of said conveyance. This deed of Joseph F. Lahaney was not as to any portion thereof *void*. This the respondents also concede to be the law as particularly laid down in the case of Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, 539. The language of this latter decision is instructive as having particular reference to the effect of the amendment to section 172 of the Civil Code made in the year 1891 (St. 1891, p. 425), requiring the consent in writing of the wife to the husband's gift or conveyance without a valuable consideration of the community property, and with respect to which it is stated in said decision, written by Mr. Justice Shaw and concurred in by Mr. Justice Sloss, as follows: "We are satisfied that the proviso of 1891 does not render a gift of community property by the husband without the consent of the

wife void as to him, nor confer upon him, in his lifetime, or upon his personal representative after his death, any right or power to revoke the gift or recover the property. There is nothing in the language to express the idea that the title does not, as before, remain wholly in him. * * * Neither does the proviso purport to vest in the wife * * * any present interest or estate in the community property given away by the husband without her written consent." It thus follows that the aforesaid deed of Joseph F. Lahaney was not a *void*, but was a *valid* deed, subject only to the right in the wife to institute, seasonably, in equity an action to revoke said deed and reinstate the property as "community property, with the title vested in the husband and subject to sale by him, as before." Spreckels v. Spreckels, supra. The deed of Joseph F. Lahaney was thus valid, though voidable, on its execution. It was also valid as to its delivery upon December 27, 1921, in so far as each and both of its grantees are concerned, since if its delivery upon said date to Catherine E. Lahaney, one of said grantees, was not also a sufficient delivery to Ivy L. Lahaney, the other of said grantees, under the provisions of section 1059 of the Civil Code, then as to the latter there was no other delivery of said deed, and this judgment for that reason would have to be reversed. The fact that Ivy L. Lahaney was unaware of the making or delivery of said deed prior to the death of Joseph F. Lahaney could only affect the seasonableness of her right to institute an action to set aside such deed. Spreckels v. Spreckels, supra, 172 Cal. page 783, 158 P. 537. We thus arrive at the irresistible conclusion that Joseph F. Lahaney in his lifetime and by said valid deed, and by the aforesaid valid delivery thereof as to both of his grantees, had fully conveyed the whole estate in the properties described therein to the said grantees thereof in equal undivided interests, share and share alike. This being so, there remained in him at the time of his death no part of said properties which could or did become a part of his estate, or that his heirs or personal representatives would have been entitled to recover as such. Dargie v. Patterson, 176 Cal. 714, 718, 169 P. 360, 361.

[6] It thus appears that the only outstanding right or equity, if any, existing upon the death of the husband, was the same right or equity which, as his wife, she had possessed prior to his death to have set aside a conveyance by way of gift by him which injuriously affected her community right in and to the properties of the community, which right prior to his death was but an expectancy, but which as to any community property owned by him at the time of his death had ripened into a vested estate. We are thus brought back to a consideration of the effect of the husband's conveyance to his two grantees of his entire ownership and interest in the properties in question by the same identical instrument. First as to the wife. Prior to said deed she had, as we have seen, only an expectancy in each and every portion of said properties to the extent of an undivided one-half thereof. Her whole present right therein consisted, under the authorities above referred to, in the right to have a court of equity protect that inchoate expectancy against injurious invasion on her husband's part through his gift thereof to another. When, however, her husband by his said deed to her converted her said inchoate expectancy in and to an undivided one-half of said community properties into a present vested interest therein and in the whole thereof as her sole and separate estate he gave and granted to her all of her right and expectancy both in law and equity in said properties and in the whole thereof. It is true, as the respondents herein assert and as the authorities hold, that the wife's community interest in such properties runs to the whole and every portion thereof, but so, also, did the husband's deed herein. To construe such deed otherwise than as transferring to the wife her entire right and equity in the whole of said properties would be to deny the husband both the right to convey to his wife her whole right and interest, present and future, in the community property and the whole thereof, but would also be to deny to the husband his right to dispose by gift of his undivided one-half in and to the whole of the community estate. In the case of Dargie v. Patterson, supra, this court, Mr. Justice Sloss writing the opinion, went fully into this subject, holding in harmony with the prior decision of this court in the second case of Spreckels v. Spreckels, supra, that: "The only logical conclusion is that the wife's right to assail the conveyance where, as here, the action is brought after the husband's death, is limited to an undivided half of the property. During his lifetime the husband, *notwithstanding the statutory limitation upon his power of disposition, is the owner of the community property. The proviso attached to section 172 does not impair his right to dispose of the property, so far as concerns his own interest, and that of those claiming under him.*" There would thus seem to be no escape from the effect of our holding in the case of Dargie v. Patterson, supra, wherein this court upheld the gift to a stranger of the husband's one-half of the community property and only set aside his conveyance as to the wife's, or widow's, undivided one-half interest therein. The conclusion would seem to be irresistible that when by the same identical deed the wife has fully received and has fully accepted her equal undivided one-half of the community properties, she has no remaining right in law or equity, either before or after the death of the husband, to assail his cotemporaneous gift to another of his own equal undivided interest in the same property.

The judgment herein holding to the contrary should be and is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

PRESTON, J. I concur. I have been led to concur in the conclusion in this case and, in a large measure, in the reasoning upon which it rests. It seems that the death of Laheney, prior to action of any kind or even knowledge on the part of the wife respecting the execution of said deed, is an important factor. Had he deeded the whole property to the sister, the wife, after his death, could have avoided it only as to the one-half thereof representing her share of the community estate. Dargie v. Patterson, 176 Cal. 714, 169 P. 360. If the deed is clear in its terms and shows the husband intended to give his sister the whole of the one-half of the community property over which he had testamentary power, and to exclude his wife therefrom, the deed, delivered after his death, is tantamount to a will or bequest which made this intention clear. In other words, the husband's intention is the controlling element. If he intended to exclude the wife and the wife did not or could not act prior to the falling in of the community estate upon his death, then his intention must be given effect. The deed seems to bear no other construction than that the husband did so intend to exclude the wife from the community property over which he had the right of testamentary disposition.

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208 Cal. 315

LIVESEY v. STOCK. (L. A. 10033.)

Supreme Court of California. Sept. 30, 1929.

1. Assault and battery 🔑15—Landowner may expel trespasser without incurring liability, if unnecessary force is not employed.

Landowner may expel trespasser from his premises without incurring liability, so long as unnecessary force is not employed.

2. Assault and battery 🔑39—Rule that exemplary damages cannot be recovered by trespasser for wrongful force in expelling him from premises has no application except where trespass is shown.

The rule that a trespasser may not recover exemplary damages for unnecessary force used in expelling him from premises has no application in cases other than where plaintiff was actually a trespasser.

3. Assault and battery 🔑35—Evidence held to sustain jury finding that plaintiff, suing for damages for assault with deadly weapon, was not trespasser on defendant's shore lands (St. 1911, p. 1304).

In action for damages for assault with deadly weapon, jury finding that defendant's fence posts were not within boundary line of defendant's property *held* supported by evidence, as against contention that plaintiff was a trespasser on lands of defendant above mean high tide; plaintiff's contention being that the fence was on lands below high tide, ceded by Legislature in trust to city of Long Beach, by St. 1911, p. 1304.

4. Assault and battery 🔑35—Verdict for actual and punitive damages held authorized for assault with deadly weapon, while plaintiff was removing fence from bathing beach not within defendant's boundaries.

Verdict for actual and punitive damages for plaintiff, shot by defendant while removing latter's fence from public tide lands not within defendant's boundaries, *held* authorized by evidence.

5. Damages 🔑91(1)—Exemplary damages may be awarded, where malice, fraud, or oppression exists.

Exemplary damages may be awarded, where malice, fraud, or oppression are present.

6. Courts 🔑30—Illegality respecting impaneling of jury is never jurisdictional question, but at most error in exercise thereof.

Illegality respecting impaneling of jury in civil case is never jurisdictional question, but is at most error in exercise thereof.

7. Jury 🔑115—Challenges must be to individual jurors in civil cases, challenges to panel not being recognized (Code Civ. Proc. § 601).

In view of Code Civ. Proc. § 601, challenge to panel is not allowable in civil cases; the remedy allowed being challenge to individual jurors.

8. Appeal and error 🔑1045(1)—Error in restricting special venire to township held inconsequential, in view of provisions for drawing regular venire (Code Civ. Proc. §§ 204, 206, 226, 227).

Any error in directing sheriff to summon special venire for Long Beach superior court from township was inconsequential, since, under Code Civ. Proc. §§ 204, 206, the regular panel would have consisted of persons residing within township, notwithstanding sections 226, 227, relating to summoning jurors, contain no such provision.

9. Jury 🔑110(7)—In absence of challenges to individual jurors, objection that jurors had served and been discharged within year was untenable (Code Civ. Proc. §§ 199, 200).

Objection that jurors had each served on regular or special venire and had been discharged as such within one year, in violation of Code Civ. Proc. §§ 199, 200, cannot be considered, where no jurors were challenged on this or other ground.

10. Assault and battery 🔑39—$750 actual and $33,333.33 punitive damages for wounding by No. 8 bird shot at distance of over 50 yards held, as to punitive damages, excessive, and remittitur of excess over $10,000 required.

$750 actual and $33,333.33 punitive damages, for wounds received by being shot with No. 8 bird shot at distance of 50 yards or more, *held* excessive, and remittitur of all in excess of $10,000 required as condition of affirmance.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul B. Dougherty, Judge.

Action by George Livesey against Hugh E. Stock. Judgment for plaintiff, and defendant appeals. Affirmed, on condition of remittitur.

G. M. Spicer, of Long Beach, W. I. Gilbert, of Los Angeles, and Keyes & Erskine, of San Francisco, for appellant.

Walter Desmond and Harry L. Cohn, both of Long Beach, for respondent.

PRESTON, J. In this action the judgment was for plaintiff, awarding actual and punitive damages growing out of an assault with a deadly weapon. The verdict was $5,000 actual and $50,000 exemplary damages. The court below, upon motion for a new trial, determined that, unless the amount of such damages was remitted by the plaintiff to $750 as actual and $33,333.33 as punitive damages, a new trial should be ordered. Plaintiff remitted said excess sum, but the defendant has nevertheless appealed.

The first assignment of error requiring special consideration may be summed up in the words of defendant's counsel as follows: "The appellant was the owner and was in possession of real property. The respondent deliberately and willfully, for the second time within a period of two days, was destroying the fence on appellant's property. Under the law the respondent was a trespasser, and appellant had the right to use all necessary force to repel his unlawful trespass. The respondent cannot recover anything in this action, unless he shows that unnecessary force was used to prevent the trespass, and then can only recover the actual damage resulting from the unnecessary force, and under the law he cannot recover exemplary damages."

[1, 2] The soundness of the proposition of law thus asserted can scarcely be doubted, for the law is clear that a trespasser may be expelled from the premises of a landowner without incurring liability, so long as unnecessary force is not employed. Burnham v. Stone, 101 Cal. 164, 171, 35 P. 627; Walker v. Chanslor, 153 Cal. 118, 129, 94 P. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61. It may also be conceded that there is little, if any, reason for awarding exemplary damages in favor of a trespasser upon the property of another, who by reason of his own wrong is in part responsible for the force used. Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543. But these principles of law are applicable solely upon the assumption that the plaintiff was a trespasser upon the property of the defendant. In this case the necessary finding of the jury was to the effect that plaintiff was not a trespasser upon the property of defendant at the time and place of the assault. The case in this aspect then resolves itself into one as to the sufficiency of the evidence to sustain this finding. A brief recital of the facts must precede our further consideration of this issue:

Defendant, a man of considerable wealth owned on April 4, 1926, at the time in question, a block of land in Long Beach, Cal., situated on Ocean avenue, between Fifth and Sixth place. The southern boundary line of this property, for the purposes of this case, may be considered to have been, as contended by appellant, the line of mean high tide of the Pacific Ocean. The tide lands of the ocean below the line of mean high tide within the city limits of Long Beach were by the Legislature of California in 1911 (Stats. 1911, p. 1304) ceded to said city in trust for the purpose of developing same as a public harbor, and to promote commerce and navigation; the state reserving to itself, however, the right of the public to fish in said ocean, and the right of convenient access over said lands for said purpose. Previous to said above-mentioned date, and for a considerable period of time, there had existed a controversy between the city of Long Beach, acting principally for the purpose of preserving the beach for the public as a place of recreation, and a number of property owners of said city, of whom defendant was one, known as "bluff owners," over the location of the line between their property and the line of mean high tide of said ocean. The public, too, made considerable use of the beach; resident men, women, and children, as well as guests, frequented it; life guards were kept in attendance upon it, and vehicles used for sanitary purposes traveled up and down this area. But some time prior to April 2, 1926, defendant, acting to better his position legally in his contention with the city, projected two barriers, called by some fences, one of which was an extension or projection of his east and the other of his west property line southward toward the ocean. He had also theretofore constructed a concrete bulkhead or retaining wall some distance north of the southerly boundary line of his property; but this wall did not connect with the extremities of these barriers, and bore no relation thereto.

On April 2d, presumably at night, plaintiff removed what might be called one panel of said barriers, by releasing the staples with which the woven wire fence was attached to the most southerly post of said barriers, and laid back the portion of said wire extending from this post to the next post, a distance of some 8 or 10 feet. Defendant immediately caused said barriers to be reconstructed. On April 4, 1926, about 2 P. M., the day being Easter Sunday, plaintiff and other portions of the public were using or attempting to use said beach for recreation purposes, and plaintiff, having theretofore procured a bar of iron, was engaged, while standing at said most southerly post of the so-called Fifth place barrier, in releasing said staples holding said woven wire fence, for the purpose of repeating his said previous performance, when defendant, seeing him through the window of his home, seized a No. 12-gauge Winchester pump shotgun, 2 shells of three drams of powder each, and 1⅛ ounces of No. 8 shot, came out of his residence, and a short distance down the walk leading therefrom, and upon reaching a point some 200 feet from the place where plaintiff was standing, with said gun fired at him leaden pellets, several of which took effect, but worked no considerable injury. Plaintiff desisted for a moment, and conferred with some other persons near him. Later he returned to the post and began the further execution of his purpose, when defendant, who had approached within a distance of some 160 feet, fired a second shot, which also took effect. There was evidence, also, that defendant, approaching still closer, either leveled his gun or undertook to shoot plaintiff a third time, but the effort was a false one, or else the gun failed to fire. As a result of said shooting, plaintiff received small wounds and some 35 or 40 shot were extracted from his body by the physician.

The basis of defendant's contention is that on October 2, 1924, he had his property lines surveyed, and had set stakes marking the line of mean high tide and the southeast and southwest corners of said property, and that said fences or barriers terminated within this projected area. The evidence of plaintiff, however, showed that the post in question was at least 7 feet south and oceanward from the line of mean high tide. This also was the logical deduction from the testimony of experts offered by defendant, and it is not seriously controverted by him; but his theory in this behalf is that, by reason of a sudden storm in February, 1926, the level of the sand on the beach at this point had been materially reduced, consequently causing the line of ordinary high tide to strike the beach at a point considerably to the north of where it formerly had been; hence what is known as the doctrine of avulsion should be applied, under which he had the right to maintain his ownership at the old line as indicated by the said posts.

[3, 4] The authenticity of the claimed survey was not established by him. However, the court, under the most careful, liberal, and specific instructions, submitted to the jury the issue as to whether or not the post in question and the position of plaintiff at the time of the shooting were within or without the boundary line of defendant's property. The court also specifically submitted under appropriate and elaborate instructions the doctrine of avulsion claimed by defendant to be applicable. Upon both these issues the jury returned a verdict against the contention of appellant, and in favor of the contention of respondent. There being, as above pointed out, ample evidence to sustain this finding, application of the rule of trespass may not be invoked by appellant. In other words, the evidence warranted the finding that plaintiff at the time and place in question was without the boundary line of defendant's property, and upon the public domain, and was there engaged in removing what must have been considered by the jury a public nuisance, which was not an unlawful act, nor was it an invasion of any property right of defendant; hence the jury was well within its province in assessing actual damages, and, we think, also in assessing exemplary damages.

[5] Exemplary damages may be awarded where malice, fraud, or oppression are present. Section 3294, Civ. Code; Davis v. Hearst, 160 Cal. 143, 161, 116 P. 530; Scott v. Times-Mirror Co., 181 Cal. 345, 367, 184 P. 672, 12 A. L. R. 1007. It requires no argument to establish the fact that malice or oppression is present in a case where, within little more than 50 to 60 yards distant, a defendant deliberately shoots twice at another with a gun loaded with No. 8 shot. The evidence even warranted a finding of a third attempt within still closer range. This situation is not changed by the statement of defendant that he was firing at the small fence post at which plaintiff was standing.

The further claim is made that the court was without jurisdiction to proceed on the trial by reason of a void order directing the sheriff to summon a special venire of talesmen from which to select the jury. The court in this case, pursuant to a recent statute, sat in Long Beach as department 28 of the superior court of Los Angeles county. No regular jury was in attendance. The court directed the sherif to summon a special venire from Long Beach township, instead of from the body of the county. Defendant moved to vacate the order, which motion was denied. Later he objected to going forward with the trial. But he declined to interpose a challenge to a single juror on this or any other ground.

[6-8] The presence of illegality respecting the impaneling of a jury in a civil cause is never a jurisdictional question, but it is, at most, but error in the exercise thereof. Amos v. Superior Court, 196 Cal. 677, 239 P. 317. A challenge leveled at the panel is not contemplated by the statute in civil cases. The remedy allowed is a challenge to the individual juror. Section 601, Code Civ. Proc.; Estate of Wall, 187 Cal. 50, 200 P. 929.

The general objection here made to the panel amounted to no more than a challenge thereto. Moreover, the error was at most but technical, for under sections 204 and 206 of the Code of Civil Procedure, a regular panel for the Long Beach superior court would have consisted of persons selected "from the names of men and women residing within the township within which said city is located." While sections 226 and 227 do not contain a similar provision, still directing the sheriff to remain in a given township while seeking a special venire, so long as they were not taken from bystanders, would seem to be a matter of small consequence.

[9] The point that the jurors had each served upon a regular or special venire and had been discharged as such within one year, in violation of sections 199 and 200 of the Code of Civil Procedure, if true, fails by reason of defendant's omission to interpose a challenge on this or any other ground to a single juror. People v. Mortier, 58 Cal. 262; People v. McFarlane, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L. R. A. 245; People v. Boren, 139 Cal. 210, 72 P. 899.

[10] Notwithstanding the total absence of prejudicial error in the trial of this cause, we can reach no other conclusion upon this record than that the action of the jury was largely prompted by prejudice or passion. It is true that the trial court undertook to purge the verdict of excess damages due thereto; but, in our judgment, the excess is much greater than he found it to be. Any amount in excess of $750 as actual and $10,000 as punitive damages in our judgment can be ascribed to no other cause than passion or prejudice.

Our power to thus interpose our judgment has often been recognized where, upon the record, the amount of the verdict is so large as to suggest at first blush the existence of the above conditions. Phelps v. Cogswell, 70 Cal. 201, 11 P. 628; Davis v. S. P. Co., 98 Cal. 13, 32 P. 646; Simoneau v. Pac. Elec. Co., 166 Cal. 264, 277, 136 P. 544, 49 L. R. A. (N. S.) 737; Shaffer v. Arnaelsteen, 54 Cal. App. 719, 728, 202 P. 946. A case might easily be supposed where the question of segregation might be so difficult that, instead of suggesting a reduction, the cause would be remanded for a retrial generally or upon the issue of damages alone. Bond v. United R. R., 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Morris v. Standard Oil Co., 188 Cal. 468, 473, 205 P. 1073. But after a study of the whole record in this case, and in view of its nature and the length of time it has been pending, we are content to accept the responsibility of the above conclusion. The defendant was prosecuted criminally, and allowed to receive a fine of $500 and a suspended sentence of 6 months. The plaintiff was to a certain extent active in provoking trouble, and no reason exists for unduly compensating him. The amount of wealth of the defendant is also highly speculative.

Accordingly, the judgment is reversed, and the cause remanded to the lower court for a new trial, solely upon the issue of the amount of damages, unless, within 30 days from the filing of the remittitur in the court below plaintiff shall remit from the judgment all except the sum of $10,750 and the costs as at present adjudged therein, neither side to recover from the other costs on this appeal. If such remission be so made, then, in that event, the judgment shall stand affirmed; otherwise, it shall stand reversed, and the cause shall be retried upon the issue of damages alone.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

101 Cal. App. 92

BOLLES et al. v. HILTON & PALEY, Inc., et al. (Civ. 6892.)

District Court of Appeal, Second District, Division 1, California. Oct. 3, 1929.

Appeal and error ⚷456—Where appellant is entitled to supersedeas, court in which appeal is pending will grant special order restraining enforcement of trial court's judgment.

Where appellant has taken proper steps to create a statutory supersedeas or stay by filing notice of appeal and proper undertaking in sum twice amount of judgment and giving notice thereof to defendant, and trial court seeks to enforce its judgment against appealing party, court in which appeal is pending will grant special order or writ restraining such action.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Lillie H. Bolles and husband against Hilton & Paley, Inc., and others. Judgment for defendants and the named plaintiff appeals. On application for writ of supersedeas to stay execution of judgment. Writ granted.

I. W. Bane, of Los Angeles, for appellant.

Samuel J. Crawford, of Ocean Park, for respondents.

CONREY, P. J. In this action to recover damages for personal injuries, a motion for nonsuit was granted, and the defendants recovered judgment for costs in the sum of $122.80. Plaintiff appealed from judgment, which appeal is now pending in this court. Plaintiff now applies for writ of supersedeas to stay enforcement of the judgment.

In addition to the facts above noted, appellant states in her petition that after filing her notice of appeal she filed an undertaking in a sum twice the amount of the judgment entered in favor of the defendants and gave notice thereof to the defendants, who did not except to the sureties. Nevertheless, on demand of defendants, an execution was issued and by the sheriff levied upon property of appellant. Based upon the foregoing facts appellant asks for the writ of supersedeas.

On this motion no questions of fact are raised, but respondents claim that the stay bond, of which a copy is attached to the petition, was not signed by two persons entitled to be sureties on such bond. The persons named thereon are Charles I. Bolles and Constance Bolles. Charles I. Bolles is the husband of the plaintiff Lillie H. Bolles and is her coplaintiff in the action. Respondent has not cited, and we have not found any decision or any provision by statute in California which denies the right of a nonappealing party to become surety on the bond of his appealing coplaintiff or codefendant. Decisions in some states have affirmed the competency of such nonappealing party to act as surety. In some other jurisdictions the contrary view prevails. 3 Cor. Jur. p. 1138. For the present purpose we shall assume that the undertaking as filed is sufficient. On this assumption it results that we have the situation where an appellant has taken the proper steps to create a statutory supersedeas or stay, and where in the face of such existing stay the court below seeks to enforce its judgment against the appealing party. In such case the court in which the appeal is pending will grant a special order or writ restraining its action. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 P. 123. The execution has been issued against both plaintiffs. Of course there is no reason why execution may not issue against the nonappealing plaintiff, as to whom the judgment is final.

It is ordered that a writ of supersedeas issue herein staying execution upon the judgment against appellant Lillie H. Bolles, upon the giving by her of an undertaking in the form and in the amount required by law in an undertaking on appeal from a money judgment; said undertaking to be approved by the presiding judge of the superior court of Los Angeles county, and filed in this court within 30 days from the date of this order.

We concur: HOUSER, J.; YORK, J.

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100 Cal. App. 743

In re HANN'S GUARDIANSHIP.

WOODHEAD v. CHILDREN'S AGENCY, ASSOCIATED CHARITIES.

(Civ. 7039.)

District Court of Appeal, First District, Division 2, California. Sept. 25, 1929.

1. Appeal and error ⚷110, 113(2)—Order denying new trial, or refusing to vacate appealable order, is not appealable (Code Civ. Proc. §§ 963, 1714).

Under Code Civ. Proc. §§ 963, 1714, appeal does not lie from order denying a new trial, or from order refusing to vacate an appealable order, particularly where it is only another name for a motion for new trial.

2. Guardian and ward ⚷13(1)—Probate court could properly decide it would not be necessary, or for minor's best interests, to appoint guardian while minor was ward of juvenile court (Code Civ. Proc. § 1747).

Under Code Civ. Proc. § 1747, providing that court may appoint guardian for minor, when it appears necessary or convenient, probate court was not bound to appoint guardian merely because minor desired one, but it was for court to decide whether guardianship was necessary or convenient, and court could properly decide that it would not be necessary, or for best interests, of 16 year old minor to have a guardian of her person appointed, while she was a ward of juvenile court and being cared for by agencies of that department.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding by Sarah Jane Woodhead to be appointed guardian of the person of Frances Hann, a minor, opposed by the Children's Agency, Associated Charities. From a judgment denying the application, petitioner appeals. Affirmed.

Daniel Barton, of San Francisco, for appellant.

Rufus H. Kimball, of San Francisco, for respondent.

KOFORD, P. J. Appellant, Sarah Jane Woodhead, signed and filed a petition in the probate court asking to be appointed guardian of the person of Frances Hann, a minor, alleging that the said minor was an orphan of the age of 16 years, in the custody of the Associated Charities of San Francisco. The Children's Agency of the Associated Charities filed an opposition to the said petition, alleging that the said minor's father deserted her in 1916, and that his whereabouts has since been unknown, that her mother died in 1923, and further alleged as follows:

"That the aforesaid Sarah Jane Woodhead is in no way related to the said minor, has only seen her a few times, does not know her well, and is not well qualified to act as her guardian, nor is she able to give the kind of home surroundings that the said minor at present needs."

"That on the 23d day of July, 1916, the said minor, Frances Hann, was committed to the care of her mother, and that on the 12th day of April, 1927 (1917), the said minor was again committed to the Children's Agency, a department of the Associated Charities of San Francisco, a corporation, both of said commitments having been duly signed and entered by the above entitled court, sitting in department 2, juvenile, thereof."

"That ever since the 12th day of April, 1917, the said minor has been under the care, custody, and control of said Children's Agency, and boarded in various foster homes in San Francisco, and that she is at present under the care and control of a competent foster mother selected by the said Children's Agency, and whose home is directly under the supervision and control thereof."

"That the character of the said minor is such as to require the careful supervision of a social agency and her upbringing in a proper foster home selected thereby."

The opposition concluded with the prayer that the petition be denied, and that, in case the court should decide that any guardian was desirable, Catherine Moriarty, a social worker and employee of the said Children's Agency, be appointed.

On the last day of the hearing of the matter, December 3, 1928, a minute order of the court was made, denying the petition for letters of guardianship and sustaining the objections thereto. On the same day there was filed a document, dated November 3, signed by the minor, nominating and requesting the court to appoint said petitioner. Petitioner thereafter filed a notice of intention to move for a new trial, giving notice that she would on December 14 move to set aside the decision of the court and for a new trial. A minute order of the court was made on December 18, reading, "Motion for a new trial denied." On December 26, petitioner filed a notice of appeal "from the order of the court made herein, denying the motion of the petitioner to set aside the decree of the court therein rendered on the 18th day of December, 1928, denying the petitioner's motion for a new trial and to open up said cause for further hearing, the court thereby ordering petitioner's motion dismissed and the said order [to] which petitioner's counsel excepted. The petitioner does hereby appeal from said order and judgment and the whole thereof."

The appeal is perfected under the alternative method. The only record brought up is the clerk's transcript, containing, of course, no testimony. Appellant describes her appeal as an appeal from an order "denying the motion of appellant for a rehearing of the case."

[1] An appeal from the order denying a new trial is not permitted. Code Civ. Proc. §§ 963 and 1714. An appeal from an order refusing to vacate an appealable order is likewise not permitted (Steinberg v. Jacobs, 21 Cal. App. 765, 132 P. 1060; 2 Cal. Jur. 166), especially so, where, as here, it is only another name for a motion for a new trial.

[2] Considering the appeal as one taken from the order and judgment denying the petition, the record fails to show any error. The evidence and proceedings of the trial of the issues framed by the petition and opposition thereto are not before us, and it must be assumed the evidence at the trial supported the decision. Under the allegations of the opposition to the petition, the court could properly decide that it would not be necessary or for the best interests of the minor to have a guardian of her person appointed by the probate court, while she was a ward of the juvenile court and being cared for by the agencies of that department. It is provided in Code Civ. Proc. § 1747, that the court may appoint a guardian for a minor "when it appears necessary or convenient." The court was not bound to appoint a guardian simply because the minor nominated one. Newton v. Janvrin, 62 N. H. 440. The court, not the minor, is required to decide whether a guardianship is necessary or convenient.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

101 Cal. App. 104

SAN MARINO CITY SCHOOL DIST. OF LOS ANGELES COUNTY v. MORGENTHALER et al. (Civ. 6055.)

District Court of Appeal, Second District, Division 2, California. Oct. 4, 1929.

1. Eminent domain 🔑205—Evidence sustained finding that no damages would accrue to portion of tract not sought to be condemned by reason of severance and construction of improvement.

Evidence in proceeding in eminent domain *held* sufficient to sustain finding that no damages would accrue to portion of tract not sought to be condemned by reason of its severance from the portion sought to be condemned and construction of improvement in manner proposed.

2. Eminent domain 🔑259—Appellate court is bound by record sustaining action of lower court in eminent domain proceeding.

Appellate court is bound by record which sustains action of lower court relative to award in proceeding in eminent domain.

Appeal from Superior Court, Los Angeles County; Harry B. Archbald, Judge.

Proceeding in eminent domain by San Marino City School District of Los Angeles County against Clara Methes Morgenthaler and others. From the judgment, defendants appeal. Affirmed.

John C. Miles, of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and Homer I. Mitchell, Deputy Co. Counsel, both of Los Angeles, for respondent.

IRA F. THOMPSON, J. [1] This is an appeal from a judgment in a proceeding in eminent domain. The appellants owned 1.510 acres fronting on Alhambra road in the San Marino City school district. The respondent sought by the action to condemn 1.308 acres thereof for school purposes, leaving as the remainder a parcel with a frontage of 47½ feet on Alhambra road and 186.37 feet deep. The court made a finding as follows: "That no damages will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff." Appellants say the "trial court failed to take into consideration certain evidence bearing upon the damage which the defendants might sustain, in the severance of the property condemned from the parcel left." Three expert witnesses called for the purpose of expressing their opinion concerning the value of the property involved testified that there was no severance damage to the parcel not taken. The record then by which we are governed discloses ample testimony to support the finding of the court, which finding of ultimate fact is diametrically opposed to the one appellants believed should have been made.

[2] In like manner is the second contention of counsel, that the award is unfair, concluded. The value placed upon the property by the court is considerably in excess of that given to it by several of the witnesses. It is obvious that the appellate court is bound by the record which sustains the action of the lower court.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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100 Cal. App. 731

BEHLER v. KUNDE et al. (Civ. 6737.)

District Court of Appeal, First District, Division 1. California. Sept. 25, 1929.

1. Appeal and error ⟹994(3)—Whether plaintiff's testimony was valueless, because of his interest, was question for trial court.

In suit to compel specific performance of contract to partition property, in which defendant claimed that consideration for agreement on part of defendant was inadequate, question whether plaintiff's testimony was practically valueless on question of value of defendant's land, because of his interest and manifest biased opinion, was for trial court.

2. Specific performance ⟹49(2)—To entitle plaintiff to specific performance of partition contract, it was not necessary that consideration for defendant's agreement be measured by exact equality.

In order to entitle plaintiff to specific performance of contract for partition of property, it was not necessary that consideration for defendant's agreement be measured by exact equality in dollars and cents.

3. Courts ⟹104—Reviewing court need not present detailed argument on sufficiency of evidence to support judgment, where question is one of determining which side to believe.

It is not province of reviewing court to present by way of opinion detailed argument on sufficiency of evidence to support judgment, where it appears that question is one purely of determining which side may be believed.

Appeal from Superior Court, Sonoma County; Percy S. King, Judge.

Suit by Benjamin Behler, also known as Benjamin J. Behler, against Arthur Kunde, to compel the specific performance of a contract for the partition of real property. From a decree for plaintiff, defendants appeal. Affirmed.

W. F. Cowan and R. M. Quackenbush, both of Santa Rosa, for appellants.

Wallace L. Ware and George W. Murphy, both of Santa Rosa, for respondent.

PARKER, Justice pro tem. Plaintiff commenced an action to secure a decree compelling the specific performance of a contract of partition entered into between plaintiff and defendant Arthur Kunde. The remaining defendants are fictitious persons, and upon the opening of the trial the action was dismissed as to these.

The parties hereto, plaintiff and defendant, on July 31, 1923, purchased certain parcels of land, and held and farmed the same as tenants in common until on or about May 19, 1925. On this last date they agreed to partition the property so held by them, and in pursuance of this agreement a written document evidencing the understanding of the parties was prepared and executed. The written agreement sets forth the joint ownership of the real property therein described, and recites the fact that it is the desire of the parties to divide the same. It further provided that a division of the lands, together with the erections and buildings thereon, and also the live stock and other effects upon said premises, shall be made. By its terms plaintiff agreed to execute a good and sufficient deed to the defendant, conveying unto him certain of the real property described. The remaining part of the lands jointly owned was to become and be the sole and exclusive property of plaintiff, defendant agreeing to execute and deliver to plaintiff a good and sufficient deed, conveying all of his right, title, and interest in and to the lands agreed, as being the part that plaintiff was to have. The land was to be surveyed within 30 days, so that a certain division line mentioned in the agreement might accurately be determined, the expense of said survey to be equally borne by the parties.

The agreement further provided that the waters of a certain spring, known as and described as "Winegartner spring," shall be thereafter owned by the parties, one-half each, and it was agreed that no more taps were to be put on the pipe leading from said spring by either party, without having obtained the consent of the other party so to do. It was further agreed that the defendant should have all the water rights which the parties may have in and to the water flowing from a certain place described in the agreement as Brockman Canyon. The defendant was to pay the plaintiff $1,000 as a further consideration for the division of the lands. The agreement also provided for the manner of division of the personal property. This property has been divided, and the agreement respecting it fully executed and consummated. Likewise the agreement provided for an accounting of past operations, and this, too, has been consummated, or at least is not involved herein. Defendant, though requested so to do, has failed and refused to execute the deed to plaintiff, though plaintiff has tendered to defendant his deed as in the agreement provided; hence this action.

The decree in the court below was in favor of plaintiff, and ordered defendant to execute and deliver to plaintiff the deed demanded, and to pay to plaintiff the $1,000 as agreed. The appealing defendant urges many reasons why the judgment of the lower court must be reversed, and we will take them up in the order presented.

[1, 2] Appellant contends, first, that the consideration for the agreement on the part of defendant is not adequate, fair, or just, and bases this contention upon the disparity in value between the tract that plaintiff was to receive and the tract that was to go to the defendant. We have examined the record and the evidence adduced on this issue, and find therein a substantial conflict. Ordinarily this would end our inquiry, but, in order to meet the contention of appellant that the conflict is not a real conflict, we will discuss the testimony. The only direct testimony as to values offered by plaintiff was that of himself. Against this was the testimony of two or three witnesses. Appellant urges that the testimony of plaintiff is practically valueless, in so far as it relates to the question of the value of defendant's land, because of his interest and manifest biased opinion. This question was for the trial court. If the learned judge of the court below believed the testimony of plaintiff, and felt that he was perhaps more qualified to express his opinion than any of the other witnesses called, on this phase of the case an appellate court will not intervene and arbitrarily hold that the trial judge erred in so doing. However, the testimony offered by defendant himself was not too conclusive. For instance, one of defendant's witnesses placed the value of the land that defendant was to receive at $20,000, and the value of the land that plaintiff was to receive at $25,000, and added, "and that is raising it high." This same witness then continued to state that in his judgment the defendant has the more marketable land, and that the land of defendant would sell for more money than the land of plaintiff. In addition, it appears that the land allotted to defendant is land that adjoins and squares up his other holdings in the immediate vicinity, and that his own declarations on the subject of values, made at the time, indicate his opinion of the fairness of the division.

Nowhere in the authorities on the subject of specific performance is it held that the consideration must be measured by exact equality in dollars and cents. In 23 Cal. Jur. at page 42, the general doctrine is announced as follows: "An adequate consideration does not necessarily mean a price measuring fully to the value of the property. Thus it is not necessary that the value of real property, as found by the court to exist at the time of the contract to convey, shall exactly, or even substantially, equal the price fixed by the contract, for such value can rarely, if ever, be determined with precision. The cases cited support the text. We conclude that there is no merit in this contention.

Appellant next contends that the findings on material issues are hopelessly in conflict. There seems to be some ground for this contention, but the conflict in the findings, as pointed out by appellant, may be easily reconciled by taking the view of the respondent in support of the judgment. The findings refer to the pleadings by paragraph, and the trial court, instead of finding the existence or nonexistence of certain issues tendered by defendant's answer, made findings as to the truth or falsity of the paragraph in the answer. In his answer, defendant first specifically denied the allegations of the complaint, and then set up several separate defenses. Defendant construes his answer as being a denial, and then a first, second, and third defense. The trial court construed the answer as an entire pleading, and called the specific denials a first defense, and from there on numbered each defense consecutively. Therefore, where the findings refer to a paragraph in defendant's first defense, the appellant contends that it is a finding on his first separate defense, and where the court finds concerning a paragraph of defendant's second defense, the defendant contends that it is a finding on the same paragraph of his second defense. The findings, as a whole, make it manifest that the apparent conflict results from the method of designating the paragraphs, and is more a matter of form than substance. Further, the findings otherwise sufficiently cover the issues tendered.

[3] The remaining contentions may be grouped under the head of disputed fact. Defendant had sought to have the contract reformed, in a separate defense, and the findings of the trial court were against him. His contentions under this last group are mostly claims as to what his rights might be under the contract as reformed. Without detailing all of the contentions made, a careful reading of the reporter's transcript, a task which is not incumbent upon us, discloses that the findings of the trial court adverse to appellant's contentions were, in each instance, supported by competent evidence.

The appeal is presented under the alternative method, and neither in appellant's brief, nor in any appendix thereto, is there printed sufficient of the evidence to disclose the errors complained of. It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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100 Cal. App. 700

ANDREWS v. CITY OF PIEDMONT.
(Civ. 6624.)

District Court of Appeal, First District, Division 2, California. Sept. 24, 1929.

1. Action 🔑6—Plaintiff, seeking decree that municipal zoning ordinance is invalid, held not bound to enumerate every statute that may be involved (Code Civ. Proc. § 1060).

Where plaintiff sought decree that municipal zoning ordinance was invalid, under Code Civ. Proc. § 1060, providing that any person who desires declaration of his rights or duties in respect to property rights may bring action for declaration of rights, he was not bound in first instance to enumerate every statute that may be involved.

2. Action 🔑6—Trial court, in proceeding under statute to obtain declaration of rights, may determine validity of zoning ordinance (Code Civ. Proc. § 1060).

On trial, as hearing of cause proceeds to determine whether municipal zoning ordinance is invalid, trial court may construe and interpret each statute or municipal ordinance which may be involved, under Code Civ. Proc. § 1060, providing for bringing of an action to obtain a declaration of rights in respect to property.

3. Municipal corporations 🔑601—City may adopt zoning ordinance valid in nature.

City may not be prevented from adopting zoning ordinance of valid nature, and paragraph in judgment so holding will be stricken out.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by F. A. Andrews against the City of Piedmont. Judgment for plaintiff, and defendant appeals. Modified, and, as modified, affirmed.

Girard N. Richardson, of Oakland, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action to obtain a judgment of declaratory relief. The defendant answered, and a trial was had before the court sitting without a jury. The court made findings in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed, and has brought up a typewritten record. The plaintiff sought a decree that a municipal zoning ordinance is invalid.

[1, 2] The defendant claims the court had no authority to declare invalid a municipal ordinance. It quotes section 1060 of the Code of Civil Procedure as follows: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property. * * *" Then it contends that the power of the court is confined to construing private writings. It cites the Kansas statute, and calls attention to the fact that the latter contains words expressly enumerating statutes and municipal ordinances. The vice in this reasoning is the failure to note that our statute is written in the disjunctive. The power is manifold. It includes the power to construe private writings as defendant contends. But it goes much further, and it also includes this broad power: "Any person * * * who desires a declaration of his rights or duties * * * in respect to, in, over, or upon property * * * may," etc. Under the latter grant the plaintiff, in the first instance, is not bound to enumerate every statute that may be involved. But, on the trial, as the hearing of the cause proceeds, the trial court at a proper time will be called upon to construe and interpret each statute or municipal ordinance which may be involved.

[3] In the next place, the defendant contends that the zoning ordinance of the city of Piedmont is valid. Since its brief was filed the point has been definitely ruled against it. Wickham v. Becker (Cal. App.) 274 P. 397. The trial court held the ordinance invalid. On the authority of the case just cited it did not err. But the court did not stop at that point. It went further, and inserted a paragraph as follows: "It is further ordered, adjudged, and decreed that defendant, city of Piedmont, has no right or power to prevent the use of the above-described real property of plaintiff for retail business purposes, and that any and all restrictions attempted to be imposed by said city of Piedmont, preventing the use of said real property for retail business purposes, are null, void, and of no effect." The effect of that paragraph is to hold that the defendant may not adopt any zoning ordinance that will be valid. Of course, that is not so.

The paragraph quoted is stricken out. As so modified, the judgment is affirmed. The respondent will recover his costs on this appeal.

We concur: KOFORD, P. J.; NOURSE, J.

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100 Cal. App. 801

F. A. ANDREWS, Plaintiff and Respondent, v. R. H. BARRETT, as Building Inspector of the City of Piedmont, a Municipal Corporation, Defendant and Appellant. (Civ. 6624.)

District Court of Appeal, First District, Division 2, California. Sept. 24, 1929.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Girard N. Richardson, of Oakland, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondent.

STURTEVANT, J. This is an application for a writ of mandate to compel the municipal authorities to issue to the plaintiff a building permit. It was tried one week later than the action entitled Andrews v. City of Piedmont, 90 Cal. App. —, 281 P. 78, this day filed. While the actions were tried separately, the parties stipulated that the evidence in each case could be used in the other, and the reporters' transcripts could be included in one transcript, that the clerk's transcripts could be included in one transcript, and that all of the briefs could be considered in each case.

On the authority of Andrews v. City of Piedmont, supra, the judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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100 Cal. App. 802

Alice J. WILLIAMS, Plaintiff and Respondent, v. CITY OF PIEDMONT, Defendant and Appellant. H. S. HARRIS, Plaintiff and Respondent, v. SAME. Francis E. REYNOLDS, Plaintiff and Respondent, v. SAME. (Civ. 6848.)

District Court of Appeal, First District, Division 2, California. Sept. 24, 1929.

Appeals from Superior Court, Alameda County; John J. Allen, Judge.

Girard N. Richardson, of Oakland, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondent.

STURTEVANT, J. From each of three declaratory judgments the defendant has appealed. In each case the point is made that the trial court had no jurisdiction to determine the validity of ordinance No. 268 of the city of Piedmont. On the authority of Andrews v. Barrett (No. 6624) 90 Cal. App. —, 281 P. 78, this day filed, the point may not be sustained.

In the view we take of the record, it is unnecessary to discuss either of the other two points made by the defendant.

Each of the judgments is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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100 Cal. App. 792

PEOPLE v. CLOUD. (Cr. 1855.)

District Court of Appeal, Second District, Division 1, California. Sept. 27, 1929.

1. Larceny 🔑62(2)—Testimony by corporation's agents that they gave no permission for defendant to take rug sufficiently proved taking was without owner's consent.

In prosecution for grand theft of an oriental rug, where agents of corporation who were in charge and possession of rug testified that no permission was given for defendant to take rug, law requiring that prosecution prove taking was without consent of owner of property was sufficiently complied with, since corporation's acts must be performed by or through its agents.

2. Larceny 🔑32(1)—Where transaction is identified so that defendant prosecuted again for same offense may protect himself by proper plea allegation as to ownership of stolen property is immaterial (Pen. Code, § 956, as amended by St. 1927, p. 1042, § 2).

Where identification of transaction which resulted in commission of offense is established to extent that in event of second prosecution of defendant for same offense he may readily protect himself by proper plea, allegation in first action as to ownership of property stolen is immaterial under Pen. Code, § 956, as amended by St. 1927, p. 1042, § 2.

3. Larceny 🔑40(9)—Variance between information and proof as to owner of rug stolen held immaterial under circumstances (Pen. Code, § 956, as amended by St. 1927, p. 1042, § 2).

Where defendant in prosecution for theft of oriental rug was not misled by allegation that rug was property of certain person, though evidence disclosed that rug was under control of corporation of similar name and rug's identity as stolen property was clearly established, variance was immaterial; it being clear that, should defendant be again prosecuted for same offense, he might protect himself by proper plea under Pen. Code, § 956, as amended by St. 1927, p. 1042, § 2, providing that erroneous allegation as to person injured is not material.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Charles Cloud was convicted of grand theft, and he appeals. Affirmed.

John S. Cooper and Grant B. Cooper, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, of Los Angeles, for the People.

HOUSER, J. From a judgment of conviction of the crime of grand theft, with two prior convictions of felony, and from an order denying his motion for a new trial, defendant has appealed to this court. The action was tried before the court sitting without a jury.

From the evidence introduced on the trial it appears that an oriental rug which had been rented by, and which was in the possession of, William Fox Film Corporation, was stolen.

The first point presented by appellant is that the evidence was insufficient to support the judgment in that the prosecution failed to prove that the rug was taken from William Fox Film Corporation without its permission. In that regard each of two witnesses, one known as a "set dresser," and the other as "assistant set dresser," who were in charge and possession of the rug, testified that no permission was given by him to defendant to take the rug.

In the case of People v. Hutchings, 8 Cal. App. 550, 555, 97 P. 325, 327, where a similar question was incidentally involved, the court said: "The father of the owner of the steer being in control of the cattle at the time of the larceny, owing to the illness of his son, it was proper that he should be permitted to testify that he had not given permission to anyone to take the steer. If it had been taken with his consent, there would have been no crime committed." See, also, State v. Adams, 115 N. C. 775, 20 S. E. 722; Hudspeth v. Commonwealth, 195 Ky. 4, 241 S. W. 71.

[1] It is confidently asserted by appellant that in a prosecution for the commission of the crime of theft it is essential that the prosecution prove that the taking was without the consent of the owner of the property. But manifestly such rule must yield to the necessities of the case. It should be remembered that William Fox Film Corporation was a corporation and for the purposes of this action is to be considered as the owner of the rug which was stolen. It is, of course, apparent that a corporation can never act personally. Necessarily each and every of its acts must be performed by or through its agents. It would seem but reasonable that where, from the evidence introduced on the trial, it is made to appear that the management, control, and possession of the property in question has been intrusted by the owner to his agent and that such agent has not given his consent to the defendant that he take the property, a sufficient compliance with the requirements of the law is established.

It is also urged by appellant that a material variance existed between the allegation contained in the information under which defendant was charged with the commission of the offense and the evidence which was offered on the trial of the action. By the information defendant was charged with stealing the rug in question, "of the property of one William Fox." As hereinbefore indicated, the evidence disclosed the fact that the rug was rented, not by William Fox, but by William Fox Film Corporation, which corporation had possession of the rug at the time it was stolen.

Section 956 of the Penal Code (as amended by St. 1927, p. 1042, § 2), which deals with a situation such as is here presented, is as follows: "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, or of the place where the offense was committed, or of the property involved in its commission, is not material."

[2] Although some pertinent authorities, including that of People v. Hughes, 41 Cal. 234, support the position assumed by the appellant in the matter, the undoubted weight of authority is to the effect that, where the identification of the transaction which resulted in the commission of the offense is established to the extent that in the event of a second prosecution of the defendant for the same offense he may readily protect himself by proper plea, the allegation in the first action as to ownership of the stolen property is immaterial.

In the case of People v. Leong Quong, 60 Cal. 107, the defendant was charged with the crime of stealing a horse and wagon, the alleged property of one Sang Hop. On the trial of the action the owner of the stolen property testified that Sang Hop was his business name, but that his real name was Yup Chin. In ruling upon the question of variance between the allegation in the information and the evidence produced at the trial, the Supreme Court said in part: "* * * The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. * * *"

In the case of People v. Nunley, 142 Cal. 105, 75 P. 676, by the information the defendant was charged with the larceny of a horse alleged to have been the property of one J. Suey Lung. The evidence showed that the horse was the property of a Chinese company of which J. Suey Lung was the manager. The Supreme Court took occasion to review the authorities touching the question involved and reached the conclusion that the variance was immaterial. To the same effect is the case of People v. Sing, 42 Cal. App. 385, 183

P. 865, where it appeared that the difference between the information and the evidence was that by the former it was alleged that the stolen property was that of a certain individual; whereas by the evidence it was shown that the property belonged to a partnership of which the named individual was a member. See, also, People v. Melson, 84 Cal. App. 10, 257 P. 555, where the authorities are carefully reviewed.

[3] From the evidence in the instant case it is apparent that defendant was in no wise misled by the allegation contained in the information of which he here complains. So far as the stolen property was concerned, its identity was clearly established by evidence introduced by the prosecution, as well as being freely admitted by defendant himself. The entire transaction was so surrounded and hedged by various facts and circumstances that under no condition would it be possible to confuse it with any other. It is clear that should defendant be hereafter prosecuted in another action for the same offense, he may protect himself by proper plea.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

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100 Cal. App. 785

PEOPLE v. CRANDALL. (Cr. 1840.)

District Court of Appeal, Second District, Division 1, California. Sept. 27, 1929.

1. Criminal law 🔑829(3)—Refusal of instruction on criminal negligence covered by instructions given held not error.

In prosecution for involuntary manslaughter, refusal of instruction requiring that death of deceased should have resulted from defendant's reckless and gross neglect *held* not error, where principle of law contained in such instruction was fully covered by other instructions given at request of prosecution.

2. Criminal law 🔑829(3)—In prosecution for involuntary manslaughter, refusal of instructions as to speed of automobile at intersection held not erroneous, where instruction in statutory language was given (California Vehicle Act, § 113(a)(b).

In prosecution for involuntary manslaughter, refusal of instruction as to speed of automobile at intersection *held* not error, where court gave instruction in language of statute, California Vehicle Act, § 113(a)(b), St. 1923, p. 553, as amended by St. 1927, p. 1436, § 30.

3. Criminal law 🔑763, 764(6)—In prosecution of automobilist for involuntary manslaughter, instruction on effect of omission by another driver to give signal of intention to turn held properly refused as invading jury's province (California Vehicle Act, § 130).

In prosecution against automobile driver for involuntary manslaughter, refusal of instruction relative to effect of omission on part of another driver to give signal of intention to turn based on California Vehicle Act, § 130 (St. 1923, p. 558, as amended by St. 1925, p. 412, § 15a), *held* not error, in view of statement that jury should acquit if they found "that the omission to so signal" was proximate cause of accident, since such language indicated that omission occurred, whereas testimony was conflicting, and therefore instruction invaded jury's province.

4. Criminal law 🔑543(2)—Admission of testimony given at preliminary examination held not abuse of discretion, in view of showing that witness was not within state (Pen. Code, § 686).

In prosecution for involuntary manslaughter, admission of testimony given at preliminary examination before committing magistrate *held* not abuse of discretion under Pen. Code, § 686, in view of showing that witness was not within state.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Harold B. Crandall was convicted of involuntary manslaughter, and he appeals. Affirmed.

Carter & Webster and John W. Holmes, all of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of involuntary manslaughter, and from an order denying his motion for a new trial.

From the evidence the jury would have been justified in concluding that the essential facts in the case were that as defendant was operating an automobile southerly on a public thoroughfare at an intersection of said thoroughfare with another public highway, by reason of the failure of defendant to exercise due care and circumspection in the premises, the automobile operated by him collided with another automobile traveling in a northerly direction and thereby caused the death of two of the occupants of the latter automobile.

[1] The first two points presented by appellant relate to the refusal of the trial court to give to the jury, at the request of defendant, an instruction to the effect that before defendant could be found guilty of the charge of manslaughter the jury must be "satisfied beyond all reasonable doubt that the death of the deceased ensued as a direct and proximate result of the *reckless and gross neglect* of the defendant." Although with some minor criticisms, not affecting the intent of the offered instruction, it may be said that defendant was entitled to have the substance of it given to the jury, on examination of the record herein it is noted that the principle of law contained in said proffered instruction was fully covered by other in-

structions given to the jury at the request of the prosecution—from which it follows that the point made by appellant is not well taken.

[2] Appellant next complains that the trial court refused to give to the jury the following instruction requested by defendant: "You are instructed that it is not unlawful under the laws of the state of California for the driver of an automobile to operate the same at a speed greater than fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed, provided he operates and drives the same at a careful and prudent speed, not greater than is reasonable and proper having due regard to the traffic, surface and width of highway, and does not drive or operate said vehicle on such highway at such a speed as to endanger the life, limb or property of any person."

In part, subdivision (b) of section 113 of the California Vehicle Act (Stats. 1923, p. 517, as variously amended), is as follows:

"Subject to the provisions of subdivision (a) of this section and except in those instances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following: * * *

"2. Fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed. * * *"

Subdivision (a) of said section 113 provides that: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person." St. 1923, p. 553, § 113 (a) (b), as amended by St. 1927, p. 1436, § 30.

It will be noted that in effect the declared law is that at an intersection of highways where the driver's view is obstructed it is lawful to operate an automobile at a speed not exceeding 15 miles per hour, provided that in any event he must "drive the same at a careful speed," etc. But whatever may be the correct construction of the statute, the record discloses the fact that the trial court gave to the jury an instruction in its exact language—from which it would follow that defendant was in no wise prejudiced by the refusal of the trial court to give the particular instruction requested by him. In the same connection appellant suggests that at the request of the prosecution the trial court committed error in giving to the jury the instruction to which reference has just been had. It is clear that the point advanced by appellant is without merit.

[3] Prejudicial error is also predicated upon the refusal of the trial court to give to the jury, at the request of defendant, the following instruction: "You are instructed that the driver of any vehicle upon the public highway, before starting, turning, or stopping such vehicle, shall first see that such movement can be made in safety; and if it cannot be made in safety, shall wait until it can be made in safety. Then if the operation of any other vehicle may reasonably be affected by such movement, the driver shall give a signal plainly visible to the driver of such other vehicle, of the intention to make such movement. Such signal may be given either by the use of a hand and arm, or by means of a mechanical or electrical device which meets the requirements of the Motor Vehicle Act of this state and which has been approved by the Division of Motor Vehicles of this state. If you find that *the omission to so signal*, by Michael Sandstrom, was the direct and proximate cause of the accident and the resulting death of Eva M. A. Gwin or Permillia J. Gwin, and not the lack of due care and circumspection on the part of the defendant Harold Crandall, then you should acquit said defendant."

With the exception of the last sentence of such requested instruction, it is couched in nearly the identical language of a portion of section 130 of the California Vehicle Act (St. 1923, p. 558, as amended by St. 1925, p. 412, § 15a). A part of the defense presented by defendant was in effect that a third automobile (which immediately preceded the automobile with which the automobile operated by defendant collided as such third automobile approached the intersection of the highway where the accident occurred) turned abruptly to the left of its driver directly in the path of the automobile operated by defendant; and that in order to avoid a collision with such third automobile defendant swerved his automobile to his left and thus caused the accident which resulted in the death of the two persons named in the information which is the basis of this action. As hereinbefore noted, the jury was generally instructed to the effect that before the defendant could be convicted of the offense charged it would be necessary for the prosecution to prove not only that *the act of defendant* "was one which might produce death," but as well that it did "cause the death of deceased." However, it would seem clear that defendant was not bound to rest satisfied with such a generalization of the law as applied to his construction of what were the facts of the case, but that he was entitled to a particular statement of the law dealing with his theory of the defense and consonant with the evidence or some part thereof, by which the jury would be instructed that unless the act of defendant was the proximate cause of the death of the person or persons whom defendant was accused of killing, he was entitled to an acquittal of the charge. Without consideration of the lack in the proposed instruction of directions to the jury that it must find from the evidence the existence of various and sundry conditions which, according to the language of the statute, must be present before the driver of an intending-to-turn automobile may be required to give the or any signal, it may be noted that at least the last sentence in such proposed instruction presents ground for legal criticism and serious objection. Such language is that "if you find *that the omission to so signal* by Michael Sandstrom was the direct and proximate cause of the accident," etc., "then you should acquit said defendant." It is manifest that the words "the omission to so signal" constituted a clear indication that the omission occurred; whereas, the testimony of the respective witnesses relating to the fact as to whether Michael Sandstrom failed to give a signal was in conflict one with the other. If given, the effect of the proposed instruction to the jury would have constituted an invasion by the trial judge of the province of the jury and would have deprived it of its function to determine the fact as to whether Michael Sandstrom gave either any signal, or a proper signal, as prescribed by the statute. A statement of law that an instruction which involves such a situation is properly refused requires the citation of no authority in its support.

[4] Finally, it is urged by appellant that, over the objection of defendant, the trial court erred in admitting in evidence the testimony of Michael Sandstrom given by him at the preliminary examination of defendant before the committing magistrate.

After it has been "satisfactorily shown to the court that he * * * cannot with due diligence be found within the state," section 686 of the Penal Code furnishes the authority for permitting "the deposition of such witness" to be read in evidence on the trial of the action. The record herein shows that as a part of the foundation for the introduction in evidence of the deposition in question, the wife of Michael Sandstrom testified that two weeks before the trial occurred he left the city of Los Angeles, to be gone perhaps as long as three months, and that following his departure the wife had received at least one letter each day from him—the last of which contained the statement, "You will hear from me in Portland." The context indicates Portland, Oregon. In addition, the testimony of a process server showed that in his attempt to serve Michael Sandstrom with a subpœna to attend the trial, on two occasions shortly before the trial he had visited the home of Michael Sandstrom, but was unable to serve the subpœna; that on the latter of such occasions he was told by Mrs. Sandstrom that "her husband (Michael Sandstrom) was away, and had been gone about a week."

In the case of People v. Lederer, 17 Cal. App. 369, 374, 119 P. 949, 952, it is said: "* * * It has been held that under the provisions of this section [686 of the Penal Code] the trial judge has discretion in determining whether or not a sufficient foundation has been laid, entitling such testimony to be read in evidence, and that, where there is any evidence to support the conclusion affecting that matter, the ruling cannot be disturbed on appeal. People v. Nelson, 85 Cal. 421, 24 P. 1006; People v. Witty, 138 Cal. 576, 72 P. 177; People v. Lewandowski, 143 Cal. 574, 77 P. 467." To the same effect is the case of People v. Thomas (Cal. App.) 279 P. 826, where additional authorities are cited. It appearing that some substantial evidence was adduced to the effect that the witness could not "with due diligence be found within the state" (section 686, Pen. Code), from a consideration of the authorities it is clear that the judge of the trial court did not abuse his discretion in permitting the deposition of the witness given at the preliminary examination of defendant to be read in evidence.

No prejudicial error appearing in the record, it is ordered that the judgment and the order denying the motion for a new trial be and they are affirmed.

We concur: CONREY, P. J.; YORK, J.

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101 Cal. App. 103

PEOPLE v. MESA et al. (Cr. 1854.)

District Court of Appeal, Second District, Division 2, California. Oct. 4, 1929.

Robbery ⚷24(1)—Evidence held to sustain conviction for robbery.

Evidence in prosecution for robbery *held* sufficient to sustain conviction.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Alfonso Mesa and another were charged with robbery, and from his conviction Mesa appeals. Affirmed.

C. B. Conlin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and Warner I. Praul, Deputys Atty. Gen., for the People.

IRA F. THOMPSON, J. The defendant Alfonso Mesa was tried by the court sitting without a jury and found guilty of the crime of robbery. He prosecutes this appeal from the judgment pronounced against him and from the order denying his motion for a new trial. The sole ground relied upon for a reversal is the insufficiency of the evidence.

The evidence is amply sufficient to justify the finding that Mrs. Mabel Mosco was held up and robbed of about $50 and an opal ring at about midnight on March 17, 1929, near Sixty-Fifth street and Broadway, in Los Angeles. She positively identified appellant and the defendant Gallegos as her assailants, testifying quite fully to the rough and brutal character of the attack upon her. Another witness testified that he heard the screams for help of the complaining witness and ran to her assistance; that he found Mrs. Mosco lying on the ground; that one man with a black hat and gray overcoat was running away, and the appellant was standing close to the automobile from which Mrs. Mosco testified they had alighted; that he started to talk to appellant, but the latter "mumbled away," whereupon the witness hit him on the side of the head and knocked him senseless. Two police officers testified that shortly afterward they found appellant lying on the ground unconscious, and also saw the victim of the robbery, who was then in a hysterical condition. This testimony was adduced by the prosecution. Appellant argues that, because the defendant Gallegos was able to produce witnesses who convinced the judge that he was elsewhere at the time of the crime, the judge should not believe the testimony of Mrs. Mosco, at least in so far as it appertains to the identification of appellant. But it is obvious that, while this contention of appellant is one which might with all propriety have been addressed to the trial judge as bearing upon the weight of the testimony, yet it is not open for our consideration. The testimony supports the finding and judgment of the court.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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100 Cal. App. 750

RUSCONI v. CALIFORNIA FRUIT EXCHANGE. (Civ. 3814.)★

District Court of Appeal, Third District, California. Sept. 25, 1929.

Rehearing Denied Oct. 25, 1929.

1. Compromise and settlement ⇨23(3)—Evidence in action upon marketing contract held to show compromise of claim for loss and claim to earnings to which plaintiff was entitled.

In action upon fruit marketing contract to recover money alleged to have been wrongfully withheld by produce marketing corporation, evidence *held* to show compromise of claim arising from shipment of grapes sold at a substantial loss and claim to share in earnings of corporation arising from commissions retained.

2. Contracts ⇨53—There being good or valid consideration for agreement, law will not weigh quantum thereof.

When a good or valid consideration for an agreement exists, law will not weigh the quantum thereof.

3. Contracts ⇨53—Inadequacy of consideration, in absence of fraud, may not be considered to upset contract.

In absence of fraud, inadequacy of consideration may not be considered as means of upsetting contract.

4. Compromise and settlement ⇨6(1)—Payment of rebate to grower under marketing contract long before due held sufficient consideration for compromise agreement settling claim for loss from shipment of grapes (Civ. Code, § 1605).

Payment by produce marketing corporation to fruit grower of his proportion of rebate fund arising from earnings of corporation more than four years before grower was entitled thereto under contract *held* sufficient consideration, under Civ. Code, § 1605, for compromise agreement settling claim for loss from shipment of grapes, since corporation's waiver of right to hold rebate fund as it was entitled to under contract and consenting to pay it forthwith constituted sufficient consideration for compromise agreement.

5. Agriculture ⇨6—Plaintiff pleading corporate by-law as basis of recovery on marketing contract where its existence and language as pleaded was specifically denied had burden of proof.

Where plaintiff suing produce marketing corporation upon fruit marketing contract relied upon corporate by-law and set it out at length in complaint, and existence and language of by-law in form pleaded was specifically denied by corporation, form and provisions of by-law became valid issue in case, and burden was on plaintiff to establish right to recovery based upon by-law.

6. Agriculture ⇨6—Grower under marketing contract, having failed to deliver percentage of crop required to marketing corporation, held not entitled to participate in reserve fund accumulated from earnings (Civ. Code, §§ 1436, 1439).

Under marketing contract entitling grower to share in unconsumed portion of gross receipts of marketing corporation if grower had fulfilled contract, which under Civ. Code, § 1436, was a condition precedent to grower's right to participate in fund, where grower had delivered only 35 per cent. of crop, instead of 65 per cent. thereof required to be delivered, grower was not entitled to participate in reserve fund, in view of Civ. Code, § 1439, providing that before any party to obligation can require another to perform any act under it he must fulfill all conditions precedent thereto imposed upon himself.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by L. Rusconi against the California Fruit Exchange. Judgment for defendant, and plaintiff appeals. Affirmed.

★Rehearing denied.

Everts, Ewing, Wild & Everts, of Fresno, and Butler, Van Dyke & Desmond, of Sacramento, for appellant.

Dozier, Kimball & Dozier and Dozier & Kimball, all of San Francisco, for respondent.

ROLFE L. THOMPSON, J. This is an appeal from a judgment in an action upon a fruit marketing contract to recover money alleged to have been wrongfully withheld by the respondent.

The respondent is a produce marketing corporation. June 1, 1917, the parties to this action executed a written contract by the terms of which the respondent agreed to promptly sell and market, as appellant's agent, all his deciduous fruit which was to be delivered during a series of years, for a consideration expressed as follows: "For which [service] the Exchange shall deduct from the growers' account sales 7% of the gross receipts in full compensation for such services. * * * Growers are entitled to any dividend in accordance with the last paragraph of Article XIX of the by-laws, * * * having carried out the provisions contained in the paragraph of Article XIX. * * * This agreement covers 65% of the shipping grapes of party of the first part."

Article XIX of the by-laws, which is referred to in the foregoing contract, is set out at length in the complaint. The answer denies that said article, as alleged in the complaint, was in force at the time of the execution of the contract, and, upon the contrary, asserts that the article was subsequently amended and sets out the amended article as it was adopted.

During the seasons of 1917 to 1923, inclusive, the appellant delivered grapes to the respondent for marketing pursuant to said agreement. It was stipulated that the proportion of the proceeds from the sales of appellant's grapes which were delivered in 1917, which funds were reserved, and to which appellant would be entitled under his contract as a refund when the obligation matured and became due in 1922, was the sum of $1,342.27; that in the event appellant had fulfilled his agreement to deliver to the respondent 65 per cent. of his shipping grapes for the year 1923, he would have been entitled to a refund of $3,045.79 when that fund matured at a later date; that not more than 35 per cent. of appellant's grape crop for the year 1923 was delivered to respondent.

The complaint contains two counts, the first of which demanded the refunding of said sum of $1,342.27, which the respondent claims was fully paid. The second cause of action demanded the refunding of said sum of $3,045.79, which the respondent denied was due the appellant for the reason that this refund obligation was conditioned upon the grower delivering to the respondent at least 65 per cent. of his crop of 1923, which he failed to do. The court adopted findings in favor of the respondent, granting a nonsuit as to the second cause of action, and rendering judgment against the appellant on both counts. From this judgment an appeal was perfected.

The appellant contends that the findings and judgment are not supported by the evidence as to the first cause of action, and that the repayment of the claim demanded in the second count was not dependent upon an alleged condition precedent to the effect that the appellant was required to deliver 65 per cent. of his annual crop to the respondent.

[1] Addressing ourselves to the first count, we find the record discloses a conflict of evidence regarding the circumstances under which the payment of $1,320.82 was made. The appellant admitted that sum was paid to him on February 28, 1918, but asserts that it was paid to him only in settlement of a claim for a special eastern shipment of Tokay grapes which were delivered in 1917, concerning which there was a dispute. The respondent admitted that a dispute occurred over this particular shipment of grapes, but claims that the payment of $1,320.82, which was made February 28, 1918, was the result of a compromise of that claim and was made solely in consideration of appellant's having waived his claim to a rebate of $1,342.27, to which he would have been entitled when it matured in 1922. The appellant admits receiving the sum of $1,320.82, but denies that he accepted it subject to the conditions related by the respondent, and upon the contrary asserts that since he would have been entitled unconditionally to this rebate at its maturity, the alleged compromise of that claim was without consideration. Mr. Nagle, the general manager of the respondent corporation, testified with respect to this settlement:

"The board of directors * * * ordered distribution of a portion of those earnings to all shippers who had shipped consistently with the Exchange during that year [of 1917]. * * * The earnings of that year were 4% upon the gross sales, of which 1% was ordered distributed to those entitled to it in January of the year following. In the winter of that year another 1% was ordered distributed, and the remaining 2%, under our by-laws was placed in a withholding fund, and was held for five years.

"Q. I take it therefore that the last payment for business transacted during the year 1917 would have been payable in 1922. A. In 1922. * * *

"Q. This contract, * * * with which we are today concerned calls for payment by Mr. Rusconi to your company, of 7% of the total volume, or gross business, is that correct? A. That is correct. * * *

"Q. Out of that 7% which is paid, 4% is returned to the grower, isn't that true? A. Yes, but the earnings of 4% would be distributed as I have described, according to the by-laws over a period of five years. * * *

The company would * * * retain approximately 3% * * * as its operating cost. * * *

"Q. Will you state what the settlement was, the $1,320.82 that was paid? A. That represented * * * the last of the fifth year's 1917 holding refunds of that year."

Regarding a special shipment of grapes, which is the subject involved in the first cause of action and which shipment was furnished by appellant in 1917 and was rejected by the consignee requiring the necessity of selling it at auction at a substantial loss, Mr. Nagle further testified:

"We did not consider we were at fault at all, neither did he consider he was at fault, but there was a misunderstanding regarding whether they were juice grapes or table grapes. * * * The only time I came into the play was to settle Mr. Rusconi's account, and that he agreed to do when I gave him my check. * * * Mr. Rusconi said his loss was in the neighborhood of $1500; I figured that the refund was about $1320. * * * We adjusted the loss by giving him this fifth year refund. * * * He agreed to it—He didn't have to wait five years. * * * That was the consideration.

"Q. That he would take the money that would be coming to him in five years later, and waive the loss? A. Yes, sir."

The appellant denied that this was the understanding upon which he accepted the respondent's check for $1,320.82. The court, however, found the facts in accordance with the foregoing evidence. This conflict must be resolved in favor of the judgment in that regard.

[2-4] Appellant contends that since he was entitled to the rebate fund, the compromise was without consideration. This contention, however, may not be sustained under the circumstances of this case. It is conceded the appellant would have been entitled to the payment of his proportion of the rebate fund in the amount which he received. But he was not entitled to that refund for about four years. Respondent's waiving its right to hold and enjoy the use of this sum of money for that period of time, and consenting to pay it forthwith, constituted a sufficient consideration for the compromise agreement which resulted in the settlement of their dispute. In 6 R. C. L. 654, § 67, it is said: "A long series of decisions has established the rule that a benefit to the promisor, or a detriment to the promisee is a sufficient consideration for a contract." Section 1605, Civ. Code; 6 Cal. Jur. 168, § 117; Stein v. Leeman, 161 Cal. 502, 511, 119 P. 663. When a good or valid consideration for an agreement exists, the law will not weigh the quantum thereof. Whelan v. Swain, 132 Cal. 389, 64 P. 560; Fairchild v. Cartwright, 39 Cal. App. 118, 121, 178 P. 333. In the absence of fraud, the inadequacy of consideration may not be considered as a means of upsetting a contract. 6 Cal. Jur. 189, § 128; Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522. The immediate settlement of an obligation, the payment of which may be legally delayed for a considerable period of time, is a benefit to the claimant which constitutes a sufficient consideration for the compromise of another claim, under such circumstances as are presented in the present action.

[5, 6] The second cause of action, to which a nonsuit was granted, is based upon a claim that appellant was entitled under the by-laws of the corporation to a share of the unconsumed portion of the gross receipts from the sales of grapes of the crop of 1923. The contract provides that the respondent was entitled to "deduct from the grower's account [of] sales 7% of the gross receipts in full compensation for such services." Section 8 of this contract further provides: "In consideration of the party of the first part holding stock in the Exchange, it is hereby agreed that it shall be paid any dividend based on the gross amount realized on all fruits received for marketing through the party of the first part [appellant] in the same manner as growers are entitled to any dividend in accordance with the last paragraph of article XIX of the by-laws, less any amounts that may be due to individual growers who are members of the party of the first part and who are also entitled to receive direct this dividend, having carried out the provisions contained in the paragraph of article XIX of the by-laws referring to growers' shipments." To ascertain the amount of dividends of rebates to which the grower may be entitled, and the conditions upon which the obligation depended, it was necessary to resort to article XIX of the by-laws of the corporation. Appellant relied upon this by-law and set it out at length in his complaint. The existence and language of this by-law, in the form in which it was pleaded, was specifically denied by the respondent. The form and provisions of this by-law, therefore, became a valid issue in the case. The burden was on the appellant to establish his right to recover judgment which depended upon the authorization of this by-law. Except for the testimony of Mr. Nagle, above quoted, neither party offered proof of this by-law or its provisions. Section 8 of the contract above quoted provides that growers shall be "entitled to receive direct this dividend, *having carried out the provisions contained in the paragraph of article XIX of the by-laws.*" Except for the testimony of Mr. Nagle, the court was not informed as to the provisions of this important by-law. The record is otherwise silent upon this subject. There is therefore a total absence of evidence upon this subject, unless we accept the statement of Mr. Nagle, who testified as follows: "The management was then instructed to distribute those earnings [of 1923] beginning January, 1924, according to the by-laws which provided that they were to be distributed *to those who had fulfilled their contracts* and shipped consistently with the Exchange." It thus appears that only those growers who had fulfilled their contracts with the marketing corporation were entitled to participate in the unconsumed portion of the so-called withholding fund. This provision entitling growers "who had fulfilled their contracts," to participate in the reserve fund, was clearly a condition precedent, which was created by the terms of the contract. "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." Section 1436, Civ. Code. The right to share in this reserve fund was conditioned upon the fulfillment of the contract to deliver to the respondent 65 per cent. of appellant's crop for 1923. Section 1439 of the Civil Code provides that, "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself." The last paragraph of the contract upon which the appellant relies provided: "This agreement covers 65% of the shipping grapes of party of the first part." It was stipulated that only 35 per cent. of appellant's crop of grapes for 1923 was delivered. This was fatal to his right of recovery, and a nonsuit was therefore properly granted.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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101 Cal. App. 53

McELHANY v. W. E. MOYER & CO.
(Civ. 5441.)

District Court of Appeal, Second District, Division 2, California. Sept. 30, 1929.

1. Fraud 🔑58(1)—Evidence held to sustain finding of fraud in securing exchange of stock for other worthless stock.

Evidence in action to recover value of certain shares of stock *held* sufficient to sustain finding of fraud in securing transfer of stock in exchange for other worthless stock.

2. Fraud 🔑31—Action for rescission was not necessary to recover value of stock exchanged pursuant to agreement induced by false statements.

Where owner of stock was induced to sign agreements for exchange thereof for other worthless stock by deliberate and false statements, it was not necessary to bring action of rescission in order to recover value of stock fraudulently secured thereby, in that there was no meeting of the minds necessary to constitute a contract.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Elma McElhany against W. E. Moyer & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank P. Doherty and Franklin W. Peck, both of Los Angeles, for appellant.

Brown & Bissell and Ben S. Beery, all of Los Angeles, for respondent.

BURNELL, Justice pro tem. Respondent brought this action to recover the value of certain shares of stock which she claimed had been secured from her by fraud on the part of the appellant corporation. Appellant's chief contention is that the evidence does not support the finding of fraud. We have examined the transcript with care, and, while the evidence is conflicting, there is abundant evidence to support the court's findings in this regard.

[1] It appears from the testimony of the respondent and of various other witnesses that prior to January, 1924, respondent owned two units of stock in a corporation known as Commercial Loan Company, each unit consisting of two shares of preferred and one of common stock. Her first transaction with appellant was in that month and consisted of the signing of a subscription agreement for four shares of stock of a corporation known as United Camps, at $100 per share, payable in installments of $25 a month. The certificates representing these shares were never delivered to her. On its face the subscription agreement appears to establish a contractual relation between respondent and United Camps. There is evidence, however, to the effect that Moyer & Co. was actually selling to respondent stock which was owned by itself, that her "subscription" was never turned in to United Camps, which corporation incidentally had power under its permit from the corporation commissioner to sell for cash only and not on installment payments, and that she was charged on appellant's books with the agreed purchase price of the stock and credited with her payments thereon.

In March, 1924, respondent called at appellant's office in response to a letter from Mr. Moyer, its president and general manager, suggesting switching her subscription for United Camps to one for four shares of Moyer & Co. stock at $100 per share. To this she agreed. At this time she sold to appellant her Commercial Loan Company stock for $470, receiving $300 in cash and a credit of $170 on her account for the purchase of the Moyer & Co. stock, pursuant to the arrangement for taking that stock instead of United Camps. She kept up her payments until they were completed, and then received certificates evidencing her ownership of the Moyer & Co. stock. This was the only stock received by her from appellant.

In June, 1924, respondent went to work for appellant as a stenographer, and at this time agreed to purchase five additional shares of its corporate stock at $100 per share, payable at $5 a week, which was to be deducted from her weekly salary. When she left her position, she had a credit of $70 on this last subscription. The situation thus stood at the time of the transaction next to be referred to: Respondent had sold her Commercial Loan Company stock to appellant for $470; she had purchased four shares of Moyer & Co. stock and had paid therefor $400, and had a credit of $70 on the uncompleted purchase of five more shares of Moyer & Co. stock.

In September, 1924, according to respondent's testimony, Mr. Moyer called her into his office to take dictation, and, when that was completed, he said that he understood that she was dissatisfied with her Moyer & Co. stock and was trying to dispose of it. She told him this was true. Mr. Moyer then expressed his regret, and said that he did not blame her for feeling as she did because there were several lawsuits involving the corporation. She also testified that Moyer told her "there were many things to make me feel uneasy about the stock that I held and that he wanted to treat me as he would his mother, and that he did not want me to lose a dollar, he was going to make it so that I would never lose a dollar on Moyer & Company, or lose a night's sleep or have any worry in any way." He then said to her, according to her testimony: "Now, I am going to give you back the stock that I got of you, and I will take back what you got of me and place you exactly the same as you were before you knew there was a Moyer & Company or before you had any business with us, and then no matter what happens to Moyer & Company, you will be the same as you were, and will not blame me in any way." To this and similar statements on the part of Mr. Moyer, respondent testified that her reply was: "I would be very glad to get the stock back that I had sold him." At this point we pause to call attention to the fact that prior to coming in contact with Moyer & Co. respondent had the Commercial Loan Company stock, and that that was the only stock which she had sold to appellant corporation. Mr. Moyer then produced two little slips and said to respondent: "I am going to get you to sign these little slips which go to show just what we have done, that we have made the exchange of stock." The only exchange they could possibly have been referring to was the exchange of the Commercial Loan Company stock which appellant had acquired from respondent, for the Moyer & Co. stock which respondent had acquired from appellant. The amount which respondent had received for the Commercial Loan Company stock, $470, exactly equaled the amount which she had paid for the Moyer & Co. stock actually received by her, plus the $70 paid on the additional subscription. Respondent further testified that Mr. Moyer covered with his hands all but the places for respondent's signature on the slips referred to and asked her to sign without reading them, stating that he was in a hurry. He pretended, however, to tell her the purport of the documents which she had signed; "he said it was just making a statement that we were exchanging the stock." Respondent further testified that she signed these slips believing every word Mr. Moyer had said. Respondent then, according to her testimony, "thanked him profusely for returning the Commercial Loan Company stock" to her, and proceeded about her business in connection with the office. Later on, Mrs. Moyer, who was also connected with the corporation as one of its officers, handed her the slips which she had signed. She then discovered that they were actually buy and sell orders; one of them being an order for the sale of the Moyer & Co. stock and the other for the purchase of United Camps, the two documents being so worded that the proceeds of the sale of the Moyer & Co. stock were to be applied on the purchase of the United Camps stock. Nothing was said in either document as to the Commercial Loan Company stock.

We think that this evidence is amply sufficient to justify the trial court in finding that appellant had practiced fraud upon respondent. The nature of the transaction was not only concealed from her, but she was actually misinformed with respect thereto by her employer, in whom she had every right to repose her trust and confidence. Instead of being put in the same position in which she was prior to falling into the hands of Moyer & Co., namely, having her Commercial Loan Company stock returned to her in exchange for her Moyer & Co. stock, she was placed in the position of exchanging her Moyer & Co. stock for stock which the evidence shows almost without question to have been utterly worthless, stock which Mr. Moyer himself recognized as being of no value, as is evidenced by his communication to the corporation commissioner, which is set out in the transcript and in which he charged mismanagement and incompetence on the part of the officers of United Camps and that the "income and future prospects of the company are greatly impaired if not wholly destroyed by the incumbent officers," and suggested that the corporation commissioner should act to protect others from purchasing stock in this company.

There is, of course, evidence going to contradict that of respondent. In other words, this is a clear case of conflicting evidence, and in such a case it has been so repeatedly held that the finding will not be disturbed by the appellate tribunal as to render the citation of authorities unnecessary.

[2] The remaining point urged by appellant, namely, that the action is not in the proper form and that respondent should have brought a suit for rescission of the contract and not for money had and received is entirely without merit. An action for rescission

must of necessity rest upon the existence of a contract to be rescinded. Where there is no meeting of the minds, there can be no contract, and hence there is nothing which can be rescinded. Hardison v. Davis, 131 Cal. 635, 63 P. 1005. Respondent, relying upon the statements and promises of Mr. Moyer, believed that the transaction was one in which she was to receive back the stock she had sold to Moyer & Co., namely, that of the Commercial Loan Company, in return for the stock which she had purchased from the Moyer Company. She was induced to sign the agreements which she believed evidenced that transaction, without reading them, and she was so induced by deliberate and false statements on the part of Mr. Moyer. In such a case there is no necessity for attempting to rescind that which never in fact existed. Meyer v. Haas, 126 Cal. 560, 58 P. 1042; Calmon v. Sarraille, 142 Cal. 638, 76 P. 486; Hoowe v. Kreling, 93 Cal. 136, 28 P. 1042; Togni v. Taminelli, 11 Cal. App. 7, 103 P. 899; King v. Globe Grain Co., 58 Cal. App. 105 at page 110, 208 P. 166.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

100 Cal. App. 756

MILLER v. SALOMON et al. (Civ. 6739.)★

District Court of Appeal, First District, Division 1, California. Sept. 26, 1929.

Rehearing Denied Oct. 26, 1929. Hearing Denied by Supreme Court Nov. 25, 1929.

1. Assignments 🔑5—Transferee's possession and claim of title to personal property will prima facie support transfer thereof, as against one claiming through transferee's act or omission.

In claim and delivery action by transferee of personal property, possession and claim of title to personal property will prima facie support transfer thereof, as against one claiming by virtue of some act or omission of the transferee.

2. Statutes 🔑241(1)—Penal statute should be strictly construed.

Strict construction should be given penal statute in determining application thereof.

3. Chattel mortgages 🔑229(3)—In claim and delivery action by remote assignee of mortgagor against mortgagee of chattels, court must presume that original transfer of mortgaged property by mortgagor was made on notice to mortgagee (Pen. Code, § 538, as amended by St. 1925, p. 295).

In claim and delivery action to recover personal property withheld by defendant asserting claim thereto under chattel mortgage, as against claim by plaintiff as remote assignee of mortgagor, court must presume, in absence of evidence, that mortgagor in making the original transfer of the mortgaged property complied with Pen. Code, § 538, as amended by St. 1925, p. 295, requiring mortgagor to notify mortgagee of intended sale of mortgaged property and making sale without such notice larceny.

4. Chattel mortgages 🔑230—One to whom mortgaged personal property is transferred with mortgagee's assent may deal with property free from restrictions of larceny statute (Pen. Code, § 538, as amended by St. 1925, p. 295).

Where mortgaged personal property is transferred to one not a party to the mortgage with notice of the mortgage and with knowledge and assent of mortgagee, transferee of mortgaged property may deal therewith without being subject to provisions of Pen. Code, § 538, as amended by St. 1925, p. 295, making sale of mortgaged property by mortgagor, without informing mortgagee of sale in writing, larceny.

5. Chattel mortgages 🔑230—Courts will not generally add burdens to transfer of mortgaged personal property.

Courts will not attempt to add burdens to transfer of personal property covered by a chattel mortgage, in absence of fraud or other sufficient reason.

6. Chattel mortgages 🔑230—Assignment by mortgagor's transferee, without notice to mortgagee, of conditional sales contract covering mortgaged property, held not illegal (Pen. Code, § 538, as amended by St. 1925, p. 295).

Assignment by mortgagor's transferee, without notice to mortgagee, of conditional sales contract covering mortgaged furniture, *held* not illegal, since Pen. Code, § 538, as amended by St. 1925, p. 295, requiring notice to mortgagee in case of transfer of mortgaged chattels, applies only where transfer is by original mortgagor.

7. Sales 🔑475—Assignee of conditional sales contract covering mortgaged chattels need not give notice of ownership by recordation or otherwise.

Assignee of conditional sales contract covering mortgaged chattels was under no duty to mortgagee or others to give notice of her ownership either by recordation or personal notice, or by taking possession of chattels, where vendees were not in default.

8. Chattel mortgages 🔑235—Lien on furnishings of chattel mortgage given by lessee to secure rent held released by lessor by taking possession and leasing premises anew to third party not in privity with lessee or assignees, where rent had been paid under original lease.

Where original lease of premises was accompanied by chattel mortgage covering furniture and furnishings in leased premises and securing rent, and furniture together with leasehold was assigned and furniture was sold under conditional sales contract, lessor by taking possession of premises and executing new lease to another tenant, who was not in privity with former lessee or any of her assignees, released furnishings from lien of chattel mortgage, where all the obligations under the original lease had

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★Rehearing denied. Hearing denied by Supreme Court.

been discharged by the lessee and assignees thereof.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Violet M. Miller against Maurice Salomon and another. Judgment for defendants, and plaintiff appeals. Reversed.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for appellant.

A. S. Newburgh, of San Francisco, for respondents.

PARKER, Justice pro tem. This is an action in claim and delivery, whereby plaintiff seeks to recover possession of certain personal property alleged to be wrongfully withheld from her by defendants. Plaintiff further claims damages for and on account of said withholding. Judgment was for defendants in the court below, and plaintiff has appealed.

The defendant Sarah Salomon appears to be purely a nominal party, though she has appeared jointly with her codefendant and the same answer filed on behalf of both defendants. In so far as the activities of the defendants are involved, the sole actor throughout was the defendant Maurice Salomon, and hereafter in referring to him he will be designated as defendant, without heed to the fact that there is a joinder.

Defendant was the owner of a certain apartment house in the city of San Francisco. On May 17, 1922, as such owner, he entered into a written lease agreement with one Alma Flynn, whereby he demised to her for the period of 60 months from May 20, 1922, the premises by him so owned. As is usual, the lease contained many provisions, a very important one regarding the payments of rent. After setting forth the amount of rental, the lease further provided that the lessee should give to the lessor a chattel mortgage upon all of the furniture carpets, curtains, bedding, and all other personal property and chattels belonging to said lessee and placed by her in the premises. Such chattel mortgage was to be given the lessor as security for the faithful performance of all of the covenants of the lease and for the payment of the rent as provided in the lease.

On the 11th day of July, 1922, Alma Flynn, lessee aforesaid, did execute and deliver to defendant a chattel mortgage in due and legal form covering certain furniture and furnishings, being the personal property involved in the present suit. It may be here noted that no question is raised concerning the title and ownership of the said property by the said Alma Flynn. The chattel mortgage, by its terms, was given as security for the full, prompt, and faithful performance of all the terms, provisions, covenants, and conditions of the lease, and especially as security for the prompt and full payment of the rent reserved. The said rent was $1,050 per month, payable monthly in advance. The chattel mortgage contained the following provision: "It is further agreed that the property herein mortgaged shall not be removed from the premises on which they are now located without the written consent of the mortgagee, and upon any attempted removal without such consent, the said mortgagee may immediately take possession of all said property and foreclose this mortgage."

On July 11, 1922, the same date as that of the chattel mortgage, the lessee, Alma Flynn, did transfer, set over, and assign to one Madeline Leonard all of the former's right, title, claim, and interest in and to the lease. This assignment was accepted by Madeline Leonard, who assumed all responsibilities and obligations of Alma Flynn under the lease. The assignment received the consent of the defendant lessor.

[1] The record is silent on the question of any transfer or sale of the furniture to Madeline Leonard, but it was the theory of the case in the court below and taken for granted by all parties that Alma Flynn did sell and transfer the furniture to Leonard at the time of the assignment of the lease. It is the fact that Madeline Leonard took possession of the premises and of the furniture and assumed the obligations of the lease, which included the chattel mortgage to secure the rent payments. No point was made in the court below on the lack of any showing that there was any written transfer or bill of sale between Alma Flynn and Madeline Leonard. In any event, possession and claim of title to personal property would prima facie support a transfer thereof as against one claiming by virtue of some act or omission of the transferee.

On November 23, 1922, Madeline Leonard transferred and assigned to certain parties named Bennett (husband and wife) all of her right, claim, title and interest in and to the lease. This assignment was accepted by the Bennetts and consented to by the defendant, lessor.

On April 22, 1923, Madeline Leonard, under a contract of conditional sale, sold and transferred to the Bennetts all of the furniture and furnishings of the house, receiving therefor, under the terms of the agreement, a cash sum in partial payment and the balance to be paid in monthly payments at the rate of $150 per month.

On the 17th day of May, 1923, Madeline Leonard transferred and assigned to plaintiff herein, Violet M. Miller, the contract or agreement of sale held by the said Leonard, and the said plaintiff accepted the assignment subject to the outstanding agreement with the Bennetts. At the same time, and as a part of the same transaction, Madeline Leonard on the same date executed and delivered to plaintiff a bill of sale covering the furniture. The Bennetts remained in possession of the furniture, kept in and at the leased apartments, continuing the monthly payments to the plaintiff as assignee.

On July 15, 1923, the Bennetts assigned the lease to one Hewitt, and the latter accepted the assignment, agreeing to faithfully and promptly keep and fulfill all obligations, conditions, and covenants in the lease contained. Hewitt took possession of the premises and of the furniture therein and with the consent and acquiescence of the plaintiff continued along under the conditional contract of sale up to and including the payment due October 22, 1925. The payment due November 22, 1925, was not made. Here the record falters. It appears from the evidence that on November 22d, or thereabouts, the assignee, Hewitt, paid in full all rent then due.

The defendant owner on November 19, 1925, made, executed, and delivered to one Frank Drew a new lease on the premises covered by the original Flynn lease; the term of said lease being for 60 months, commencing November 19, 1925. In this new lease no mention is made of the old lease, which still had some 2 years to run. In no way or manner were the leases connected or tied in, by reference or otherwise. This Drew lease contained the old provision as to a chattel mortgage on the furniture running to the lessor to secure full performance of the lease obligations on the part of the lessee. Drew went into possession of the leased apartments, and the chattel mortgage that he gave covered the furniture here in dispute and also additional items that had from time to time, throughout the period of the various tenancies of the Flynn lease, been added thereto. In December Drew defaulted in his rent payment and did abscond and abandon the premises. Hence the issue here. Plaintiff claims the furniture as the owner thereof after default in payments under the conditional sale, and defendant claims the furniture under both the old lease and mortgage and the new lease and mortgage.

From the facts as narrated it is clear that plaintiff has succeeded to all of the rights and she accepts all the liabilities of the original lessee, Flynn. It is likewise necessarily conceded that as between the parties here the right of plaintiff to recover follows, unless defendant has acquired some better title or right to the possession of the furniture under the lease agreements and his chattel mortgage. Concededly, defendant has no right to the possession of the property in question except as that right accrues by reason of the instruments hereinbefore mentioned.

At the outset defendant contends strenuously that the conveyance from Madeline Leonard to plaintiff was unlawful and void as being in contravention of section 538 of the Penal Code, as amended by St. 1925, p. 295. This section, as far as applicable here, provides: "Every person, who after mortgaging any of the property, permitted to be mortgaged * * * sells, transfers * * * the said mortgaged property, or any part thereof, * * * is guilty of larceny, and is punishable accordingly; unless in case of a sale, transfer * * * such mortgagor informs the person to whom such sale * * * is made of the existence of the prior mortgage, and also informs the prior mortgagee of the intended sale * * * in writing."

[2-4] There is not a word of evidence concerning any notice, given or not given, by Alma Flynn, the original mortgagor, to defendant, the original mortgagee. The statute, being a penal statute, when under consideration, as here, will receive a strict construction. The duty of giving notice, by the terms of the statute, is restricted to the original mortgagor and is a personal obligation. Under the presumptions that all persons are presumed innocent of crime and that the law had been obeyed, we must presume, in the absence of all evidence on the subject, that the original transfer from Alma Flynn was in full compliance with the statute. We then find Madeline Leonard the owner of the mortgaged property, but not the original mortgagor. Upon her the law has placed no duty in the respect noted. She was lawfully entitled to the possession of the property, controlled by the terms of the mortgage and with like limitations the absolute owner thereof. The test of her liability under the penal statute would be her criminal liability thereunder. In this connection we are satisfied that no crime could be charged against her under the express terms of the statute. It is our opinion that where mortgaged personal property is transferred to one not a party to the mortgage, with full notice of the mortgage and with the knowledge and assent of the mortgagee, the said transferee may in all respects deal with the property without regard to section 538 of the Penal Code, and the rights of the parties are governed by the provisions of the general law regarding notice, recordation, etc.

[5] Personal property, covered by chattel mortgage, is the subject of daily transfer and has become so much a part of the usual routine of sales commerce that the courts will not attempt to add burdens not already placed thereon by the Legislature, in the absence of fraud or other sufficient reason.

[6] The Legislature, no doubt, reasoned that between the immediate mortgagor and his mortgagee there was a privity of contract and perhaps a personal contact; it recognized the transient character of personal property and the ease with which it might be concealed or transported beyond reach of the creditor. It gave, therefore, to the creditor or mortgagee a preliminary protection by forbidding, under pain of severe punishment, certain acts on the part of the mortgagor. The section of the Penal Code could have gone farther and provided that any person owning property subject to a chattel mortgage, or knowing of the existence of the mort-

gage who did the acts forbidden to the mortgagor, should be guilty of larceny and punished. However, this was not done. Or, in the body of the section (538, Pen. Code) the words "or person claiming the ownership of any property subject to chattel mortgage and in possession thereof" could have been added and subjected a transferee of mortgaged property to liability under the terms of the statute. This penal statute has not attempted to limit or define the contractual rights of parties to a chattel mortgage. It has, in the interests of public welfare, attempted to prevent certain species of fraudulent conduct. The letter of the law manifests the intent designed. After a mortgagee has once waived the protection accorded him by the terms of this section and permitted his boat to drift away from this haven of safety, he then must look to such other safeguards as the law affords.

Holding, as we do, that the contract between Madeline Leonard and the plaintiff was not an unlawful contract as being in violation of section 538 of the Penal Code, it becomes unnecessary to discuss the further point as to whether or not a contract made in violation of a penal statute is ipso facto void. It could be seriously questioned as to whether the transaction between Madeline Leonard and the plaintiff was such a sale or transfer as the penal laws forbid. At the time of the transaction, and long prior thereto, there was extant a conditional agreement of sale between Leonard and the Bennetts, who were not in default. The transfer to plaintiff was with full knowledge, on both sides, of this agreement. The bill of sale was merely one of a series of documents evidencing the transaction, which, in legal effect, was no more than an assignment of the rights of the vendor under the said conditional sale. The property remained on and in the premises and no effort was ever made by plaintiff to remove any portion therefrom.

[7] Respondent contends that plaintiff was guilty of some kind of a fraud by her conduct in not giving notice of her ownership to the world, either by recordation or personal notice to those who might be concerned. The circumstances called for no action on the part of plaintiff. She was not entitled to make any claim to the possession of the furniture on account of the conditional sale wherein the vendees were not in default. As long as the terms of the conditional sale agreement were being fulfilled, there was no obligation on the plaintiff to give notice, or to otherwise assert her interest. As indicated hereinbefore, we conclude that plaintiff lawfully acquired the right of ownership, subject only to the terms of the conditional sale agreement, and she likewise acquired the right of full enjoyment and possession of the property involved subject only to the terms of the chattel mortgage executed by Alma Flynn to the defendant.

[8] As noted, the chattel mortgage was not given to secure the payment of a pre-existing debt or obligation; it was given to secure performance of certain obligations assumed under and by virtue of a lease. It cannot be gainsaid that if all of the terms of the lease had been fulfilled at the expiration of the term, the chattel mortgage would have become functus officio and the chattels released from the lien thereof. Likewise, there can be no question but that the lessor could, at any time during the term, with the consent of the lessee, cancel the lease and assume possession of the demised premises, in which event the chattel mortgage would have fallen.

The record is barren of anything that will support even an inference that there was any privity between the last lessee, Drew, and the former lessee, Flynn, or any of her assignees or any other person holding under the Flynn lease. Nowhere in the record before us can it be even inferred as to the source of Drew's title to the furniture. Hewitt, the last assignee of the Flynn lease, paid the rent and discharged in full every obligation assumed by the lessee in the Flynn lease. At that very moment, if the lessor, Salomon, had accepted possession of the premises and agreed to a cancellation of the lease, he would have had not the slightest claim under the chattel mortgage. As a matter of fact, supported by abundant authority, that is exactly what he did when he accepted possession from the lessee and executed a new lease to another tenant.

There is no showing that the new lessee, Drew, was an assignee of the old lease. nor is there any evidence that Drew was an assignee of the rights of the vendee under the conditional sales contract. In fact, there is not a scintilla of evidence from which the identity of Drew might be disclosed or even inferred. The last holder under the Flynn lease, which supported the chattel mortgage under which defendant claims, had made complete and timely compliance with the terms of the lease, and had, with the consent and acquiescence of the lessor, surrendered up the premises. Before this was done, and involved in the same transaction, the lessor had negotiated a new lease with one Drew and immediately upon Hewitt, the last assignee of the Flynn lease, going out, the new lessee, under a complete new lease, was in possession. The Flynn lease was then terminated, and if, as found and here conceded, all obligations thereunder had been fulfilled, the mortgage lien upon the chattels was removed and the chattels freed therefrom.

The foregoing principles of law need little citation of authority. Sufficient support therefor will be found in 35 C. J. 1088, and the cases there cited. See, also, Triest v. Goldstone, 173 Cal. 240, 159 P. 715.

As to the point that the lien of a chattel mortgage falls with the discharge of the obligation, see 17 Cal. Jur. 711; 18 Cal. Jur. 157; Todd v. Todd, 164 Cal. 258, 128 P. 413.

Respondent contends that the taking of the new lease was nothing more nor less than the continuance of the old lease. Had the parties to the new lease been the same, or had there been shown a privity of relationship between the parties to the old lease and those named in the new lease, there might be some merit in this contention; but under the record here the contention needs only to be noted and disregarded.

From what has preceded, it must follow that any claim of defendant must rest upon his contract with Drew. Nothing in the record supports any claim on the part of Drew. It is not shown that he was an assignee either of the old lease or of the conditional contract of sale of the furniture. Defendant might as well have a bill of sale of the furniture from the ever-willing John Doe.

Judgment reversed.

We concur: TYLER, P. J.; CASHIN, J.

FRIESEN et ux. v. CITY OF GLENDALE et al. (Civ. 6224.) ★

District Court of Appeal, Second District, Division 1, California. Sept. 30, 1929.

Rehearing Denied Oct. 30, 1929. Hearing Granted by Supreme Court Nov. 25, 1929.

1. Covenants 🔑1—Deeds conditioned on using premises for residence purposes only, and providing conditions should run with land, and that other lot owners might enjoin breach thereof, imposed valid restriction.

Conveyance of lots made on condition "that said premises shall be used for residence purposes only," and that "as to the owners * * * of any other lot in said tract above mentioned conditions shall operate as covenants running with the land, for the benefit of all of said lots and owners of such lots in said tract, * * * and the breach of any of the covenants or the continuance of any such breach may be enjoined," *held* to create valid restriction, where tract was described and lands beneficially interested were clearly indicated.

2. Covenants 🔑103(1)—Construction of street on land conveyed, pursuant to grantee's dedication, held violative of covenant restricting premises to residential purposes.

Where land was conveyed under valid restriction against use thereof for other than residence purposes, construction of public street on the land so conveyed, pursuant to an attempted dedication for that purpose by the grantee, and without the consent of the beneficiary of the restriction, was in violation of restriction.

3. Dedication 🔑12—Right of owner to dedicate restricted lot for street depends on whether other lot owners would be necessary parties in condemnation proceedings.

Right of lot owner alone to dedicate for street purposes lot deeded under restrictive covenant, as against other lot owners in tract, made beneficiaries of the restriction, may be tested by determining whether other lot owners would be necessary parties in action to condemn the lot for use as street.

4. Eminent domain 🔑152(1)—One for whose benefit restriction is imposed is entitled to compensation on application of restricted property to public use inconsistent with restriction (Code Civ. Proc. §§ 1240, 1244; Const. art. 1, § 14).

When property subject to restrictive condition is taken for or applied to public use inconsistent with the restriction, owner of property for whose benefit the restriction is imposed is entitled to compensation, under Code Civ. Proc. § 1240, providing for taking real property, and Code Civ. Proc. § 1244, requiring complaint in eminent domain proceeding to contain names of all owners and claimants of property, and under Const. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation.

5. Covenants 🔑49—Restrictive covenants, expressly running with land and limiting premises to residential use, have qualities of easement (Civ. Code, § 801).

Covenants in deed, restricting use of property to residence purposes only and expressly made to run with the land, have essential qualities of easement, though not included within list of land burdens or servitudes on land which are denominated as easements by Civ. Code, § 801.

6. Injunction 🔑62(1)—Beneficiaries of covenant restricting lot to residential purposes could enjoin wrongful appropriation of property for street, where property had not passed into public use.

Plaintiffs, as beneficiaries of restrictive covenant expressly made to run with land, which limited use of lot for residence purposes, *held* entitled to injunction to prevent wrongful appropriation of property for use as street, pursuant to attempted dedication by grantee of lot, without consent of beneficiaries of restriction, where road had not yet been constructed, and land had not yet actually passed into public use as street.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by H. J. Friesen and wife against the City of Glendale and others, including W. H. Andrews and Maude E. Andrews. Judgment for plaintiffs, and defendants, except defendants Andrews, appeal. Affirmed.

Arthur M. Ellis, of Los Angeles, for appellant Heuser.

W. Turney Fox, City Atty., Ray L. Morrow, and Frank M. Moody, all of Glendale, for appellant city of Glendale.

R. C. McAllaster, City Atty., and Harold P. Huls, Deputy City Atty., both of Pasadena, on the brief, and Everett W. Mattoon, Co. Counsel, and Claude H. McFadden, Deputy Co. Counsel, both of Los Angeles, amici curiæ, for appellants.

★Hearing granted. 288 P. 1080.

Harold L. Watt, of Los Angeles, for respondents.

CONREY, P. J. Upon an agreed statement in writing signed by all of the parties to the action the court rendered judgment in favor of plaintiffs, and granted a permanent injunction, from which judgment all of the defendants except W. H. Andrews and Maude E. Andrews, have appealed.

The questions involved, as stated by appellants, are: (1) Does the construction of a public street on land dedicated for public street purposes violate a prior deed restriction providing that said land is to be used "for residential purposes only"? (2) If such a restriction is violated by the construction of a public street on the restricted land, should a court of equity act to enjoin such a violation?

In the original argument it was assumed that the restriction itself was valid. Being doubtful about that point, we reopened the case for further argument. In Werner v. Graham, 181 Cal. 179, 183 P. 945, 949, the Supreme Court referred to decisions which hold that, when it appears that the owner of a subdivided tract has sold various lots in the tract, and in each conveyance has exacted restrictive covenants, which, it is evident, when all the deeds are considered together, were exacted in accordance with a common plan, it is enough, and that mutual equitable servitudes have been created, although in any deed taken by itself there is nothing to indicate any intent to create such reciprocal rights. The court then cited other decisions to the contrary, and stated its own conclusion as follows:

"An analysis of such a case, however, leaves, we believe, no reasonable doubt as to which line of authorities is correct. The intent of the common grantor—the original owner—is clear enough. He had a general plan of restrictions in mind. But it is not his intent that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them—in this case, the deed—constitute the final and exclusive memorial of such intent. It is also apparent that each deed must be construed as of the time it is given. It cannot be construed as of a later date, and, in particular, its construction and effect cannot be varied because of deeds which the grantor may subsequently give to other parties. Yet that is exactly what is done in the decisions holding that mutual servitudes exist in cases where all the deeds taken together, evidence a common plan of restrictions, although no single deed by itself evidences anything more than an intent to put particular restrictions on a particular lot."

[1] In the case at bar the deeds are not sufficient to create reciprocal restrictions, or mutual servitudes. But we see no reason why the grantor may not impose upon the lot granted by any deed to a lot purchaser a restriction therein declared to be made in favor of all other owners of lots in the tract. See cases cited in McBride v. Freeman, 191 Cal. 152, at pages 155, 156, 215 P. 678. In the deed here presented for construction, the conveyance was made upon the condition "that said premises shall be used for residence purposes only." It was then provided that as to the grantors a breach of the condition should cause the premises to revert, etc., "and as to the owners, their heirs, devisees, executors, administrators, or assigns of any owner of any other lot in said tract above mentioned conditions shall operate as covenants running with the land for the benefit of all of said lots and owners of such lots in said tract, their heirs, devisees, executors and administrators or assigns and the breach of any of the covenants or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by any or either of such owners, their heirs, devisees, executors, administrators or assigns." This language was in the first as well as all other of the deeds conveying the lots sold in said tract.

In the statement of facts in Werner v. Graham, supra, at page 181 (183 P. 948), it was pointed out that the deed in which the restrictions were contained was "without a word indicating that the land conveyed is part of a larger tract, the balance of which the grantor still retains, * * * or that their benefit is to inure to or pass with other lands, and without any description or designation of what is an essential element of any such servitude as is claimed, namely, the land which is to be the dominant tenement." The differences between the deed thus described and the deed before us in this action are strongly marked. Here the tract itself was described, the lands beneficially interested in the restrictive covenant were clearly indicated, and the right to enforce such beneficial interest was plainly declared. Therefore we have concluded that the questions presented by appellants, which questions we have stated at the beginning, must be considered and decided upon their merits.

[2] We are of the opinion that, where land has been conveyed to a grantee under a valid restriction against the use of that land for other than residence purposes, the construction of a public street on the land so conveyed, pursuant to an attempted dedication for that purpose by said grantee, and without the consent of the beneficiary of the restriction, is a violation of said deed restriction.

[3, 4] It must be conceded that by proceedings in eminent domain, all interested parties having been brought before a court of competent jurisdiction, this land could be condemned and taken for street purposes. It follows that, as against the right of plaintiffs under the restrictive covenant, the right of

the lot owner, alone, to dedicate the lot for street purposes may be tested by determining whether or not the plaintiffs would be necessary parties in an action to condemn and take the lot for use as a street.

The private property which may be taken for public use includes "all real property belonging to any person." Code Civ. Proc. § 1240. The complaint in an eminent domain proceeding must contain "the names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants." Code Civ. Proc. § 1244. "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." Const. art. 1, § 14. "Some authorities hold that, when property subject to a restrictive condition is taken for or applied to a public use inconsistent with the restriction, the owner of property for whose benefit the restriction is imposed is entitled to compensation. Lewis on Eminent Domain (3d Ed.) § 224; 20 C. J. 654." Hanna v. Rodeo-Vallejo Ferry Co., 89 Cal. App. 462, 468, 265 P. 287, 289. We are of the opinion that these authorities correctly state the law.

[5, 6] In the case at bar the restrictive covenants, expressly made as covenants running with the land, have the essential qualities of an easement. It must be admitted that the restriction under consideration here is not identical with any of those included within the list of "land burdens, or servitudes upon land," which in section 801 of the Civil Code are denominated as easements. But that list is not prohibitory of all other easements. "The ingenuity and foresight of the Legislature would be taxed in vain to name and classify all the burdens which might be imposed upon land. By section 801 it enumerated some of them." Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 415, 129 P. 593, 594.

It has been held that damages may be recovered for an interference with an easement of right of way whereby property of the plaintiff has been depreciated in value. Lawlor v. So. Pac. Co., 39 Cal. App. 97, 178 P. 165. It is only another illustration of the same principle when we say that, in an action to condemn and take for street purposes the lot involved in the present proceeding, the persons in whose favor the restriction exists would be necessary defendants. In that action the owner of the fee would not necessarily be entitled to all of the compensation allowed for the taking of the land, but such owner would be required to share with the beneficiaries of the restriction, to the extent of the damage suffered by them.

Appellants further contend that, even if the restriction would be protected by injunction as against violations by private persons, equity will not grant that remedy against a public agency, but that the owner of the restriction will be relegated to his right to recover damages in an action at law. It has been held by this court that, when private property has been taken for road purposes and the road completed, and the road as constructed has passed into actual public use, an injunction will not be granted to interfere with the continued enjoyment of that use, notwithstanding that the road was not constructed in accordance with the plan contemplated by the condemnation proceedings under which possession was acquired by the public. County of Los Angeles v. Rindge Co., 69 Cal. App. 72, at pages 81 and 82, 230 P. 468. We think, however, that this rule should not be extended, so as to prevent the granting of an injunction against the wrongful appropriation of such property for use as a street, when the road has not been constructed and the land has not yet actually passed into public use as a street.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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100 Cal. App. 775

VON STETTEN v. YELLOW-CHECKER CAB CO., CONSOLIDATED, et al.★

(Civ. 6763.)

District Court of Appeal, First District, Division 1, California. Sept. 27, 1929.

Rehearing Denied Oct. 26, 1929. Hearing Denied by Supreme Court Nov. 25, 1929.

1. Witnesses 🔑268(1)—Refusing questions as to how taxi and automobile collided held not unduly restricting cross-examination, where witness stated view of contact was obscured.

Sustaining objections to questions, asked on cross-examination of witness of plaintiff, suing for injuries received as result of automobile collision, to show precise manner in which taxi of one defendant and machine of other defendant came together, resulting in one of them striking plaintiff's car, *held* not erroneous, as unduly restricting cross-examination, where witness stated that his view of exact point of contact of two machines was obscured by body of taxi.

2. Appeal and error 🔑1048(6)—Cross-examining witness to show that driver of taxi colliding with automobile was escaping pursuit, though improper, held not prejudicial, in absence of bad faith.

Cross-examination of witness, in action for injuries received in automobile collision, endeavoring to show that driver of taxi, colliding with automobile of another defendant, was escaping man he had nearly collided with, though improper, *held* not prejudicial, where counsel stated that he was not seeking to inquire into private affairs of driver, and there was nothing to show that counsel was not acting in good faith.

★Rehearing denied. Hearing denied by Supreme Court.

3. Evidence 🔑471(19)—Testimony of witness riding in automobile that it entered intersection before taxi it collided with was not opinion.

Where record disclosed that witness stated that defendant's automobile in which he was riding entered intersection before taxi of other defendant, testimony was as to fact, and not an expression of opinion.

4. Appeal and error 🔑1004(1)—Only award so grossly disproportionate as to shock sense of justice, and indicating passion or prejudice, may be set aside.

It is only when an award is so grossly disproportionate as to shock sense of justice, and indicate that the amount of the award was arrived at as result of passion or prejudice, that award may be set aside.

5. Appeal and error 🔑1004(3)—Whether award of damages is result of passion or prejudice is primarily for trial court.

Only means of discovering existence of passion or prejudice, as influencing award of damages, is by comparing amount thereof with the evidence; the question being one primarily for determination in trial court.

6. Damages 🔑132(8)—$4,000 for severance of thumb's extensor tendon and cutting radial nerve at wrist, preventing color photography work, held not excessive.

$4,000 for complete severance of extensor tendon of thumb and cutting of radial nerve at wrist, causing disability of right hand, so that injured person could not pursue occupation of color photography work, which required great delicacy in handling plates and exerting sufficient pressure to bring out colors, *held* not unreasonable and excessive.

7. Automobiles 🔑246(58)—Refusing instruction that, if negligence of taxi driver created emergency, causing collision, other driver need not exercise carefulness required under ordinary circumstances, held justified; evidence showing no emergency.

Refusal to give instruction that, if jury found as result of negligent acts of taxi driver, and without fault of other defendant, with whose car taxi collided, an emergency was created, other defendant was not called on to exercise presence of mind and carefulness that is required of person of ordinary prudence under ordinary circumstances, *held* justified on ground, among others, that evidence wholly failed to show that an emergency existed.

8. Trial 🔑260(1)—Refusing instruction covered by another instruction held not error.

Refusing to give instruction *held* not error, where principle of law set forth therein was given in substance by court in defining negligence.

9. Appeal and error 🔑1067—Refusing instruction that, if taxi driver's negligence created emergency, driver of car taxi struck need not exercise ordinary prudence, held not prejudicial, where negligence proximately contributed to collision.

Where jury found on ample evidence that negligence of one defendant, whose automobile collided with taxi of other defendant proximately contributed to cause of collision with taxi, which resulted in injury to plaintiff and his automobile, refusal to give instruction to effect that if, as result of negligent acts of taxi driver, an emergency was created, which did not require of lay driver exercise of ordinary prudence, *held* not prejudicial.

10. Trial 🔑296(3)—Instruction concerning right of way at intersections held not misleading, when read with another instruction in language of statute (California Vehicle Act, § 15).

In action for injuries received as result of automobile collision, instruction relating to subject of right of way at intersection, deviating slightly from language employed by California Vehicle Act (St. 1925, p. 412) § 15, by using words "reach an intersection," instead of "approach an intersection," *held* not misleading, when read together with another instruction worded in identical language of statute.

11. Trial 🔑260(8)—Refusing instruction that, if automobile driver had right of way, he could assume taxi driver would yield it, held not error, where instructions given covered matter.

Refusal to give an instruction proposed by one defendant in action to recover for injuries received as result of automobile collision, to effect that, if jury found he was entitled to right of way at intersection, he had right to assume that driver of taxi of other defendant would yield same to him, *held* not error, where same subject-matter was fully covered by other instructions given by court.

12. Automobiles 🔑226(1)—Neither driver of taxi nor of automobile, both approaching intersection where collision occurred, at excessive speed, could claim right of way, nor complain of instructions given or refused thereon (St. 1925, p. 412).

Where evidence was ample to support conclusion reached by jury that taxi and another automobile, with which it collided, both approached and entered intersection at an excessive rate of speed, driver of neither vehicle was in position to claim benefit of statutory right of way rule, as stated in St. 1925, p. 412, nor to complain of instructions given or refused on that subject.

13. Damages 🔑216(2)—Testimony showing thumb's extensor tendon was severed and radial nerve at wrist cut, preventing color photography work, justified instructions on elements of damages.

Evidence that extensor tendon of thumb was completely severed, and that radial nerve at wrist was cut, thereby preventing continuation of employment as color photography worker, was legally sufficient to justify giving of instructions on elements of damages.

14. Trial 🔑295(1)—Instructions must be read in entirety.

Segregated single sentence, from several instructions given on subjects of burden of proof and preponderance of evidence, complained of, must be read in connection with other portion of court's charge, rendering instructions correct.

15. Automobiles 🔑246(22)—Modifying instruction that, if actions and omissions of automobile driver, were remote and secondary, he was not liable for collision, by adding "and not sole proximate cause," held proper as clarifying "remote and secondary."

Where proposed instruction was to effect that, if jury found sole proximate cause of accident to plaintiff was due to taxi driver, and that the other defendant's actions and omissions, if any, were remote and secondary, driver of other automobile was not liable, was modified by inserting after words "remote and secondary" the clause "and not the sole proximate cause of the accident," modification was proper, as clarifying meaning of term "remote and secondary," not elsewhere defined in instruction, and to distinguish term from "sole proximate cause."

16. Trial 🔑228(3)—That instruction included "proximately contributing to plaintiff's injury," instead of "negligence proximately contributing to cause of injury," held technical objection, without force.

Use of court in one of its instructions of term "proximately contributing to plaintiff's injury," in action for injuries resulting from automobile accident, instead of term "negligence proximately contributing to cause of injury," *held* not erroneous; criticism being technical in character and without force.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Berthold Von Stetten against the Yellow-Checker Cab Company, Consolidated, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Courtney L. Moore, of San Francisco, for appellant Yellow-Checker Cab Co.

Redman & Alexander, of San Francisco, for appellant Gunther.

Treadwell, Van Fleet & Laughlin, of San Francisco, for respondent.

KNIGHT, J. Respondent was injured and his automobile damaged as a result of a collision which happened at the intersection of Green and Franklin streets in San Francisco. Two other machines were involved in the collision, a taxi owned and operated by the appellant cab company, and a sedan owned and driven by the appellant Gunther, and respondent brought this action for damages against the cab company and Gunther, jointly, alleging that their joint negligence was the proximate cause of his injuries. The trial took place before a jury, which rendered a verdict against appellants for the sum of $5,000, and from the judgment entered on said verdict appellants took separate appeals. As grounds for reversal the appellant cab company urges that the trial court erred in ruling upon the admissibility of evidence, that it erroneously instructed the jury as to the law relating to the right of way at intersections, and that the verdict was excessive. The appellant Gunther assigns as error the giving and refusal to give several instructions, including the one to which his coappellant objects.

The accident occurred at 3:30 o'clock in the afternoon of a clear day. The taxi was traveling easterly along Green street toward Franklin, which intersects Green at right angles. Gunther was driving his automobile northerly on Franklin street toward Green, and the two machines collided within the intersection somewhere easterly of the center thereof. The taxi then careened across and beyond the intersection into Green street and struck respondent's automobile, which had come to a stop on Green street 20 feet easterly of the intersection. The latter collision was of sufficient force to overturn the taxi and hurl respondent's machine against the sidewalk on the northerly side of Green street, injuring respondent, who at the time was driving the car.

The evidence is in conflict as to the particular circumstances attending the collision between the taxi and Gunther's machine. With reference thereto the driver of the taxi, named Jurd, testified as follows: "When my car, the front end of it, got to what we would term where the button would be located in the center of the street at the intersection, I noticed a dark car [Gunther's] approaching [from the south along Franklin street] about 15 feet back of the property line, and I proceeded, * * * figuring that by so doing that this other machine which was coming down Franklin street from the south * * * would pull to the left, * * * passing me in the rear, and avoiding a collision. But * * * that did not work out the way I had figured, and [instead] the [Gunther] machine made a turn to the right, attempting to go up [east] Green street in the same direction that I was, thereby throwing his left front fender forward, which struck my right rear fender." Gunther testified that he reached the intersection first, and saw the taxi coming down Green street; that thereupon he looked to the right, to observe traffic to the east on Green street, and that when he was well within the intersection the taxi suddenly shot across his path; that he applied the brakes, but the taxi was so close that its wheel or rear fender caught his left front fender and swung his machine around, so that it faced east on Green street.

In addition to the foregoing conflict the testimony is contradictory as to the rate of speed appellants' machines were traveling immediately preceding and at the time of the collision. No point is made by either appellant, however, as to the sufficiency of the evidence to sustain the conclusion reached by the jury upon the issue of negligence, and consequently it is unnecessary to narrate in greater detail here the testimony given by the various witnesses upon the points mentioned, more than to say that it is legally sufficient to establish that both appellants approached the crossing at an excessive rate of speed, that they entered the intersection almost simultaneously, that neither had sufficient control of his machine to avoid a collision, and that consequently they were jointly responsible for the damage sustained by respondent as a result of such collision.

[1] In support of the claim that Gunther's car ran into the taxi, counsel for the cab company sought to show by the cross-examination of respondent's witness Ross the precise manner in which the taxi and Gunther's machine came together; but the court sustained objections made by Gunther's counsel to the questions asked in that behalf, and the cab company contends that thereby its right to cross-examine was unduly restricted. We find no error in the ruling, because the witness repeatedly stated that his view of the exact point of contact of the two machines was obscured by the body of the taxi, and that consequently he was unable to tell which machine struck the other, or which portions of the machines were first in contact.

[2] The driver of the taxi admitted that in driving along Green street at the time of the accident he was taking an indirect route of travel to reach his objective, but explained that he was doing so to secure private information as to the number of a house. Counsel for Gunther cross-examined the witness on that point, endeavoring to show as he stated, a different reason, and an answer to objections made by counsel for the cab company further stated in effect that he expected to prove that Jurd's real reason for taking that course was to escape from a man who was pursuing him, and with whom he had nearly collided on another street a few minutes before the present accident took place. This man was afterwards produced as a witness on behalf of Gunther, but his testimony did not fully substantiate counsel's statement.

It is now contended that such cross-examination and the statement made by counsel in connection therewith constituted prejudicial error. Counsel for Gunther clearly stated, however, in answer to a direct question asked by the court, that he was not seeking to inquire into the private affairs of the driver, and there is nothing in the record which would justify the belief that counsel was not acting in good faith when he declared the purpose of the cross-examination. We are of the opinion, therefore, that, even assuming the cross-examination to have been improper, its effect was not prejudicial.

[3] Nor is there any merit in the contention made by the cab company that the testimony given by the witness Mondani in response to questions asked by Gunther's counsel, to the effect that Gunther's machine entered the intersection first, was the expression of an opinion. In this connection the record discloses that Mondani was riding in the Gunther machine at the time of the accident, and his testimony was directed to what he actually saw. It is evident, therefore, that he was testifying to a fact and not giving his opinion.

[4-6] As to the amount of the verdict, the rule is well established that it is only when an award is so grossly disproportionate as to shock the sense of justice, and indicate that the amount of the award was arrived at as a result of passion or prejudice, that it may be set aside (Averdieck v. Barris, 63 Cal. App. 495, 218 P. 786; Martin v. Shea, 182 Cal. 130, 187 P. 23; Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 P. 487), and that the only means of discovering the existence of passion or prejudice as influencing the award is by comparing the amount thereof with the evidence, the question being one primarily for determination in the trial court (Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513).

In the present case respondent proved special damages approximating $1,000, which included property damage, payment of the medical and hospitalization fees, and loss of time, and according to the medical testimony the personal injuries he sustained were severe and permanent. Besides having suffered minor cuts and bruises, the extensor tendon of the thumb was completely severed, and the radial nerve at the wrist was cut. The result of such injury, as the medical testimony shows, was as follows: "On pressure at various parts about the scar, where these nerves were that were included in the scar tissue, there was extreme tenderness and pain upon pressure. This combination of symptoms caused a disability of his right hand, due to the weakness of his thumb; to numbness, lack of sensation of the distribution nerve; and, third, because of the extreme pain."

Up to the time of the accident, respondent was engaged in color photography work. Most of his time was spent in laboratories developing pictures, and the nature of the permanent injuries to his hand has compelled him to abandon such work, for the reason that such employment requires great delicacy in handling plates, in properly superimposing one on the other, and exerting sufficient pressure to bring out the colors. In view of the situation described, we are not prepared to hold as a matter of law that the jury's allowance of $4,000 for the permanent injury was unreasonable and excessive.

[7-9] The court refused to give an instruction proposed by Gunther to the effect that, if the jury found that as a result of the negligent acts of the taxi driver, and without fault on the part of Gunther, an "emergency" was created, Gunther "was not called upon to exercise all that presence of mind and carefulness that is required of a person of ordinary prudence under ordinary circumstances." The refusal to give the instruction

was justified upon the ground, among others, that the evidence wholly failed to show that an emergency existed.

Assuming, however, that such an inference could be drawn, the refusal to give the instruction was not error, because the principle of law set forth therein was given in substance by the court in defining negligence, wherein it was stated that negligence "is not absolute or to be measured in all cases in accordance with the same precise standard, but always relates to some circumstance of time, place and person." And in any event the refusal to give the proposed instruction cannot be said to have operated to Gunther's prejudice, because the application of the doctrine embodied therein is made dependent upon the proposition, as the instruction plainly states, and as the numerous cases hold, that the emergency or perilous position, if any there be, was not brought about in whole or in part by the fault of the party seeking to invoke such doctrine, and here the jury found upon ample evidence that Gunther's negligence proximately contributed to the cause of his collision with the taxi.

[10] In one of the instructions relating to the subject of the right of way at intersections the court deviated slightly from the language employed by the statute (California Vehicle Act; Stats. 1925, p. 412), in that it used the words "reach an intersection," instead of "approach an intersection." Section 15. Later in its charge, however, the court gave another instruction, proposed by Gunther, upon the same subject, which was worded in the identical language of the statute, and therefore, when the latter is read in connection with the court's instruction, it is evident that the deviation referred to could not have misled the jury.

[11, 12] The court also refused to give an instruction proposed by Gunther to the effect that, if the jury found that he was entitled to the right of way at the intersection, he had a right to assume that the driver of the taxi would yield the same to him. The refusal to give such instruction was not error, because the same subject-matter was fully covered by three other instructions proposed by Gunther, which the court gave. The appellant cab company complains of the contents of these three latter instructions, upon the ground that the jury "was left in the dark as to the circumstances under which Gunther was obliged to yield the right of way to the taxi." The rule of traffic declared by the statute as to the right of way at intersections (Stats. 1925, p. 412) is made subject, however, to the express provision that the vehicle claiming the right of way "is traveling at a lawful speed," and here, as shown, the evidence is ample to support the conclusion reached by the jury that the taxi and Gunther's machine approached and entered the intersection at an excessive rate of speed. Consequently the driver of neither is in a position to claim the benefit of the statutory right of way rule nor to complain of the instructions given or refused upon that subject. Rosander v. Market Street Ry. Co., 89 Cal. App. 721, 265 P. 541.

[13] It is claimed that there was no evidence to show that the injury to respondent's hand impaired his future earning power, nor any evidence upon which the jury might base a reasonable estimate of the loss occasioned thereby, and that consequently the court erred in giving instructions upon those elements of damages. The evidence hereinabove set forth relating to the question of the amount of the verdict was, in our opinion, legally sufficient to justify the giving of the instructions complained of. Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 P. 72.

[14] Appellant Gunther segregates a single sentence from several instructions given by the trial court upon the subjects of burden of proof and preponderance of evidence, and complains of its effect, claiming that the jury was thereby instructed in substance that Gunther was not entitled to a verdict unless there was a preponderance of the evidence in his favor. When the single sentence complained of is read in connection with the other portion of the court's charge, however, it becomes apparent at once that the jury was correctly instructed upon the subjects mentioned.

[15] An instruction was proposed by Gunther to the effect that, if the jury found that "the sole proximate cause of the accident to respondent was the negligence of the taxi driver," and that Gunther's "actions and omissions, if any, were remote and secondary," Gunther was not liable. The court modified the instruction by inserting after the words "remote and secondary" the clause "and not the sole proximate cause of the accident." The only effect of the modification was to clarify the meaning of the term "remote and secondary," which was not elsewhere defined in the instruction, and to distinguish that term from the term "sole proximate cause," as used by appellant in the forepart of the instructions, and did not alter the legal effect of the legal principle embodied therein. The modification was therefore proper.

[16] The final criticism made by the appellant Gunther is directed at the court's use, in one of its instructions, of the term "proximately contributing to plaintiff's injury," claiming that it should have used the term "negligence proximately contributing to the cause of the injury." It is self-evident that the criticism is purely technical in character, and consequently requires no discussion to point out that it is entirely without force. Blackwell v. American Film Co., 48 Cal. App. 681, 192 P. 189.

In conclusion it may be stated that the court's charge to the jury covers approximately 26 typewritten pages of the transcript, and with the exception of a few general instructions, given by the court of its own motion, consists of instructions proposed by the parties to the action. We have fully examined the entire charge, and also the instructions which the court refused to give, and in our opinion the jury was fully, fairly, and correctly advised on all legal points involved in the action.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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101 Cal. App. 7

PEOPLE v. HUNTSMAN. (Cr. 1853.)

District Court of Appeal, Second District, Division 1, California. Sept. 27, 1929.

1. Intoxicating liquors 🔑233(1)—Testimony regarding gas consumed on premises where still was found and in whose name premises stood held properly received (St. 1927, p. 497).

In prosecution for possession of a still under St. 1927, p. 497, testimony by clerk in employ of gas company regarding amount of gas consumed on premises where still was found, and that account with gas company stood under name of another in whose name defendant acquired property, *held* properly received, since such evidence tended to meet issue raised as to ownership and occupation of premises where still was found.

2. Intoxicating liquors 🔑233(1)—Testimony regarding defendant's operations and conversation at place other than where still was found held admissible (St. 1927, p. 497).

In prosecution under St. 1927, p. 497, for possession of still, testimony of officer regarding defendant's operations at place other than where still was found and conversation wherein defendant admitted he was in bootlegging business and regarding accounts found there with names of persons and their addresses *held* properly received, since any evidence of possession of large quantity of moonshine or that defendant was in bootlegging business would be pertinent to inquiry regarding connection with or interest in still found.

3. Intoxicating liquors 🔑239(3)—Instruction authorizing conviction for possessing still if defendant aided and abetted or advised and encouraged acts alleged held warranted by evidence (St. 1927, p. 497).

In prosecution under St. 1927, p. 497, for possession of still, evidence showing that persons other than defendant occupied premises where still was found, and warranting inference that defendant had connection with still and that persons occupying house were agents or representatives of defendant, *held* sufficient to warrant instruction to convict if defendant committed acts alleged or aided and abetted in their commission or, not being present, advised and encouraged their commission.

4. Intoxicating liquors 🔑239(3)—Instruction that possession of still may be actual or constructive or by agent and stating effect of joint possession held warranted by evidence (St. 1927, p. 497).

In prosecution under St. 1927, p. 497, for possessing still, evidence showing persons other than defendant occupied premises where still was found, warranting inference that defendant had some interest or connection with still and that persons occupying house were agents and representatives of defendant, *held* sufficient to warrant instruction that possession of still may be actual or constructive and that possession by agent is possession of owner, and that possession by one of two persons unlawfully operating or possessing still constitutes possession for each and all of such persons.

5. Statutes 🔑35½—Statute making it felony to possess still held not unconstitutional because conflicting with referendum statute making it misdemeanor to possess property designed to illegally manufacture liquor (Wright Act; Still Act).

St. 1927, p. 497, commonly known as Still Act, making it a felony to possess still, *held* not unconstitutional as being in conflict with St. 1921, p. 79, commonly known as Wright Act, making it misdemeanor punishable by fine to possess property designed to manufacture liquor in violation of law.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Ray Huntsman was convicted of possession of a still, and he appeals. Affirmed.

Newton J. Kendall and A. Wm. Christlieb, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. Defendant appeals from a judgment of conviction upon an information filed by the district attorney of Los Angeles county, charging him with the crime of "possession of a still," and from an order denying his motion for a new trial of the action. In urging a reversal of the judgment, appellant presents the following grounds:

1. That the evidence is insufficient to support the verdict.

2. Errors committed by the court in connection with certain rulings made during the trial.

3. Errors committed by the court in the giving of certain instructions to the jury.

4. That Act 3795 (Stats. 1927, p. 497), known as the "Still Act," is unconstitutional.

It is undisputed that the officers who arrested the defendant found a complete still at No. 4234 Los Nietos drive, but defendant denies any knowledge of the existence of the still or that he was in any way responsible for its maintenance, although he admits that he is the owner of the property where the still was found.

The evidence bearing upon the disputed question is mainly circumstantial, and while the evidence of the state connecting the defendant with the still is not as strong as in most cases that come before us for review, we are of the opinion that there is sufficient evidence to justify the inference necessarily involved in the verdict, that the defendant either owned or had some interest in maintaining the still. To recite and review the evidence in detail would extend this opinion to an unwarranted length. We feel that it will meet the requirements of the case to simply indicate that, in our opinion, appellant's contention that the evidence fails to support the verdict is not well taken.

[1] In connection with the second point, appellant contends that the court erred in overruling his objection to the questions asked by the prosecuting attorney of the witness R. F. Ogburn, who was a clerk in the employ of the Southern California Gas Company. These questions called for and elicited evidence as to the amount of gas consumed from September, 1927, to February, 1928, upon the premises where the still was found. Also, the witness, over the objection of appellant, was permitted to testify that the account with the gas company stood in the name of J. B. O'Malley. There was evidence that the defendant had acquired the property in question in the name of O'Malley. In fact he so admitted in his own testimony. We are of the opinion that the testimony objected to was properly admitted, in that it tended to meet the issue raised as to the ownership and occupation of the premises where the still was found.

[2] It is also contended that the court erred in admitting the testimony of Officer Shoemaker, a witness for the state, as to what he found in the house at No. 1128 Point View street, and also this witness' testimony as to a conversation he had with the defendant at the same place. In this testimony Officer Shoemaker related how the officers had gone to the house at 1128 Point View street, which was some distance from the property on Los Nietos drive, where the still was found, and there found the defendant in company with a woman engaged in filtering some moonshine whisky that was running from a gallon keg into a larger barrel. When the officers knocked at the door of the house on Point View street, defendant himself admitted them, and in response to their inquiry as to whether or not they could get any liquor, defendant replied that they could and stated that he was in the bootlegging business. The officers then upon further investigation found two books containing lists of names of persons with their addresses, telephone numbers, and in a number of instances memoranda of accounts. These books, the defendant stated, contained lists of names of his customers.

All of these matters were pertinent to the issue of the connection of the defendant with the maintenance of the still in question. The defendant admitted ownership of the premises where the still was found and which the evidence clearly showed was maintained primarily as a plant for the unlawful manufacture of liquor. Any evidence of the possession of a large quantity of moonshine whisky, or that defendant was in the bootlegging business, would be pertinent to the inquiry as to his connection with or interest in the still in question.

[3, 4] Appellant's third point relates to two instructions given by the court to the jury in the giving of which appellant claims the court committed prejudicial error. The following are the instructions referred to:

1. "If you believe beyond a reasonable doubt that the defendant committed the acts alleged in the information himself, or aided and abetted in its commission, or, not being present, has advised and encouraged its commission, you will find the defendant guilty as charged."

2. "You are further instructed that possession may be of two kinds: actual and constructive. Actual possession exists when a person has the actual control or dominion over a thing and constructive possession exists when a person has the right to possession or control, either individually or through an agent. An agent's possession is the possession of the owner. If two or more persons are engaged in unlawfully operating or possessing a still or apparatus for the manufacture of intoxicating liquor, then the possession, control or ownership of one of the persons so engaged constitutes possession, ownership and control for each and all of any such persons."

It is not claimed by appellant that these instructions erroneously state the law on the subjects therein referred to, but that there is no evidence in the case that warrants the giving of these instructions. There is no merit in this contention. Defendant and appellant was not apprehended in the house with the still. There is evidence in the case that other persons than the defendant occupied the premises during the period of the defendant's admitted ownership of the house. And there was sufficient evidence to warrant the inference that the defendant, although not seen in the house with the still had some interest in or connection with the still, and that the persons who were occupying the house during this period were doing so as the agents or representatives of the defendant. This evidence very clearly justified the instructions complained of.

[5] The last contention of appellant constitutes an attack upon the constitutionality of Act No. 3795, Deering's Gen. Laws Supp. 1925—1927 (Stats. 1927, p. 497), commonly known as the "Still Act." In support of this contention it is argued that inasmuch as the Wright

Act makes it a misdemeanor punishable by a fine not to exceed $500 to possess property designed to manufacture liquor in violation of law, and the fact that the Still Act makes it a felony to possess a still, there are two statutes covering the same offense with different penalties; that the Still Act cannot be treated as an amendment to the Wright Act, because in its adoption the provisions of article 4, § 24, of the Constitution were not followed, and the Wright Act having been approved at a referendum is not subject to repeal by legislative enactment; therefore the Still Act must be held invalid because of its conflict with the Wright Act. In discussing this point appellant cites in his brief the cases of People v. Wood, 88 Cal. App. 621, 264 P. 298, and People v. Guido (Cal. App.) 269 P. 670, wherein the same point was raised and discussed. However, the court in both of these cases sustained the constitutionality of the Still Act, and we are in entire accord with the conclusions of the court in these cases on that point.

In view of the fact that the subject was quite fully discussed in the opinions of the cases above cited, we do not deem it necessary to again cover the same ground.

Having concluded that there is no merit in the points raised by appellant, the judgment and order denying defendant's motion for a new trial are affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

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100 Cal. App. 766

ZLOZOWER v. LINDENBAUM et al.★

(Civ. 3724.)

District Court of Appeal, Third District, California. Sept. 26, 1929.

Rehearing Denied Oct. 26, 1929. Hearing Denied by Supreme Court Nov. 25, 1929.

1. Contracts 🔑152—Words used in instruments are to be construed according to their ordinary meaning.

Words used in instruments are to be construed according to the ordinary meaning attached thereto, and definitions or meanings not ordinarily attached thereto are not to be imported into instrument unless the language of the writing compels such an interpretation.

2. Contracts 🔑152—Words used in instrument are to be given their ordinary and legal interpretation, unless language of instrument compels different interpretation.

If words are used in instrument which have ordinary, common, and also legal interpretation, and by long use have acquired such ordinary and legal interpretation, such interpretation will be followed, unless language appears in instrument compelling different interpretation.

3. Escrows 🔑5—"Conditions and restrictions" held not to include "easement" consisting of right of way for public utilities purposes with ingress and egress.

The words "conditions and restrictions," contained in escrow instructions given to title company, relative to drawing of deeds and insuring title, *held* not to include easement consisting of a right of way five feet in width over rear of lots for public utilities purposes with ingress and egress thereto, of which easement purchaser had no notice and was not familiar with other than an electric light pole on corner of one of lots; "easement" being defined as a liberty, privilege, or advantage without profit which the owner of one parcel of land may have in lands of another, while "conditions and restrictions" limit or modify existence or character of something, a restriction or qualification, and refer to subsequent acts of grantee in relation to estate granted limiting his right to use thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Easement.]

4. Vendor and purchaser 🔑134(1)—Law implies agreement to convey good title free of incumbrance when contract contains no exception or reservation or provision as to title or incumbrances.

Where one makes a contract in writing to sell and convey land without any exception or reservation or provision as to title or incumbrances, the law implies an agreement on his part to convey a good title free of incumbrance, and, if one incumbrance thereon is specifically provided for, there is an implied agreement that the title shall be conveyed free from any others.

5. Vendor and purchaser 🔑134(1, 4), 135(1)—Building restrictions, provision for payment of taxes, and grant of easement for public utilities purposes, held to constitute "incumbrances" invalidating agreement for purchase of land (Civ. Code, § 1114).

Where agreement of purchase and sale of land contained no reference to any easements, conditions, or restrictions or incumbrances, *held*, that building restrictions contained in deed, provision that conveyance was subject to taxes and assessments for prior year, and easement of right of way for public utilities purposes, constituted "incumbrances" invalidating agreement in view of Civ. Code, § 1114.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Incumbrance.]

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Max Zlozower against Sam Lindenbaum and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Samuel A. Rosenthal and Louis Babior, both of Los Angeles, for appellants.

Henry O. Wackerbarth and Joseph A. Adair, both of Los Angeles (Henry E. Carter, of Los Angeles, of counsel), for respondent.

★Rehearing denied. Hearing denied by Supreme Court.

PLUMMER, J. Plaintiff had judgment for the sum of $1,500 in an action brought to recover that amount paid to the defendants as a part of the purchase price of certain lots in the city and county of Los Angeles. From this judgment the defendants appeal.

The court found that on or about the 24th day of October, 1924, the plaintiff and defendants entered into a certain agreement in the following words and figures, to wit:

"Los Angeles, Calif., Oct. 24, 1924.

"Received of Max Zlozower One thousand $1,000.00 dollars as deposit on purchase of two double bungalows known as 1908–12 Judson St. Purchase price of which is $13,500.00 dollars. Thirteen thousand five hundred dollars. Half of the above is to be given to the seller on or about the 1st of Nov. and the balance to be paid no later than Nov. 20th 1924.

"Sam Lindenbaum
"Dora Lindenbaum
"Max Zlozower"

That at the time of entering into said agreement the court also found that the plaintiff paid to the defendants the sum of $1,000; that thereafter, and on or about the 17th day of November, 1924, the plaintiff paid to the defendants the further sum of $500. The court further found that on or about the 27th day of October, 1924, the plaintiff signed and handed to the Title Insurance & Trust Company written instructions regarding the sale referred to in the agreement heretofore set forth. The portions of said instructions necessary to be considered are as follows:

"October 27, 1924.

"I will hand you the sum of $12,500.00 and funds sufficient to cover my portion of charges, all of which you are authorized to use in connection with your order No. 784113 when you can issue, in your usual form, your new guarantee not to exceed $13,500.00 on:

"Lot 22 and the easterly 40 ft. of lots 16, 17 and 18 of Tract 5403 in the City and County of Los Angeles, as per map recorded in Book 61 page 11 of Maps, etc. Conditions and restrictions as contained in the deed from Louis J. Wilde to Sam Lindenbaum and Dora Lindenbaum, with which I am familiar and hereby approve.

"Max Zlozower,
"2813 Boulder Street."

The escrow instructions are quite lengthy, but the portions which we have set forth are the only ones involved in this action and necessary to be considered. Thereafter, the defendants executed and tendered to the plaintiff a deed of conveyance to said property, which deed not only contained conditions and restrictions relative to the use of said property, limiting the occupation thereon by people of the White or Caucasian race, except employees, but also providing that any buildings to be used for family purposes, to be erected on said premises or any part thereof, should cost and be fairly worth not less than $2,000; that such buildings and the porches and approaches thereof should be located not less than 15 feet from the front line of the property; that any buildings to be used for business purposes should cost and be fairly worth not less than $3,000; and that the exterior walls should be constructed of brick, tile, concrete, stucco, or other fire-resisting material; that outbuildings or garages permitted on said premises should be located not less than 60 feet from the front line of the property; and that all driveways should be placed on the right-hand side of said premises; that all conditions and restrictions herein contained should terminate on and after January 1, 1940. In addition to the conditions and restrictions just set forth relative to the uses to be made of said property and the buildings to be erected thereon, the deed tendered by the defendants to the plaintiff contained a reservation of an easement, to wit, of a right of way 5 feet in width over the rear of said lots, for public utility purposes, with ingress and egress thereto. The deed tendered also expressed that the conveyance was subject to all taxes and assessments for the year 1923.

Upon this appeal the appellants urge three grounds for reversal: (1) That an easement for electric light purposes granted to a municipality is not an incumbrance within the contemplation of the laws of the state of California; (2) that appellants have fully performed their part of the agreement by delivering or tendering to the plaintiff a good and sufficient deed of conveyance containing the provisions to which we have heretofore referred; and (3) that the intention of the parties governs, and that the contract must be so construed as to carry out such intention. No reference is made anywhere in the briefs to the fact that taxes and assessments constitute an incumbrance upon property as provided by section 1114 of the Civil Code, and that there is nothing in the writings referred to or mentioned in the briefs of counsel indicating that there was any agreement on the part of the plaintiff to pay the taxes on the premises for the year 1923. This fact in itself shows that the deed tendered was not in accordance with the writings to which we have referred, and to which our attention has been invited.

[1, 2] The contention is also made that any easements upon the premises are covered by the words "conditions and restrictions." In the consideration of this question it must be remembered that the conditions and restrictions contained in the tendered deed of conveyance, and which appears to have been contained in deeds of conveyance by which the defendants deraign title, specified and provided that the conditions and restrictions terminated on January 1, 1940, while the easement granted to the city covering a strip 5 feet wide across the rear of all the lots referred to, was a continuing burden. Words used in

instruments are to be construed according to the ordinary meaning attached thereto, and definitions or meanings not ordinarily attached thereto are not to be imported into the instrument unless the language of the writing compels such an interpretation. Again, if words are used in an instrument which have an ordinary, common, and also legal interpretation, and by long use have acquired such ordinary and legal interpretation, such interpretation will be followed unless language appears in the instrument compelling a different interpretation. In the instruments which we have before us there is nothing which compels an interpretation of the language used that departs from the common and the legal interpretation given thereto. With these statements as a premise, we may consider the three terms involved herein. First, as to "easement": In 19 C. J. 862, we find the term "easement" defined as "a liberty, privilege or advantage without profit, which the owner of one parcel of land may have in the lands of another; or to state it from the opposite point of view, it is a service which one estate owes to another, or a right or privilege in one man's estate for the advantage or convenience of the owner of another estate. Again, an easement or a servitude has been defined as a right which one proprietor has to some profit, benefit, * * * in or over the estate of another proprietor. * * * While it is always distinct from the occupation and enjoyment of the land itself, and does not confer title to the land, an easement is property and partakes of the nature of land. It is an incorporeal right—an incorporeal hereditament, and although only an incorporeal right and appurtenant to another, the dominant, tenement, it is yet properly denominated an interest in land which constitutes the servient tenement," etc. Other definitions are given, but they are simply in elaboration of what we have here set forth. The easement referred to in the tendered deed of conveyance is unlimited as to time, and it further appears that the easement granted to the city, as we have said, covered a strip 5 feet in width, giving to the city the right of ingress and egress thereon, and as was said by this court in the case of Switzler v. Klein, 271 P. 367, left to the owner no beneficial interest in the lots, save and except as to the light and air coming over the 5-foot strip.

We come next to the terms, conditions, and restrictions. The word "restrictions" being used in connection with the word "conditions" is only a part of one expression, and does not extend or amplify the definition or meaning of the phrase "conditions and restrictions." Thus, in 12 C. J. p. 402, we find the following: "The word 'restriction,' when used in connection with the grant of interest in real property, has been construed as being the legal equivalent of 'condition,' and that either term may be used to denote a limitation upon the full and unqualified enjoyment of the right or estate granted. The words 'terms' and 'conditions' are often used synonymously when relating to legal rights." As to the definition of "conditions and restrictions," we quote the following from 12 C. J. p. 400: "That which limits or modifies the existence or character of something; a restriction or qualification; * * * restriction or limitation modifying or destroying the original act with which it is connected, or defeating, terminating or enlarging an estate granted; something which defeats or qualifies an estate; a modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate may be either defeated, enlarged, or created upon an uncertain event; a quality annexed to land whereby an estate may be defeated; * * * a qualification or restriction annexed to a deed or devise, by virtue of which an estate is made to vest, to be enlarged or defeated upon the happening or not happening of a particular event, or the performance or nonperformance of a particular act." Other definitions are given, but these sufficiently illustrate the meaning of the words "conditions and restrictions." They refer to the subsequent acts of the grantee in relation to the estate granted limiting his right to the use thereof, as in this case, and the erection of buildings costing not less than a certain sum, and at not less than a certain specified distance from the front line of the several lots mentioned. These conditions and restrictions, if violated, were to work a forfeiture of the estate and a return thereof to the grantors, but were to expire, by the terms of the instrument of conveyance, on January 1, 1940.

[3] The foregoing we think demonstrates conclusively that the words "conditions and restrictions" appearing in the instructions given to the title company, relative to the drawing of deeds and insuring title, do not include easements that may have been previously granted, and with which the record shows that the plaintiff was not familiar at the date of signing the instructions. The record shows that on the 24th day of October, 1924, there was standing on the corner of one of the lots an electric light pole, and from this the appellants urge that this constituted a visible object of the easement theretofore granted and subsisting across all of said lots, giving the right of ingress and egress to the city over the 5-foot strip. We do not need to follow appellants' argument or consider the cases holding that certain visible objects are sufficient to notify an intending purchaser of the existence of an easement. The mere statement of the claim that an electric light pole in the corner of one lot is sufficient to indicate the existence of an easement 5 feet wide for ingress and egress over the number of lots involved in this action carries its own refutation. In so far as there being nothing upon the premises to indicate the existence

of an easement, and in so far as the existence of an unknown and undisclosed easement at the time of entering into the agreement of purchase and sale to which we have referred, this case is governed by the rules that this court followed in the case of Switzler v. Klein, supra, save and except that in the Switzler Case the defendant, after exhibiting a map to the intending purchaser, not disclosing an easement, filed a map reserving an easement to the city, in which the lots involved were situated.

[4, 5] On the part of the respondent it is argued that the writing dated October 24, 1924, is an agreement of purchase. On the part of the appellants it is argued that it is only a receipt. While it is argued on the part of the appellants that the writing of October 27, 1924, is a binding agreement upon the appellants, a reading of the instrument shows that this contention is untenable. The instructions given to the Title Insurance & Trust Company are in no sense an agreement of purchase. It is not an agreement entered into with the owner of the premises for the purchase of the lots in question. It is simply a direction to the Title Insurance & Trust Company as to what was to be done by them. It is wholly without consideration and subject to modification or retraction at any time. If the contention of the appellants that the writing dated October 24, 1924, set out in this opinion is not an agreement of purchase and sale, then the record shows no agreement of purchase and sale. The evidence is clear that the parties involved in this action so regarded the writing to which we are making reference and while it is deficient and lacking in many particulars, for the purposes of this case we will treat it as the agreement between the parties, or at least as evidencing the agreement between the parties. This writing is silent as to the kind, character, qualification, or limitation of title to be conveyed by the defendants to the plaintiff. It contains no reference to any easements, conditions, or restrictions. And thus, as said in the case of Smiddy v. Grafton, 163 Cal. 16, quoting from page 18, 124 P. 433, 434, Ann. Cas. 1913E, 921: "Where one makes a contract in writing to sell and convey land, without any exception, or reservation, or provision as to the title or incumbrances, the law implies an agreement on his part to convey a good title free of incumbrance. And if one incumbrance thereon is specifically provided for, there is an implied agreement that the title shall be conveyed free from any others." To support this quotation a large number of authorities are there cited. Likewise, in the case of Easton v. Montgomery, 90 Cal. 307, on page 314, 27 P. 280, 282, 25 Am. St. Rep. 123, it is said: "In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unincumbered and without defect"—citing a number of authorities. That building restrictions constitute incumbrances conclusively appears from the citations found in the case of Whelan v. Rossiter, 1 Cal. App. 701, 82 P. 1082. That a reservation of a right of way, though called an easement, constitutes an incumbrance, is definitely held in the case of Rustigian v. Phelps, 190 Cal. 608, 213 P. 957. In that case it is held that partial payments made before the discovery of the easement might be recovered. The easement involved in the case at bar differs so radically from the easements involved in the cases referred to by appellants that the mere statement is all that is necessary to show their inapplicability. The easements referred to in the cases cited by appellants consisted of canals, ditches, and embankments extending across the premises. These, of course, were visible objects extending across the premises, which any one with ordinary vision could readily see, while a pole in a corner of one of several lots indicates nothing more than the existence of a pole. The record shows that there was no deed from Louis J. Wilde to the defendants, and that the defendants derived their title from one Simon; but as this may simply have been a clerical error, we attach no importance thereto. We do not deem it necessary to lengthen this opinion by a review of the testimony set forth in the briefs of the respective parties, further than to say it does not change the legal effect of the instruments to which we have referred, and also to add that it is somewhat conflicting as to the essential points involved, and that the trial court necessarily resolved the conflicting portions in favor of the plaintiff.

The judgment is affirmed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

100 Cal. App. 736

MacDONALD v. REICH & LIEVRE, Inc.★
(Civ. 6837.)

District Court of Appeal, First District, Division 2, California. Sept. 25, 1929.

Rehearing Denied Oct. 25, 1929. Hearing Denied by Supreme Court Nov. 21, 1929.

1. Limitation of actions ⇨190—Plaintiff, without pleading it, may introduce evidence on rebuttal in avoidance of plea of limitations (Code Civ. Proc. § 462).

Since, under Code Civ. Proc. § 462, plaintiff is not allowed a replication to defendant's plea, plaintiff without pleading it may introduce evidence on rebuttal in avoidance of plea of statute of limitations, such as evidence of concealment of fraud.

2. Money received ⇨6(4)—Common count for money had and received may be used in action to recover purchase price of stock on ground of fraud or mistake.

A common count for money had and received may be used in an action by purchasers of corporate stock to recover purchase price because of fraud or mistake.

3. Money received ⇨17(1)—Complaint in common count by purchasers of corporate stock need not plead facts concerning discovery of fraud and mistake.

In common count for money had and received by purchasers of corporate stock seeking to recover purchase price on ground of fraud or mistake, complaint need not plead facts, circumstances, and time of discovery of fraud and mistake.

4. Licenses ⇨39—Saleswomen purchasing stock of employer-corporation held not chargeable with lack of diligence in failing to discover alleged fraud sooner (Corporate Securities Act, § 12).

Saleswomen in stores of corporation seeking to recover purchase price for stock on ground of fraud and mistake, in that corporation did not have permit from corporation commissioner, rendering sale and stock void under Corporate Securities Act (Deering's Gen. Laws 1923, Act 3814), § 12, cannot be charged with lack of diligence in failing to discover fraud sooner, where there were no facts which would have aroused their suspicion or shaken their confidence in their employer.

5. Limitation of actions ⇨16—Criterion for determining applicable statute of limitations is not form of action, but substance of it.

Criterion for determining particular statute of limitations applicable is not form of action, but substance of it and nature of the right, violation of which creates right of action, and this is particularly true in those jurisdictions where common-law forms of action have been abolished.

6. Licenses ⇨39—Issuance of certificates of stock by corporation amounts substantially to representation that certificates are regular and valid.

When corporation issues to public certificates of stock regular on their face, it amounts substantially to representation that certificates are regular and valid.

7. Limitation of actions ⇨100(6)—Action by purchasers of corporate stock for money had and received based on void sale of stock held governed by statute prescribing limitation of three years after discovery of fraud or mistake (Corporate Securities Act, § 12; Code Civ. Proc. § 338, subd. 4).

Action in common count for money had and received by purchasers of corporate stock to recover purchase price on ground that sale and stock was void under Corporate Securities Act (Deering's Gen. Laws 1923, Act 3814) § 12, because corporation did not have permit from corporation commissioner, *held* governed by Code Civ. Proc. § 338, subd. 4, prescribing limitation period of three years after discovery of fraud or mistake, and action commenced within such time was not barred.

8. Appeal and error ⇨1071(6)—Error in omitting to make separate finding on particular issue is not reversible, where, if made, it would have been adverse to appellant.

Error of trial court in omitting to make separate finding on issue of statute of limitations will not be held reversible error, where evidence was such that, if finding had been made on that issue, it must necessarily have been adverse to appellant.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Nellie MacDonald against Reich & Lievre, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Leon Samuels, of San Francisco, for appellant.

Frederic C. Benner, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff recovered judgment for the sum of $600 paid by her and her assignor for the purchase from defendant corporation of six shares of its preferred stock. The stock was sold and purchased in the state of California at a time when the said corporation did not have a permit from the corporation commissioner of California to sell the same. Under the terms of section 12 of the California Corporate Securities Act (Deering's Gen. Laws, 1923, Act 3814) the sale was void, the stock was void, and, in reality, the plaintiff and her assignor never became stockholders in the corporation.

The plaintiff's complaint was in the form of the common count of indebtedness for money had and received within two years last past. The defendant did not plead the statute of limitations by demurrer. The complaint upon its face would be good against such a demurrer. In its answer, however, defendant pleaded all of the several sections of the Code of Civil Procedure prescribing periods of limitation for the commencement of actions.

★Rehearing denied. Hearing denied by Supreme Court.

According to the evidence and stipulations of fact at the trial, the stock was purchased and issued in 1922. Some of it was paid for in installments of $20 per month. The last payment was made at the end of June, 1923. This action was commenced June 22, 1927. A period of more than four years, therefore, elapsed between the purchase and payment of the stock and the commencement of the action, with the possible exception of the last $20 payment, which was approximately three years and eleven months prior to the commencement of the action. The court gave plaintiff judgment notwithstanding the pleas of the statute of limitations. Defendant appeals upon the ground that the court should have sustained this defense.

Respondent contends that the proper period of limitation for this action is prescribed by Code of Civil Procedure, § 338, subd. 4, to wit, three years after the discovery of the fraud or mistake when the action is one for relief upon the ground of fraud or mistake. The respondent and her assignor testified that they were employees working in the appellant's stores at the time of the purchase of the stock and continuously thereafter, and that in January, 1927, in a conversation between the employees in the store they heard for the first time that the stock was void and that it was possible to recover back the money paid therefor.

[1-3] Appellant claims: First, that the action is one on implied contract and not an action for relief upon the ground of fraud or mistake; and, second, that respondent may not rely upon the testimony to the effect that she and her assignor did not discover the invalidity of the stock until January, 1927, because she did not plead this in her complaint. Appellant relies upon those cases which state that one asking for relief against fraud after three years has elapsed must plead in his complaint the time and circumstances of the discovery of the fraud. 16 Cal. Jur. 624. These cases usually deal with the sufficiency of complaints which show upon their face that three years have elapsed since the date of the fraud. Here, however, the complaint being in the form of a common count, did not show on its face that three years had elapsed since the date of the fraud. On the other hand, it has been held that since the plaintiff is not allowed a replication to the defendant's plea (Code Civ. Proc. § 462), the plaintiff, without pleading it, may introduce evidence upon rebuttal in avoidance of the plea of the statute of limitations, such as evidence of concealment of fraud. Fox v. Tay, 89 Cal. 339, 24 P. 855, 26 P. 897, 23 Am. St. Rep. 494; Tarke v. Bingham, 123 Cal. 163, 55 P. 759; Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093; 16 Cal. Jur. 616. It is not to be doubted, in fact appellant concedes, that the common count may be used in an action of this kind. 17 Cal. Jur. 616; Minor v. Baldridge, 123 Cal. 187, 55 P. 783. The pleading of the facts, circumstances, and time of the discovery of the fraud and mistake belong more properly to a complaint of a kind which sets out all the facts, and it would seem to have no place in a complaint declaring upon a common count. Such a plea is not a part of the cause of action, and when it appears in a complaint it should be regarded as alleged either to anticipate a defense or to avoid the plea of the statute of limitations by demurrer when the complaint would otherwise appear on its face to be barred by the statute. We may add that it has been held that the omission of this matter from a complaint directly declaring upon fraud will not be held prejudicial error after trial and judgment where the plea of the statute is raised by answer and not by demurrer. Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243.

[4] Appellant also claims that the public records of the state of California would have shown the plaintiff and her assignor at any time that the purchased stock was void, and that therefore they were not diligent in failing to discover the fraud sooner. They were employed as saleswomen in the stores of the defendant corporation, and no fact has been suggested from the evidence which would or should have aroused their suspicion or shaken their confidence in their employer. "Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent ommission. Bank of Mendocino v. Baker, 82 Cal. 114, 22 P. 1037, 6 L. R. A. 833; Prouty v. Devin, 118 Cal. 258, 50 P. 380. In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry, and for these reasons, under the facts of this case, we think the finding of the court sufficient and sufficiently supported by the evidence." Tarke v. Bingham, 123 Cal. 163, 166, 55 P. 759, 760. See, also, Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243.

The discovery of the invalidity of the stock was not merely a discovery of the provisions of law which respondent and her assignor were presumed to know, but it was likewise a discovery of the fact that the stock had been issued and sold without a permit.

[5] No doubt the form of the action is one upon an implied contract, but the criterion for determining the particular statute of limitations applicable is, not the form of the action, but the substance of it and the nature of the right, the violation of which creates the right

of action. This is particularly true in those jurisdictions where common-law forms of action have been abolished. Bates v. Bates Machine Co., 230 Ill. 619, 82 N. E. 911, 12 Ann. Cas. 175; Union Tool Co. v. Farmers', etc., Nat. Bank, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417; Bell v. Bank of Calif., 153 Cal. 234, 94 P. 889; Miller & Lux v. Batz, 131 Cal. 402, 63 P. 680; Lord v. Morris, 18 Cal. 482.

[6] The substance and nature of the right which gave respondent a cause of action in this case was not contract. Appellant never in fact and reality agreed to pay back the money received for the stock. The contract implied by law is merely a fiction of law and does not, therefore, go to the substance of this cause of action. A fiction of law is introduced to promote justice, not to work a wrong contrary to the real truth and substance of the thing. Hibberd v. Smith, 67 Cal. 547, at page 561, 4 P. 473, 8 P. 46, 56 Am. Rep. 726. If all the facts of this case had been set forth in the complaint in detail instead of recourse having been had to the common count, it would readily have appeared that plaintiff's cause of action was based upon either fraud or mistake. When a corporation issues to the public certificates of stock, regular on their face, it amounts substantially to a representation that the certificates are regular and valid. Certificates of stock so issued by a corporation, but which were irregular or void for reasons not participated in by the stockholder, have been held to amount to a misrepresentation and fraud upon the part of the corporation officials for which the corporation is answerable. Green v. Caribou Oil Mining Co., 179 Cal. 787, 178 P. 950; Sykes v. Pure Food Cider Co., 157 Iowa, 601, 138 N. W. 554; Windram v. French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750.

In Union Tool Co. v. Farmers' Nat. Bank, supra, the action was by a depositor to recover from the bank money deposited, but which had been paid out by the bank upon a forged or raised check. The court held that the substance and gravamen of the action was based upon the payment of a forged or raised check, and therefore governed by Code of Civil Procedure, § 340, and was not governed by Code of Civil Procedure, § 348, relating to an action to recover money deposited with a bank. There is a strong analogy between that case and the instant one. The action for recovery of money by the depositor corresponds to an action by this plaintiff upon an implied contract for the return of the money paid for the void certificates of stock, while the action based upon the payment of a forged check would correspond to an action by this plaintiff based upon the fraud or mistake of the corporation in selling the stock to her without authority to do so.

[7, 8] We conclude, therefore, that the statute of limitations prescribed for this cause of action is that contained in Code of Civil Procedure, § 338, subd. 4, and that under the terms of that section the action was not barred at the time it was commenced. The court omitted to make a separate finding upon the statute of limitations, but the error in so doing will not be held reversible because the evidence at the trial was such that if a finding had been made on this issue it must necessarily have been adverse to appellant. 24 Cal. Jur. 944.

The judgment is therefore affirmed.

We concur:
STURTEVANT, J.; NOURSE, J.

101 Cal. App. 49

HOLABIRD v. SUPERIOR COURT IN AND FOR FRESNO COUNTY. (Civ. 7038.)★

District Court of Appeal, First District, Division 1, California. Sept. 30, 1929.

Rehearing Denied Oct. 30, 1929. Hearing Denied by Supreme Court Nov. 25, 1929.

1. Executors and administrators 🔑29(3)—Order granting letters of administration is adjudication of deceased's residence, which is binding for all purposes of administration of deceased's estate, unless vacated on direct attack.

Order granting letters of administration is an adjudication of the fact of residence of the deceased in the county over which the court has jurisdiction, and is binding on the whole world for all purposes of administration of the estate of deceased, unless vacated or set aside on direct attack.

2. Executors and administrators 🔑29(2)—Determination of deceased's residence in administration proceedings cannot be attacked collaterally.

While residence of deceased is jurisdictional in proceedings for administration of estate, it is a jurisdictional fact which the court must determine from evidence produced before it, and determination of deceased's residence cannot be attacked collaterally.

3. Courts 🔑475(2, 3)—Superior court of county in which petition for letters of administration has first been filed has exclusive jurisdiction to determine deceased's residence.

Superior court of county in which petition for letters of administration has first been filed has exclusive jurisdiction to determine question of residence of decedent, and courts of other counties must abide by that determination, which is reviewable only on appeal.

4. Mandamus 🔑4(4)—Mandamus did not lie to require court to hear motion to vacate order admitting will to probate, on ground that decedent was nonresident of county; remedy being by appeal.

Where proper notice was given to all interested parties of time and place of hearing on application for admission of will to probate and issuance of letters testamentary, mandamus will

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★Rehearing denied. Hearing denied by Supreme Court.

not lie to compel court to hear motion to set aside order admitting will to probate on ground that deceased was a resident of another county, since court had jurisdiction to determine question of deceased's residence, and sole remedy for error in its determination was by appeal.

Application by Mabel Webb Holabird for writ of mandate to be directed to the Superior Court in and for Fresno County. Petition denied.

D. Joseph Coyne, of Los Angeles, for petitioner.

B. H. Cory and W. H. Stammer, both of Fresno, for respondent.

TYLER, P. J. Mandate to compel the superior court of the county of Fresno to hear and determine a motion for an order to vacate and set aside a previous order, admitting the will of one Bessie M. Ball to probate, and appointing an executor thereof.

The petition in substance alleges that the court had no jurisdiction of the estate, for the reason that the deceased was not a resident of the county of Fresno at the time of her death, but, on the contrary, was a resident of the county of Los Angeles, and that the testimony given at the hearing, to the effect that deceased was a resident of the county of Fresno, was untrue.

It appears from the record that Bessie M. Ball died on the 20th day of May, 1929. Thereafter, on the 28th day of May of the same year, Leo A. Seibert filed her will for probate in the county of Fresno, and prayed for letters testamentary thereon. Notice was given of the hearing in all respects as required by law.

On June 7, 1929, at the time and place fixed, testimony was taken of all the material facts alleged in the petition, which was reduced to writing and filed with the clerk. At the close of the hearing the court executed a certificate of proof of the will of deceased, which was duly filed. The court thereupon made its order admitting the will to probate, and further ordered that letters testamentary be issued to Seibert in accordance with his petition. Seibert thereupon qualified as executor, and proceeded to administer upon the estate. Thereafter, on June 22, 1929, petitioner, herein, a sister of the deceased, filed with the clerk of the superior court of the county of Fresno, in said proceeding, a notice of motion for an order revoking and vacating the order admitting the will to probate, and for an order dismissing all proceedings in the matter of the said estate. The motion was based upon the ground that the superior court of the county of Fresno had no jurisdiction to admit the will to probate for the reasons hereinabove stated. Certain affidavits were filed in support of the motion; the executor of the estate filed counter affidavits and an answer thereto, in which he denied that he falsely testified as to the residence of the deceased, and alleged that the deceased was a resident of the county of Fresno at the time of her death. The affidavits filed by the executor were nine in number, and all were to the effect that the deceased was a resident of the county of Fresno at the time of her death. We do not deem a recital of the facts contained in these various affidavits to be necessary.

On the 26th day of July, 1929, at the time specified in said notice, said matter came on regularly for hearing. The executor filed his objections to the hearing of the motion on the ground that the court had no authority, power, or jurisdiction to hear or grant said motion, as the order admitting the will to probate and appointing the executor and directing the issuance of letters testamentary was conclusive upon all persons as to the matters adjudicated in said order, and particularly as to the residence of the deceased. It was further claimed that the notice to revoke was a collateral attack upon the order admitting the will to probate, which order was res judicata upon the subject of the residence of the testator. The court refused to entertain the motion, and the present proceeding followed.

[1, 2] At the outset it may be stated that nowhere in the petition does petitioner claim that she did not have actual notice of the proceedings admitting the will to probate, nor does she recite any facts going to show that she suffered any injury or that she was in any manner prevented from attending the hearing or enforcing her alleged rights. The fraud claimed is purely intrinsic. It is the settled law of this state that an order granting letters of administration is an adjudication of the fact of residence of the deceased in the county over which the court has jurisdiction, and it is binding upon the whole world, unless vacated or set aside on direct attack, for all the purposes of the administration of the estate of the deceased. In re Estate of Relph, 185 Cal. 605, 198 P. 639; In re Estate of Dole, 147 Cal. 188, 81 P. 534; In re Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441. While residence is jurisdictional, it is one of those jurisdictional facts which the court must determine from evidence produced before it, and, when determined, it cannot be attacked collaterally. In re Estate of Griffith, 84 Cal. 107, 23 P. 528, 24 P. 381.

[3, 4] The superior court of a county in which the petition for letters has first been filed has exclusive jurisdiction to determine the question of residence of the decedent, and the courts of other counties must abide the determination of that court, which is reviewable only upon appeal. In re Estate of Spencer, 198 Cal. 329, 245 P. 176. Here the court had jurisdiction to hear the proceeding and weigh the evidence and consider its sufficiency to establish the residence of the deceased, and, if it erred in that respect, the proper remedy was by appeal within the time allowed by law. As above stated, no claim is here made

that any extrinsic fraud was practiced in the procurement of the order, and the petition alleges that proper notice was given to all interested parties of the time and place of the hearing, as required by law.

Under these circumstances, the petitioner is not entitled to the remedy prayed for. The petition is therefore denied.

We concur: KNIGHT, J.; CASHIN, J.

208 Cal. 364

BALDWIN et al. v. PACIFIC ELECTRIC RY. CO. et al.★

McGUFFIN v. SAME.

(L. A. 9526.)

Supreme Court of California. Oct. 8, 1929.

Rehearing Denied Nov. 4, 1929.

1. Trial ⊂⇒260(8)—Refusal of instruction as to duty to illuminate railroad crossing and gates held not erroneous in view of other instructions.

Refusal of instruction as to duty of railroad to exercise reasonable care to illuminate gates and crossing *held* not erroneous, in view of other instructions relative to railroad crossings being warning of danger only in case reasonably careful person could see and know they were there.

2. Railroads ⊂⇒307(4)—Railroad's failure to light crossing with artificial light or to station flagman there was not negligence per se, where not required by statute.

Failure of railroad to light crossing with artificial light or to station flagman at crossing was not negligence per se, in absence of statute placing duties on railroad.

3. Negligence ⊂⇒93(1)—Contributory negligence of automobile driver could not be imputed to passenger.

Contributory negligence of automobile driver could not be imputed to passenger who was a guest in the car at time of accident.

4. Appeal and error ⊂⇒930(2)—Supreme Court must assume jury followed correct instruction.

Supreme Court on appeal must assume in support of judgment that jury followed correct instruction relative to negligence sufficient to prevent recovery.

In Bank.

Appeals from Superior Court, Orange County; Z. B. West, Judge.

Separate actions by Nellie Baldwin and others and by Mrs. James T. McGuffin against the Pacific Electric Railway Company. Judgment for defendant, and plaintiffs appeal; the appeals being consolidated by stipulation. Affirmed.

Superseding opinions 273 P. 155; 274 P. 72.

Rehearing denied; CURTIS, J., dissenting.

Bertrand J. Wellman, of Los Angeles, and Norval N. Edwards, of Orange, for appellants.

E. E. Morris and Frank Karr, both of Los Angeles, and S. M. Reinhaus, of Santa Ana, for respondents.

LANGDON, J. This is an appeal by the plaintiffs in two cases which were consolidated by stipulation in the trial court because each case involved the same facts. The plaintiffs, respectively, are heirs of Elwood L. Baldwin, deceased, and James T. McGuffin, deceased. Baldwin and McGuffin were killed in a collision between an automobile driven by McGuffin, in which Baldwin was riding, and an electric car owned and operated by defendant Pacific Electric Railway Company.

It is unnecessary to recite the facts in great detail, because the verdict of the jury has determined the issues of negligence upon conflicting evidence. In brief, the situation is that the automobile was being driven, at night, along the state highway which was intersected by the railway tracks of the defendant company. The railway tracks were protected by gates which were properly lowered at the time of the collision. From the gates was suspended a red lantern. Decedents crashed through the gates onto the tracks, and the automobile in which they were riding was struck by the train. There are some conflicts in the evidence, as is usual in a case of this kind, but the record contains abundant evidence to support the finding of the jury that the defendant company was free from negligence and that the accident was caused solely and proximately by the negligence of McGuffin. There is in the record testimony which indicates clearly that the driver of the automobile was or should have been familiar with the crossing, and there was no evidence to indicate the contrary. He had lived for eleven years at a nearby town, and his wife testified that they had driven over the crossing occasionally during that time, but not often. While appellants contend vigorously that the decedent McGuffin was not familiar with the crossing and their objection to some of the instructions given by the court is predicated upon this assumption, there is no evidence in the record to support this assumption, and, as we have stated, the only evidence upon the question indicates the contrary.

The larger portion of the appellants' brief is made up of lengthy quotations from the evidence favorable to appellants, but, in the face of the very decided conflict between the facts and inferences to be drawn therefrom, we shall not attempt to usurp the province of the jury in determining the facts.

It is stated in appellants' brief that the "major errors relied upon for reversal are: The refusal of the court to give plaintiffs' instruction No. 3 to the effect that the defend-

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★Rehearing denied.

ant was required to exercise reasonable care to illuminate the gates and crossing in question, and giving defendants' instruction No. 29 to the effect that it was not negligence not to have the crossing lighted with artificial light and instruction No. 14 to the effect that it was not negligence to have no wig-wag or human flagman at the crossing."

[1] The effect of the plaintiffs' instruction No. 3, which was refused by the court, was conveyed to the jury by plaintiffs' instruction No. 13, which was given as requested and which stated: "While a railroad crossing is warning of danger, if the conditions are such that it cannot be seen or known to a person exercising reasonable care, it is not a warning and all that is said in these instructions about a railroad crossing being a warning of danger only applies to those crossings that a reasonably careful person could see and know were there."

[2] As to the alleged error in giving instructions 29 and 14 at the request of defendants, it is conceded that, in the absence of statute, there is no duty on the part of the railway company to have a crossing lighted with artificial light, nor to have a flagman stationed there, and that no statute placing these duties upon the defendant railway company was in existence is also conceded. It was therefore not negligence per se for the company to have neglected to do either. The instruction above quoted, given at the request of plaintiffs and appellants, covers the matter fairly to them, by allowing the jury to say whether, under all the conditions—lighting, warnings, etc.—a reasonably careful person would become aware of the existence of the crossing as he approached it.

While each instruction given and refused by the trial court is set forth in the brief of appellants with an objection thereto, we find no merit in any of the points made.

[3, 4] It is beyond dispute, of course, as argued by appellants, that, although the driver of the car was guilty of contributory negligence, if the defendant railway company were guilty of negligence proximately causing the injury, the heirs of Baldwin, who was a guest in the car, would not be barred from a recovery, as such contributory negligence could not be imputed to him. However, the jury was correctly instructed upon that question to the effect that, if McGuffin's negligence was *alone* the proximate cause of the accident, neither of the plaintiffs could recover. We must assume the jury followed this instruction and found that the defendant company was free from negligence and that the negligence of McGuffin alone proximately caused the accident.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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208 Cal. 329

McCOLGAN v. BANK OF CALIFORNIA NAT. ASS'N et al. (S. F. 12087.)★

Supreme Court of California. Sept. 30, 1929.
As Modified, Oct. 8, 1929.

Rehearing Denied Nov. 4, 1929.

1. Principal and agent ⚷36—Transfer of subject-matter of agency revokes authority of agent (Civ. Code, § 2355).

Under Civ. Code, § 2355, authority of agent is revoked by transfer of subject-matter of agency.

2. Brokers ⚷77—Principal's land, subject-matter of agency, became impressed with lien in favor of agent, for advancements made to principal, where agency was terminated before fulfillment of its terms.

Where contract between principal and agent, whereby agent was to have right to subdivide land, lay out streets, and sell lots, provided that agent should retain from profits due principal any claim for money that had been advanced by agent to principal, and agent advanced to principal $3,250.62 on account of agency, and $1,916.43 as personal loan, on termination of such agency prior to fulfillments of its terms, equitable lien was impressed on property to secure obligation of principal to agent for advancement.

3. Mortgages ⚷151(1)—Party succeeding, to rights of purchaser under deed of trust took subject to equitable lien created under contract recorded at time of execution of such deed.

Where contract between principal and agent was recorded before principal executed deed of trust to secure loan, purchaser taking under such deed of trust took subject to equitable lien created in favor of agent for advancements made by the agent to principal in accordance with terms of agency.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by R. McColgan against the Bank of California National Association and others. From a judgment in favor of defendant Cooperative Land Company, plaintiff appeals. Affirmed, as modified.

Superseding opinions in 267 P. 151, and 274 P. 342.

George D. Collins, Jr., of San Francisco, for appellant.

John L. McNab and Byron Coleman, both of San Francisco, for respondent.

PRESTON, J. In this cause paragraphs 1 to 4, inclusive, of the judgment herein are hereby sustained, and paragraphs 5 to 7, inclusive, thereof are hereby stricken out, and, as so modified, the judgment is affirmed, neither party to recover costs. The effect of this holding is that under the contracts, the subject of this action, the right to terminate

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★Rehearing denied.

them exists, except that, as to advances made for the account of the owner and to him personally, there arose on the revocation of said agency an equitable lien in favor of respondent therefor, which, while not an estate in said property, is nevertheless a charge or lien thereon. We base this conclusion upon the following considerations:

The suit is one to quiet title to about 20 acres of subdivision property located in the town of Mayfield, county of Santa Clara, California. The complaint is in the ordinary form. The answer, in addition to a general denial, sets up possession of the said property in defendant under a certain written agreement dated October 28, 1904, modification thereof dated February 28, 1905, and a supplemental contract dated June 10, 1907, all of which contracts are of record in said Santa Clara county. The nature of said contracts will be referred to hereafter.

Upon these issues the cause went to trial, and the court found that plaintiff and respondent both claimed title under one Percy Beamish, who, at all times between 1904 and 1915, was the owner of the property in question; that on March 12, 1912, said Beamish made a conveyance of said property in trust to secure a loan; that on March 22, 1915, pursuant to said deed of trust, a sale of said property was had, and title passed from said Beamish to the predecessor in ownership of plaintiff here; that on September 19, 1924, plaintiff here, under a series of mesne conveyances, succeeded to all the rights of the said purchaser under said deed of trust; that after said sale, and on March 14, 1916, said Percy Beamish died. The court also found that the said three contracts above referred to were in existence as claimed by respondent, and that under said contracts respondent was in possession of said property, and pursuant to said contracts had advanced for the account of said Beamish the sum of $3,252.62 as his portion of the carrying charges upon said property, which said sum had accrued interest due thereon to October 1, 1924, in the amount of $1,914.15; that respondent also advanced as a personal loan to said Percy Beamish the sum of $1,916.43, as principal, and $1,650.29, by way of interest, to said 1st day of October, 1924. The court further found that respondent was entitled to remain in possession to carry out fully said written contracts, and to that end the plaintiff, as successor in interest of said Beamish, was under obligation to co-operate in said matter by executing the necessary conveyances to purchasers of said property.

In accord with these findings the court gave judgment declaring said sums, above referred to, to be a lien upon said property, and adjudged respondent to have the right to carry into effect and fully perform his obligations under said contracts, and to that end directed that plaintiff co-operate with him by the execution of such deeds and conveyances as might be necessary to comply with the powers conferred by said contracts, and that, in the event of his failure to do so, a trustee or commissioner be appointed. Plaintiff appealed from so much of said judgment as attempted to confer a lien or rights of any kind or character upon respondent. The rights of other parties as defendants in said action, therefore, need not be considered. A summary of said agreements is necessary to an understanding of the points of law involved.

The contract of October 28, 1904, executed by Beamish, as party of the first part, and respondent, then known as the Co-operative Land & Trust Company, a corporation, as party of the second part, recited the making of the contract in consideration of services rendered and money advanced by the party of the second part, described the property in question, and conferred complete and exclusive control thereof upon the party of the second part until all the terms and conditions thereof should be fulfilled, and all the affairs in connection therewith finally concluded. The party of the second part was to have the right to lay out streets and avenues, to subdivide said property into lots, to sell same in parts or in any manner it saw fit, and the party of the first part ratified and confirmed all acts and deeds done by said party of the second part in respect to said subdivision work, agreed to furnish good and sufficient deeds to any parts or parcels of said land, as suggested by said party of the second part, but said party of the first part was to have control of the selling price of lots, subject to certain restrictions, with power to change it at will. Party of the second part was to receive 5 per cent. commission on the selling price and half the net profits on sales of land above the average price of $300 per acre, interest on deferred payments to be considered profits. No profits, however, were to be divided until party of the first part had received some $6,000, together with taxes advanced, etc., nor until party of the second part should have been reimbursed for money expended in making improvements. It was further provided that the cost of surveying and subdividing said tract, laying out, grading, turnpiking, and graveling, and other improvements of streets, were to be paid by the party of the second part, and should become a charge against the land and added to the net selling price of $300 an acre. Taxes were to be paid by the party of the first part, and were also to be a charge on the land and added to the net selling price of $10,000. Party of the second part was to bear the expense of advertising and selling said land. The terms of sale on deferred payments were also provided for. Lastly, said contract contained the following clause: "This agreement is coupled with an interest, and is only revocable by the consent of the parties hereto; but it is understood that for breach of covenant either party may rescind as provided by law."

The modification of February 28, 1905, is unimportant, and merely consisted of an enlargement of the powers of the party of the second part in the fixing of prices and in the execution of contracts of sale of lots in said subdivision. The court found that the item of grading, etc., for which a lien was specifically given in the first contract, had been fully paid prior to this action.

The contract of June 10, 1907, however, materially changed the original contract, and, while it purported to be a part of the original contract, it especially provided that, in case of conflict therewith, it should prevail over said original contract. The first change was to give the party of the second part, respondent, full power and control of the selling price and terms of sale of said lots, with power to make, fix, or change the price at will, which power was to be absolute. Next, it provided, in effect, that after said party of the first part was paid $6,000, as provided in the original contract, all sums of money received thereafter from the sale of land should be divided share and share alike between the first and second parties after certain expenses, thereinafter to be provided for, were paid. The right to a commission was abolished. Then it was covenanted that all expenses and costs of surveying and subdividing said tract, laying out, grading, turnpiking, and graveling, laying sidewalks, water pipes, and other street improvement, should be paid equally, share and share alike, by the parties.

The fifth clause thereof provided as follows: "It is further provided that the party of the second part shall retain from said one-half the net profits that may become due to the party of the first part from the sale of land sufficient sum or sums to liquidate any claim for money that has been advanced to the party of the first part by the party of the second part." The agreement then closed with this provision: "It is understood by this agreement that it is the intention that it shall be so considered and construed that all the expenses of any kind and nature attending the sale of said tract of land herein described shall be borne equally between the parties hereto, and that thereafter the net profits shall be divided share and share alike between the parties hereto, provided that the share of the net profits belonging to the party of the first part shall be first charged with the mortgage, taxes, and interest, hereinabove mentioned, and also for any money advanced by the party of the second part."

It is the contention of appellant that the above three written agreements when given their full legal import, do no more than confer a naked agency upon respondent, not coupled with any interest whatsoever in the subject-matter. This premise being admitted, the death of Beamish, it is said, terminated the agency. It will be noted, however, that Beamish died approximately one year after he had, by operation of law, lost all interest of every kind and character in the property. Consequently his death is a false quantity in the matter.

[1] However, it may be admitted that, under well-settled rules of law, the transfer of the subject-matter of an agency would itself revoke the authority of any mere agent. Boehm v. Spreckels, 183 Cal. 239, 248, 191 P. 5; Civil Code, § 2355; Mechem on Agency, § 698. Appellant, urging his position, cites the opinion of Chief Justice Marshall in Hunt v. Rousmanier, 8 Wheat. (21 U. S.) 174, 203, 5 L. Ed. 589, wherein it is said: "We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name."

This doctrine, as a general proposition, without doubt obtains to this day and in principle it has been recognized by this court many times. Reference may be had to such cases as Hicks v. Post, 154 Cal. 22, 96 P. 878; Miller v. Lerdo Land Co., 186 Cal. 1, 198 P. 778; Boehm v. Spreckels, supra; Todd v. Superior Court, 181 Cal. 406, 184 P. 684, 7 A. L. R. 938.

Under this rule it is asserted that a sale of the property, or the death of Beamish, had he remained the owner, would have terminated the authority of respondent, inasmuch as under these contracts nothing more than an agreement of agency was conferred by which Beamish, as owner of the land, gave respondent, in consideration of moneys to be expended and services to be performed by it, the exclusive right to sell the land for a compensation to be measured by the price realized from the sale thereof; that the right to compensation did not attach to the lands, but only to an interest in the proceeds arising from the sale thereof, in the event that such sale should be made during the life of the agreement. Hicks v. Post, supra. The soundness of this position is admitted as to the original contract, and as to all features of the subsequent contracts, except the ones now to be adverted to.

In the last contract we find inserted therein certain new features, to wit: That the owner without restriction agreed to pay "equally and share and share alike" such carrying charges as "surveying and subdividing said tract, and the cost of laying out, grading, turnpiking, and graveling, laying sidewalks, water pipes, and other improvements of the streets"; that after the owner received $6,000, as provided in the original contract, the money received should be divided equally after payment of the expenses for which each was liable for his one-half portion; that out of such sales should be deducted by the second party any sums "advanced to the party of the first part." The final clause repealed the statement that "all expense of any kind and nature attending the sale of said tract * * * shall be borne equally," and ended with the statement that, from the net profits falling to the owner, deduction should be made "for any money advanced by the party of the second part."

[2] From the undisputed findings of the court, we have the concrete facts that as to such carrying charges the party of the second part did advance for the account of the owner, Beamish, the sum of $3,252.62, and during said time the party of the second part advanced as personal loans to said owner the sum of $1,916.43. Does the doctrine of Hunt v. Rousmanier, supra, apply to advances and loans of this type? Does the termination of the agency leave the agent without redress against the property? The inapplicability of this doctrine to these advances is manifest, when we bear in mind the nature of the claims. These claims have an existence independent of the exercise of the power conferred. On termination of the contract, if not before, the owner could be sued upon these demands, whether the agency had or had not been exercised. The right to reimbursement does not come into being merely by the exercise of the agency conferred. It must have been the intent of the parties that, on termination of the agency prior to a fulfillment of its terms, a lien should be impressed upon the property to secure the obligation of the owner to the agent for the advancements received.

As was well said in the case of Marziou v. Pioche, 8 Cal. 522, 536: "Where an agent, for the collection of debts, or the sale of property, advances money to his principal before he collects the debt, or sells the property, it must be presumed, from the nature and character of the transactions, that the parties intend the agent shall have a lien for his advances, unless there is 'an express stipulation' to the contrary. It makes no difference whether the advances be made before or after the power is given, so they are approved by the principal. And when the principal, as in this case, expressly gives the power, for the very purpose of providing the means to return the advances made by the agent, there would seem to be no doubt as to the irrevocable character of the power. 5 Cal. Rep. 469, Posten v. Rassette."

This principle has been well stated by Mr. Pomeroy in his work on Equity Jurisprudence, volume 3 (4th Ed.) p. 2962, § 1235, as follows: "The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice."

The doctrine is stated in 17 Ruling Case Law, p. 604, par. 13, as follows: "To dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien."

In the case of Tinsley v. Durfey, 99 Ill. App. 239, 242, 243, we have a situation very similar to the case before us. Tinsley was indebted to Durfey in a certain sum, and Durfey and his associates were constituted agents of the owner for the purpose of sale of the property. Exclusive control of the sale was given to them, and it was provided that, when any portion of the property was sold, the sums should become then due and payable. Speaking of that situation, the court said: "In the event of sale, unquestionably, the contract gave complainants a lien upon the proceeds. While it allowed Tinsley the right to fix the price, it contemplated, and the law inferred, that he should fix a reasonable price, and that the sale should be made within a reasonable time. Equity treats that as done which ought to be done, and as Tinsley had refused to fix a price, and had incumbered the title with mortgages, it follows as a logical sequence that complainants' debt became due, and a lien on the land attached. The form of the agreement which shall create a lien is not very material, for equity looks at the intent and purpose, rather than at the form; and so it has been held that an agreement in writing, whereby the contracting party indicates an intention to make some particular property, or the fund arising from the sale of it, security for a debt or other obligation, creates an equitable lien upon the property so indicated. 3 Pomeroy's Equity, §§ 1235, 1236; Near v. Donnelly, 80 Mich. 130, 44 N. W. 1118."

The above quotation from Mr. Pomeroy has been twice expressly approved in California appellate jurisdictions—Title Ins., etc., Co. v.

California Dev. Co., 171 Cal. 173, at pages 200–202, 152 P. 542; Nau v. Santa Ana Sugar Co., 79 Cal. App. 685, 250 P. 705. See, also, Walker v. Brown, 165 U. S. 654, 664, 17 S. Ct. 453, 41 L. Ed. 865; U. S. v. Butterworth, etc., Corp., 267 U. S. 389, 393, 45 S. Ct. 338, 69 L. Ed. 672. In Jones v. Carpenter, 90 Fla. 407, 106 So. 127, 43 A. L. R. 1409, the history and nature of equitable liens are fully considered.

[3] It should be noted in this connection that the rights of respondent herein accrued prior to the rights of either plaintiff or his predecessors, and that plaintiff stands in the shoes of a purchaser or incumbrancer with full notice. It seems that the predecessors of appellant allowed respondent to remain in possession of said property and to exercise the agency conferred for approximately nine years after the transfer of title from Beamish. Appellant, by the institution of this action in 1924, for the first time essayed to terminate it. This he had the right to do, but in so doing the equitable lien above described attached and became enforceable; hence the conclusion above announced.

We concur: RICHARDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

WASTE, C. J. I concur, but only in so far as the majority opinion rests upon the theory that the transaction between Beamish and the respondent resulted in an equitable lien in favor of the respondent.

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208 Cal. 339

IRISH v. HAHN et al. (L. A. 9622.)

Supreme Court of California. Sept. 30, 1929.

1. Municipal corporations 🔑449(4)—Where charter authorized city to prescribe by ordinance method of procedure in levying special assessments, ordinance, when adopted, had effect of charter provision.

Where charter amendment (St. 1909, p. 1200) authorized city of Pasadena to prescribe by ordinance method of procedure in levying and collecting special assessments for public improvements, ordinance, when adopted, had same force and effect as if terms thereof had been incorporated in charter itself and had same force and effect within city of an act of Legislature.

2. Municipal corporations 🔑406(1)—City derives power to collect special assessment from power of taxation.

City derives its power to levy and collect special assessment from its power of taxation.

3. Municipal corporations 🔑412—Only limitations on exercise of power of special assessment are that improvement be public and that it confer special benefit on property assessed.

Generally speaking, only limitations on exercise of power of special assessment are that improvement must be public in its nature and it must confer a special benefit on property assessed.

4. Municipal corporations 🔑419—Construction of underground conduits for electric wires by city owning electric lighting plant held "public improvement" for assessment purposes.

Construction of underground conduits for electric light, power, and other wires previously maintained on streets by an overhead pole and wire system, by city owning electric lighting plant for purpose of furnishing electric current to city and its inhabitants, *held* to be a "public improvement" for which special assessment could be levied and collected.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Public Improvement.]

5. Municipal corporations 🔑439—Question of benefits from public improvement for which special assessment may lawfully be levied may be raised only in manner provided by law.

Where improvement by city is one for which special assessment may lawfully be levied, question of benefits may be raised only in manner provided by law.

6. Municipal corporations 🔑488, 489(8)—Where ordinance for improvement afforded full opportunity to property owner to be heard, and no objection was raised within time allowed, local body's determination on question of benefits was conclusive.

Where ordinances authorizing and providing for public improvement consisting of underground conduits for electric light, power, and other wires afforded full opportunity to property owner to be heard on question of benefits, and no objection in that behalf was raised within time allowed therefor, local legislative body's determination on question of benefits was final and conclusive.

7. Pleading 🔑121(4), 127(1)—Denial that defendants' property was benefited by improvement, on information or belief was insufficient since denying matter of record, and constituted admission.

In action to recover special assessment, where complaint alleged that defendants' property was benefited by completion of public improvement, denial of each and every allegation of paragraph for want of information or belief on part of defendants to enable them to answer was insufficient to meet issue tendered, since it was mere denial of conclusive determination of board of directors appearing as matter of public record, and constituted an admission of allegation.

8. Municipal corporations 🔑439—City board's determination that defendants' property was benefited by construction of underground conduits for electric wires previously maintained on poles was not abuse of discretion (Civ. Code, § 3479).

Determination of board of directors of city that property of defendants was benefited by construction of underground conduits for electric light, power, and other wires previously maintained on streets by overhead pole and wire system *held* not an abuse of discretion, since presence of poles and wires in front of defendants' property were an obstruction in street and could only be justified when maintained pursuant to public authorization, and otherwise they were a nuisance under Civ. Code, § 3479.

9. Municipal corporations ⟹440—That construction of underground conduit for wires was replacement of facilities theretofore constructed at public expense was no ground for denying special assessment.

That construction of underground conduit for electric wires was replacement of facilities theretofore acquired or constructed at public expense was no ground for denying city power to do reconstruction work by special assessment, since power to reconstruct public improvements is not exhausted when once exercised, in absence of statutory inhibition.

Curtis, Richards, and Seawell, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action to recover special assessment by Edwin A. Irish against Edwin F. Hahn and another. From the judgment, plaintiff appeals. Reversed.

Superseding opinion in 275 P. 835.

Arthur M. Ellis and Thomas S. Bunn, both of Los Angeles, for appellant.

Hahn & Hahn, of Pasadena, and Carroll Searls, of New York City, for respondents.

R. C. McAllaster, City Atty., and Frederick G. Stoehr, Asst. City Atty., both of Pasadena, Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, Jess E. Stephens, City Atty., and William H. Neal, Deputy City Atty., both of Los Angeles, W. Turney Fox, City Atty., Bernard Brennan, Asst. City Atty., and Aubrey N. Irwin, Deputy City Atty., all of Glendale, and Roscoe R. Hess, City Atty., Frederick G. Stoehr, and Leonard A. Diether, Deputy City Attys., all of Pasadena, amici curiæ.

SHENK, J. [1] This action was brought to foreclose a street assessment. Judgment went for the defendants, and the plaintiff appeals on the judgment roll alone.

The city of Pasadena acquired by purchase an electric lighting plant and distributing system for the purpose of furnishing to said city and its inhabitants electric current for light, heat, and power. The purchase price was the proceeds of a general municipal bond issue voted for that purpose. No question is raised as to the power of the city generally to acquire, maintain, and operate said plant and system, including the construction of underground conduits and appliances to replace the overhead pole and wire systems. By charter amendment adopted in 1909 (Stats. 1909, p. 1200), the city was authorized to prescribe by ordinance the method of procedure in levying and collecting special assessments for public improvements, including the construction of underground conduits and appliances for the use and accommodation of electric light and power wires and other uses. On December 20, 1910, the city passed an ordinance providing such procedure, following generally the plan outlined in the various statutes relating to the construction of public improvements by special assessment. This ordinance when so adopted had the same force and effect as if the terms thereof had been incorporated in the charter itself (Mardis v. McCarthy, 162 Cal. 94, 101, 121 P. 389; Harrison v. Horton, 5 Cal. App. 415, 90 P. 716), and had the same force and effect within the city of an act of the Legislature (San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 P. 699; Chapman v. Fullerton [Cal. App.] 265 P. 1035).

On May 31, 1922, the board of directors of said city adopted an ordinance of intention to order the improvement of Colorado and other streets by the construction therein of underground conduits wherein to place the electric light, power, and other wires then maintained on said streets by an overhead pole and wire system. Notice and an opportunity to protest both as to the necessity of the improvement and on the question of benefits to the property proposed to be assessed were duly given. Thereafter the contract was awarded for a price of $46,720. The procedural regularity of the proceedings is not attacked in any way.

The defendants are the owners of property having a frontage of 85 feet on the north side of Colorado street between Euclid and Garfield avenues, and a depth of 231.24 feet. In front of this property the city's overhead pole and wire system was maintained. The defendants' property was, however, served by a pole and wire system maintained on a side street running at right angles to, and connecting with, Colorado street. The underground conduit was constructed on Colorado street in front of the defendants' property for the purpose of replacing the overhead system on both streets and serving the defendants' property from the wires in the underground conduit. The improvement was completed and the property of the defendants was assessed therefor in the sum of $435.26. During the course of the proceedings, the defendants made no objection to the proposed improvement or to the charge for benefits or the amount thereof or to the regularity of the proceedings. In this action to enforce the assessment they contended in the trial court, and now contend, that the city was and is without power to construct said improvement through the medium of a special assessment proceeding.

The trial court found and held that, if the proceedings are not constitutionally invalid as beyond the power of the city to initiate and carry to completion, the real property of the defendants became subject to the lien in the sum prayed for in the complaint.

The bases for the claim that the proceedings are invalid are: (1) That the city acquired said electrical plant and distributing system through the proceeds of general municipal bonds for the payment of which the defendants' property is liable by general taxation; (2) that the city is maintaining and operating said plant and system in a proprietary capacity; (3) that the city charges for the services rendered by and through said system in accordance with the rates regularly established by the municipality; (4) that the underground conduits were constructed for the purpose of replacing the overhead pole and wire system; (5) that the property of the defendants was adequately served by the pole and wire system on the adjoining side street; and (6) that the city in its proprietary capacity pays into the general funds of the city an annual rental for the use of the conduits in question in order to maintain said electrical distributing system. It is therefore argued that the improvement is not shown to be public in its nature, and, further, that a benefit to the defendants' property is not disclosed, and that the proceedings are invalid for the particular reasons above stated.

[2, 3] From an early day in this state it has been established that a city derives its power to levy and collect a special assessment from its power of taxation. Emery v. San Francisco Gas Co., 28 Cal. 346. Later cases are unvarying on this point. See, also, Houck v. Little River District, 239 U. S. 254, 36 S. Ct. 58, 60 L. Ed. 266. The right to install improvements by special assessment is, like the power of general taxation, a continuing power, and is, unless restricted by law, not exhausted by being once exercised. McVerry v. Boyd, 89 Cal. 304, 26 P. 885; McQuillan, Municipal Corporations (2d Ed.) § 1975. Generally speaking, the only limitations upon the exercise of the power of special assessment are that the improvement must be public in its nature, and must confer a special benefit upon the property assessed. Federal Construction Co. v. Ensign, 59 Cal. App. 200, 216, 210 P. 536.

On the record before us, two major questions are presented: First, was the improvement as constructed a public improvement? And, secondly, was the defendants' property specially benefited thereby? If both these questions be answered in the affirmative, it would necessarily follow that the proceedings in question were valid and the assessment is enforceable, unless the other reasons advanced by the defendants deprived the city of the power to proceed.

[4] We think both major questions must be answered in the affirmative. It is now generally accepted that, when a municipality, lawfully so empowered, undertakes to furnish to its inhabitants who will pay therefor the utilities and facilities of urban life, it is thereby performing a municipal and public function. See Pasadena v. Chamberlain (Cal. Sup.) 269 P. 630; In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004. The fact that the function is not governmental is immaterial. It may be proprietary and still be public. The distinction between the governmental and proprietary functions was never made for the purpose of adding to or detracting from either as a public function, but for the purpose of determining the liability of the municipality in tort. City of Pasadena v. Railroad Commission, 183 Cal. 526, 530, 192 P. 25, 10 A. L. R. 1425.

Numerous instances might be cited where similar improvements have been declared to be public and the construction thereof justified under special assessment proceedings. In Larsen v. City and County of San Francisco, 182 Cal. 1, 186 P. 757, the Twin Peaks tunnel, over two miles long, was constructed for the use of the San Francisco Municipal Railway. Brydon v. City of Hermosa Beach (Cal. App.) 270 P. 255, approved the construction by special assessment of ornamental lighting posts to be used in part as electric railway trolly poles. Mills v. City of Elsinore (Cal. App.) 270 P. 224, approved the construction by special assessment of a municipal water supply and distributing system. Santa Clara Valley L. Co. v. Meehan, 62 Cal. App. 531, 217 P. 787, and Kane v. Wedell, 54 Cal. App. 516, 202 P. 340, approved the acquisition of an existing water distributing system by special assessment. In Park v. Pacific Fire Extinguisher Co., 37 Cal. App. 112, 173 P. 615, it was held that the installation of an electric street-lighting system by special assessment was authorized by the Improvement Act of 1911 (St. 1911, p. 730), and that the tearing up of the streets and the placing of conduits therein for the accommodation of electric wires was "street work" as contemplated by that act.

Outside of this state many similar improvements have been declared to be public improvements susceptible of being acquired or constructed by special assessment. The construction of a tunnel to be used by privately owned public utilities was approved in Milheim v. Moffat Tunnel Improvement District, 262 U. S. 710, 43 S. Ct. 694, 67 L. Ed. 1194. The construction of a tunnel at the expense of the taxpayers and to be used by a privately owned street railway was declared to be a public benefit in Browne v. Turner, 176 Mass. 9, 56 N. E. 969. Fisher v. City of Astoria, 126 Or. 268, 269 P. 853, 857, 60 A. L. R. 260, involved the reconstruction of a street-lighting system and the replacing of cedar posts with ornamental posts and overhead wires with underground conduits. The Supreme Court of Oregon held the improvement to be for a public purpose, notwithstanding the private ownership of the electrical plant, and that the city could exercise its power of special assessment in the construction thereof, provided the property assessed was especially benefited. Water and gas mains were authorized to be installed by special assessment in Gleason v. Waukesha County, 103 Wis. 225, 79 N. W. 249. In Ankeny v. City of Spokane, 92 Wash. 549, 159 P. 806, L. R. A. 1917A, 1093, many similar public improvements are referred to with citation of authority. See, also, Smith v. City of Seattle, 25 Wash. 300, 65 P. 612. Other illustrations and citations might be given, but sufficient have been mentioned to show that the improvement under attack is unquestionably a public improvement. See, also, Willmon v. Powell (Cal. App.) 266 P. 1029; Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878; Jones v. City of Portland, 245 U. S. 217, 38 S. Ct. 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660; City of Tombstone v. Macia, 30 Ariz. 218, 245 P. 677; Ewart v. Western Springs, 180 Ill. 318, 54 N. E. 478.

We perceive no essential difference between the construction or installation of water mains to conduct water to a city for fire prevention and other purposes and their installation for domestic and other uses, and, as here, the installation of underground conduits to hold wires for fire and police signal devices and to furnish electric current to consumers of that commodity. The contention of the defendants, therefore, that the enterprise of the city of Pasadena in the construction of said underground conduits was a private, and not a public, enterprise, cannot be maintained.

[5, 6] To the objection that the improvement was and is of no benefit to the defendants' property at least two answers have been successfully interposed. In the first place, if the improvement is, as here, one for which a special assessment may lawfully be levied, the question of benefits may be raised only in the manner provided by law. If, as here, the ordinances authorizing and providing for the improvement afford full opportunity to the property owner to be heard on the question of benefits, and no objection in that behalf is raised within the time allowed therefor, the determination of the local legislative body on the question of benefits is final and conclusive. Noyes v. Chambers & DeGolyer, 202 Cal. 542, 261 P. 1006; Blake v. City of Eureka, 201 Cal. 643, 258 P. 945; Duncan v. Ramish, 142 Cal. 686, 76 P. 661; Brydon v. City of Hermosa Beach, supra. It is well recognized, however, that the question of benefits may become a judicial one when the determination of the city authorities is attacked on the ground of fraud (see Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82), or the proceedings on their face show an abuse of discretion amounting in law to a fraud on the property owner (Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 P. 217, L. R. A. 1918E, 197). None of the grounds of attack which would remove this cause from the operation of the general rule may here rightfully be interposed.

[7] Secondly, assuming that a judicial question is attempted to be raised on the question of benefits, the judgment roll is in this condition: The complaint alleged in detail the several steps in the proceeding leading up to the levy of the assessment, including the passage of the ordinance establishing the district to be especially benefited by the improvement, including the defendants' property. Paragraph XI of the complaint contained the allegation, among others, that by reason of the completion of the work the property of the defendants was benefited. The only denial of this allegation was a reference to the paragraph by number and a denial of each and every allegation thereof for want of information or belief on the part of the defendants to enable them to answer. This form of denial was insufficient to meet the issue tendered. It was a mere denial of the conclusive determination of the board of directors appearing as a matter of public record, and constituted an admission of the allegation. Mulcahy v. Cuckley, 100 Cal. 484, 35 P. 144; 21 Cal. Jur. p. 150. This form of the pleading may have constituted the reason why the court did not make any finding whatever on the question of benefits.

[8] There is nothing on the face of the proceedings, in so far as they appear on the judgment roll, which would indicate or suggest fraud, actual or constructive, or an abuse of discretion in the determination of the board of directors of the city that the property of the defendants was benefited by the improvement. The contrary is apparent. The poles and wires in front of the defendants' property were an obstruction in the street preventing the free use of the thoroughfare by the defendants and the public generally. Their presence in the street constituted an element of danger, and could only be justified when maintained pursuant to public authorization. Otherwise they were a nuisance. Civil Code, § 3479. As said in Fisher v. City of Astoria, supra, the elimination of overheard wires "yields to the street a more spacious appearance," and, while the improved appearance of the street as affected by the improvement may not in and of itself be sufficient benefit to justify a special assessment, we are not prepared to say that it might not have an important bearing on the question of property values beneficial to the property from in front of which the poles and wires are removed.

[9] The fact that the construction of the underground conduit was a replacement of facilities theretofore acquired or constructed by public expense can afford no good reason for denying the city the power to do the reconstruction work by special assessment. The power so to reconstruct public improvements is not exhausted when once exercised

in the absence of statutory inhibition to that end. Wells v. Wood, 114 Cal. 255, 46 P. 96. None here exists.

The defendants stress the point that their property was already adequately served by a pole and wire system from the side street, and that the construction of the conduit in front of their property was unnecessary. But one of the purposes of the improvement was to eliminate the pole and wire system on the side street. This objection does not negative power of the city to conduct the proceeding, but rather goes to the question of benefits which, as has been shown, the defendants have waived.

The other points urged by the defendants are collateral to the two major questions, and we find in none of them a sufficient reason to invalidate the assessment on any constitutional ground.

Numerous amici curiæ on behalf of the county of Los Angeles and municipalities in said county have presented briefs. Some of them call attention to the fact that by charter provision and by many statutes the municipalities in this state have been authorized to acquire or construct public improvements such as the one hereunder attack; that in many instances the public authorities have availed themselves of this power, and it is urged that, if the assessment in this case be invalidated, many assessment proceedings heretofore completed and pending will be uprooted and an important public function destroyed. The fact that such power is conferred on municipalities and other governmental agencies by numerous statutes and charters cannot be gainsaid, but the considerations urged by amici curiæ could not serve to uphold an invalid assessment or confirm an unauthorized power if the same were in fact unauthorized by the constitution or laws of the state. Such considerations do, however, accentuate the importance of this case in the field into which it has been injected.

There is nothing in the judgment roll which would destroy the power of the city to conduct the proceedings or which would disturb the conclusiveness of the determination of the board of directors of the city on the question of benefits.

The judgment is therefore reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.

CURTIS, J. We dissent. The special assessment upon which the complaint herein is predicated was levied against defendants' property for the purpose of paying the expense of constructing an underground conduit, and placing therein certain overhead wires in front of defendants' property. These wires were a part of the distributing system and electrical light plant, a public utility owned and operated by the city of Pasadena. This system and plant had been purchased by said city and paid for from the proceeds of a general bond issue. The property of defendants was a portion of the property which was taxed for the purpose of paying said bonds. The placing of said wires in a conduit underground was simply a replacement of a part of the distributing system of said utility which had been paid for by the proceeds of said bond issue. To compel the defendants to pay for said replacement in addition to what they are compelled to pay in taxes to meet the principal and interest on said bonds would impose upon them a greater charge than that exacted from the general body of consumers in said city, and would amount to double taxation. The assessment therefore is void as violative of the constitutional provisions which assure to all the equal protection of the law. It is further violative of the Constitution, which protects the defendants against the taking of their property without just compensation.

We concur: RICHARDS, J.; SEAWELL, J.

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208 Cal. 359

ALWARD v. JOHNSON, State Treasurer.★
(Sac. 4261.)

Supreme Court of California. Oct. 7, 1929.

Rehearing Denied Nov. 4, 1929.

1. Taxation 🔑6—Tax on gross receipts of automotive stage line carrying passengers, freight, and United States mail held property tax, and not tax on carrier's contract with government (Const. art. 13, § 15).

Tax on gross receipts of automotive stage line under Const. art. 13, § 15, *held* tax on property of automotive stage line carrying passengers, freight, and United States mail, and not objectionable as direct levy on carrier's contract with government.

2. Constitutional law 🔑283—Taxation 🔑37—Tax on gross receipts of automotive stage line is not violative of due process clause (Const. art. 13, § 15; U. S. Const. Amend. 14).

Tax on gross receipts of automotive stage line, imposed under Const. art. 13, § 15, is property tax, and does not violate due process clause of Const. U. S. Amend. 14, as arbitrary, excessive, or confiscatory.

3. States 🔑4—Private corporations are not necessarily exempt from state control because of contracts with federal government.

Contracts between private corporations and United States do not necessarily render the corporations government agencies so as to entitle them to freedom from state control.

★Rehearing denied.

4. Taxation ⚷6—One operating automotive stage line for carriage of passengers and United States mail held not immune from state tax on gross receipts as agency of federal government (Const. art. 13, § 15).

One operating automotive stage line carrying passengers, freight, and United States mail *held* not exempt from state tax on gross receipts from carriage of persons and property under Const. art. 13, § 15, as instrumentality or agency of federal government.

5. Taxation ⚷6—One operating automotive stage line over regular route held not immune from gross receipts tax as outside scope of common carrier, notwithstanding carriage of United States mails (Const. art. 13, § 15).

One operating automotive stage line between fixed termini and over regular route for carriage of passengers and freight under contract for carrying United States mails *held* not immune from tax on gross receipts from carriage of persons and property under Const. art. 13, § 15, as outside scope of common carrier, notwithstanding fact that his property was largely employed in service of United States.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Leslie T. Alward against C. G. Johnson, State Treasurer. Judgment for defendant, and plaintiff appeals. Affirmed.

Simeon E. Sheffey and Sherman Blood, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondent.

WASTE, C. J. Plaintiff was engaged in the business of operating an automotive stage line over the public highways between Redding and Big Bar, Cal., carrying passengers, freight, the United States mail and parcels post. He was therefore subject to a tax on gross receipts from the carriage of persons and property, in lieu of all other taxes and licenses. Const., art. 13, § 15. He filed with the state board of equalization a statement showing gross receipts from the operation of his transportation line for the year 1926 amounting to $60,986.47. On the basis of that statement, and pursuant to the Constitution, supra, the board levied a tax of $2,978.78 for the year 1927. Appellant paid the first installment under protest, and brought this action to recover $1,057.16, the portion of the tax assessed against the revenue derived from the carriage of the United States mails and parcels post. A demurrer interposed to his third amended complaint was sustained without leave to amend, and judgment was entered accordingly, from which the plaintiff has appealed.

[1, 2] Appellant attempts to raise questions concerning the method of taxation adopted by the people of the state in 1910, by which the system of state and local taxation was separated, which were long ago settled against his contentions. He first asserts that the actual market value of the various units of property used in the operation of his stage line is not more than $15,000, and that, prior to the adoption of section 15, supra, the ad valorem tax on his property never exceeded $350 per annum. He therefore claims that, as applied to his property, the prescribed method of taxation results in an arbitrary, excessive, and confiscatory tax, violative of the Fourteenth Amendment to the Federal Constitution. He further contends that, inasmuch as the tax is not based upon the true valuation of his property, it ceases to be a tax on property and becomes a direct levy upon appellant's contract to carry mails for the United States government, and is therefore a tax on a federal agency. The question as to whether or not the taxes levied for state purposes by section 14 of article 13, upon the gross receipts of the utilities there enumerated, are taxes upon property, has several times been considered by this court, and in each instance it has been declared to be essentially a property tax. Pullman v. Richardson, 185 Cal. 484, 487, 197 P. 346, affirmed in 261 U. S. 330, 339, 43 S. Ct. 366, 368, 67 L. Ed. 682, and cases there cited. The tax required by section 15 of article 13 of the Constitution on the gross receipts of appellant's business is the identical kind of a tax required by section 14, and is, like the other, essentially a property tax. It is neither arbitrary, excessive, or confiscatory to the extent of rendering it violative of the due process clause of the Fourteenth Amendment to the Federal Constitution.

[3, 4] The second main contention of appellant is that he carries the United States mails and parcels post under a contract with the Post Office Department of the United States government, and for that purpose is an agency of the government, and, as such, immune from state taxation. He cites cases in which the courts have denied the state the right to collect taxes upon transactions in which the federal government is directly engaged (e. g., Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583). But there is a very material difference between such transactions and one in which a private citizen, whose only relation to the government is that of contract, is under obligation to furnish service in accordance with that contract. "Mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control." Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 174, 175, 70 L. Ed. 384. In that case, involving a tax on the income of consulting engineers in state service, the court, speaking through Mr. Justice Stone, said: "* * * Not every person who uses his property or derives a profit, in his dealings with the gov-

ernment, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. [Citing cases.]

" 'It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time.' "

In Railroad Co. v. Peniston, 18 Wall. (85 U. S.) 5, 33, 21 L. Ed. 787, it was claimed that the state of Nebraska had illegally imposed a tax upon the property of the railroad company, the contention being that the property was exempt from state taxation by virtue of the incorporation of the company by the United States as a means for the performance of certain public duties of the government, enjoined and authorized by the Constitution. In considering the contention, the court said: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. * * * They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed."

[5] In his closing brief, appellant for the first time raises the point that section 15 of article 13, supra, applies only to common carriers. He contends that the general definition of a common carrier, i. e., "one who undertakes, for hire or reward, to transport the goods of such as choose to employ him from place to place" (10 Cor. Jur. 39), is not applicable to one engaged in carrying the United States mails. In his third amended complaint filed in this action, appellant alleged that he was "engaged in the business of operating on automotive stage line known as the Redding-Weaverville Stage Line, between Redding, California, and Big Bar, California, * * *" and that the property used in the operation of the line was "devoted chiefly to the carrying of United States mails and parcels post." An examination of his report filed with the board of equalization shows that of the $60,986.47 reported as earned during the year 1926, $18,609.74 was revenue derived from the carriage of passengers and freight. There is nothing in appellant's complaint, or in the briefs filed in his behalf, which would indicate that he did not undertake, for hire or reward, to transport from place to place passengers and the goods of such as chose to employ him. His stage line was operated over the public highways, between fixed termini, and over a regular route. It is true his property was largely employed in the service of the United States; but that does not alter the fact that it was also devoted to public service, and, as was said in Metcalf and Eddy v. Mitchell, supra, it would seem extravagant to say "that an independent private corporation for gain created by a State, is exempt from state taxation * * * in * * * its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time." While appellant's complaint is directed only to the portion of the tax based on the receipts from the carriage of the mails, the tax, as before pointed out, is a tax on the operative property "used in the business of transportation of persons or property," without distinction as to the nature of the property transported.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

208 Cal. 357

RAY v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY. (L. A. 11341.)

Supreme Court of California. Oct. 7, 1929.

1. Criminal law ⟹576(5)—Defendant's consent that trial of criminal charge be set beyond statutory limit held equivalent to "postponement" upon defendant's application, and therefore sufficient excuse for delay (Pen. Code, § 1382, subd. 2).

Where defendant consents that trial of criminal charge be set for a date beyond 60-day limit prescribed by Pen. Code, § 1382, subd. 2, such consent is equivalent to "postponement" upon his application within meaning of that section and is sufficient excuse for delay.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Postponement.]

2. Criminal law ⟹1144(7)—Defendant's consent that trial on criminal charge be set beyond statutory limit is presumed, where cause is so set without objection (Pen. Code, § 1382, subd. 2).

Where defendant fails to object at time trial on criminal charge is set beyond 60-day limit prescribed by Pen. Code, § 1382, subd. 2, requiring dismissal of prosecution if defendant is not brought to trial within 60 days after indictment or information unless trial has been postponed upon his application, consent to postponement of trial is presumed.

3. Criminal law 🔑576(5)—Defendant not having objected to resetting of trial on criminal charge beyond statutory period, and in fact consenting thereto, held not entitled to dismissal (Pen. Code, § 1382, subd. 2).

Where trial on criminal charge, within 60-day period allowed for trial after indictment or information, was reset for trial at time beyond such period, and defendant not only failed to object thereto but actually accepted as satisfactory time so fixed, he was not entitled to dismissal of prosecution under Pen. Code, § 1382, subd. 2, requiring dismissal of prosecution if defendant whose trial had not been postponed upon his application is not brought to trial within 60 days after indictment or information.

4. Criminal law 🔑576(1)—Statute requiring criminal cases to be set for trial within 30 days after plea held merely directory (Pen. Code, § 1050, as added by St. 1927, p. 1036).

Pen. Code, § 1050, as amended by St. 1927, p. 1036, requiring criminal cases to be set for trial within 30 days after entry of plea, *held* to be merely directory and not to require dismissal in event of noncompliance with its provisions.

In Bank.

Application by Estella M. Ray for a writ of mandate to compel the Superior Court in and for San Diego County to dismiss a criminal proceeding. Writ denied.

Superseding opinion in 273 P. 1084.

M. W. Conkling, Arthur Dorn, and Edgar B. Hervey, all of San Diego, for petitioner.

Stephen Connell, Dist. Atty., and E. N. Clark, Deputy Dist. Atty., both of San Diego, for respondent.

WASTE, C. J. By this proceeding in mandamus the petitioner seeks to compel the dismissal of a certain criminal prosecution initiated by the filing of an indictment against her on November 10, 1927. On November 16, 1927, the petitioner entered a plea of not guilty, and the cause was set for trial on December 12, 1927. The record of the court below is silent as to what occurred on the day fixed for trial. It is agreed, however, that neither side had applied for a continuance; but it is a fact that on December 12, and for several days thereafter, the petitioner was actually being tried on another and separate criminal charge then pending against her. Apparently nothing was done in the cause which it is now sought to have dismissed until December 27, 1927, at which time, and without objection from the petitioner, the cause was reset for trial on January 16, 1928. The petitioner not only did not object to resetting the matter for trial on January 16, 1928, but counsel representing her stated to the court that there was "no objection to that date" and that it was "satisfactory." When the cause was called, however, the petitioner moved for a dismissal of the prosecution on the grounds that she had not been brought to trial, as required by subdivision 2 of section 1382 of the Penal Code, within 60 days after the finding of the indictment against her, nor within 30 days after the entry of her plea, as provided in section 1050 of the same code, as added by St. 1927, p. 1036.

[1-4] The consent of a defendant that his trial on a criminal charge be set for a date beyond the 60-day limit prescribed by subdivision 2 of section 1382, supra, is equivalent to a postponement upon his application within the meaning of that section, and is sufficient excuse for the delay. People v. Benc, 130 Cal. 159, 162, 62 P. 404; People v. Chadwick, 143 Cal. 116, 120, 76 P. 884. Consent is presumed when the defendant fails to object at the time the cause is set for trial beyond such period. People v. Rongo, 169 Cal. 71, 73, 145 P. 1017; In re Scott, 81 Cal. App. 577, 578, 254 P. 596; Ex parte Apakean, 63 Cal. App. 481, 482, 218 P. 768. The cause which it is now sought to have dismissed was, on December 27, 1927, well within the 60-day period, reset for trial at a time beyond such period, and petitioner not only failed to object thereto, but, as already indicated, actually accepted as "satisfactory" the date so fixed. Under these circumstances, the provisions of subdivision 2 of section 1382, supra, can be of little assistance to the petitioner. Nor do we think that petitioner may justly derive any comfort from section 1050, supra, wherein the Legislature has provided that criminal causes shall be set for trial within 30 days after entry of plea. This section has been held to be directory merely. People v. Perea (Cal. App.) 273 P. 836. Nowhere in the section is a dismissal provided for in the event of noncompliance with its provisions. Moreover, petitioner's trial on the other and separate criminal charge above referred to did not terminate until after the expiration of the 30-day period provided for in section 1050, supra.

The alternative writ is discharged, and the application for a peremptory writ is denied.

We concur: RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

208 Cal. 368

YODER v. BOARD OF SUP'RS OF RIVERSIDE COUNTY et al. (S. F. 13668.)

Supreme Court of California. Oct. 8, 1929.

1. Waters and water courses ⚷183½, 225—Waterworks district must be definitely and accurately described in formation proceedings (St. 1913, p. 785, as amended).

Waterworks district must be definitely and accurately described in formation proceedings under St. 1913, p. 785, as amended (Deering's Gen. Laws 1923, and Supp. 1925–1927, Act 9123), if order of formation is to be held valid.

2. Waters and water courses ⚷183½, 225—Proceedings for formation of waterworks district not definitely describing district could not be held valid because map filed showed description erroneous and voters understood actual location (St. 1913, p. 785, as amended).

Proceedings under St. 1913, p. 785, as amended (Deering's Gen. Laws 1923, and Supp. 1925–1927, Act 9123), for formation of waterworks district, in which boundaries of district were not definitely and accurately described, could not be held valid because map filed with petition showed clearly that description of district was erroneous and impossible and voters understood what actual location of boundaries was.

In Bank.

Application for certiorari by W. T. Yoder against the Board of Supervisors of the County of Riverside and others to review an order of respondent board purporting to create a waterworks district. Respondents filed a demurrer. Demurrer overruled, writ granted, and order annulled.

Orrick, Palmer & Dahlquist, of San Francisco, for petitioner.

Albert Ford, Dist. Atty., of Riverside, for respondents.

LANGDON, J. This is a proceeding to review an order of the board of supervisors of Riverside county, made under St. 1913, p. 785, as amended (Deering's Gen. Laws 1923, and Supp. 1925–1927, Act 9123), purporting to create Riverside county waterworks district No. 1. Respondents filed a demurrer to the petition, which raises but one issue of law, i. e., as to the sufficiency of the description of the proposed district.

Petitioner is the owner of lands situated in Riverside county and within the territory purported to be contained within the boundaries of said Riverside county waterworks district No. 1 by virtue of said order for formation of said district. He contends that the entire proceedings for the formation of the district are void, in that no definite district is defined any place in the proceedings. The defect pointed out by petitioner runs through the entire proceedings, from the petition which initiated the proceedings to the final order declaring the district formed. The description of the land in the petition for formation of the district, the description in the notice fixing time and place of hearing petition, and the description in the resolution calling election on the proposition of forming the district and incurring a bonded indebtedness, and also the description in the order of the board of supervisors declaring the district formed and organized, admittedly do not describe the land intended to be included in the district. The description used in all these documents refers successively to various points in sections 7, 18, and 19, township 5 south, range 3 west. According to the map of the district which was appended to the petition for formation of the district and which was referred to in the notice of hearing thereon, sections 7, 18, and 19 of township 5 south, range 3 west, are situate not on the easterly but on the westerly boundary of the district as outlined on the map. Apparently, the petitioners intended to refer to sections 7, 18, and 19 in township 5 south, range 2 west.

An attempt to trace on the map the boundaries of the district as set forth in the order shows that the description given is wholly unintelligible, and that is the description which was adopted by the board of supervisors in its notice and order. Also, the county surveyor filed a certificate that the petition sets forth a full, true, and correct description of the boundaries of the proposed district as shown on the map attached to and made a part of the petition and that said boundaries as described in said petition are fully and accurately delineated on said map.

[1] The act under which the proceedings for the formation of the district were taken provides that the petition shall contain the name and boundaries of the proposed county waterworks district to be benefited by the improvement. It would seem that the district must be definitely and accurately described in the formation proceedings if the order of formation is to be held valid.

In McQuillan on Municipal Corporations (2d Ed.) § 279, it is said: "It is thus obvious that every municipal corporation must have its boundaries fixed definitely and certainly in order that they may be identified and that all may know the exact scope or section of territory or geographical division embraced within the corporation limits and over which the local corporation has jurisdiction. Unless the boundaries are described with certainty so that it is possible to determine the precise area intended to be included within the municipal limits, the incorporation will be void. * * * Under statutes which require the tribunal authorized to make the order of incorporation to set out the metes and bounds in the order, an improper description will render the order of incorporation void." See, also, Dillon on Municipal Corporations (5th

Ed.) § 352; I. O. Johnson Corp. v. City of Los Angeles, 198 Cal. 308, 245 P. 164; Ferry v. O'Brien, 188 Cal. 629, 206 P. 449; Bay Rock Co. v. Bell, 133 Cal. 150, 65 P. 299; 43 Cor. Jur. p. 106. There are also numerous authorities from other jurisdictions, closely in point, which are cited in the able brief filed with us by petitioner; but it is unnecessary to extend this opinion by a discussion of them.

[2] Respondents urge that since the map filed with the petition to the Supervisors shows clearly that the description of the district is erroneous and impossible and as every one who voted at the election understood what the actual location of the boundaries was and no one is aggrieved by the error, this court should hold the proceedings valid and the error inconsequential. But such a course might result in many persons being seriously aggrieved who might later purchase bonds and perhaps have them held invalid because the proceedings upon which they were issued violated constitutional guaranties. Unfortunately, the error continued through all the proceedings and the legal, and economically sound procedure now is to correct it before further rights and equities become involved.

The demurrer to the petition filed herein is overruled; the writ prayed for is granted, and the order of the board of supervisors of Riverside county, made on August 5, 1929, purporting to create Riverside county waterworks district No. 1, is annulled.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.

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208 Cal. 353

PARESES v. CALIFORNIA STATE BOARD OF PRISON DIRECTORS et al.

(S. F. 13526.)

Supreme Court of California. Oct. 5, 1929.

1. Prisons 🔑15—One convicted of second degree murder with deadly weapon, having failed to serve minimum term under law relating thereto, could not compel determination of sentence (Pen. Code, § 1168, as amended by St. 1927, p. 1491; § 190, as amended by St. 1927, p. 1952).

Failure of one convicted for second degree murder with a deadly weapon to serve minimum term prescribed by Pen. Code, § 1168, as amended by St. 1927, p. 1491, for offense with a deadly weapon, defeated his right to compel the state board of prison directors to determine length of time in excess of minimum he was required to serve, regardless of provisions of Pen. Code, § 190, as amended by St. 1927, p. 1952, reducing punishment for second degree murder, in that the minimum term prescribed for offense of being armed with deadly weapon was applicable.

2. Statutes 🔑231—Codes must be read together and construed, if possible, to give effect to all provisions.

Codes and the several sections thereof must be read together and so construed as to give effect, where possible, to all provisions thereof.

3. Mandamus 🔑154(4)—Allegation, in petition against prison directors, that prisoner was entitled to credits for good behavior, held insufficient (St. 1917, p. 665).

Allegation that one confined in state prison was entitled to certain credits for good behavior was insufficient, in absence of showing that board of prison directors had by affirmative act in accordance with St. 1917, p. 665, accorded credits, and that they had not been forfeited by said board.

In Bank.

Original proceeding in mandamus by Demetreous Pareses against the California State Board of Prison Directors and others. Alternative writ discharged, and application for peremptory writ denied.

Demetreous Pareses, in pro. per.

U. S. Webb, Atty. Gen., and Emory F. Mitchell, Deputy Atty. Gen., for respondents.

WASTE, C. J. Petitioner, claiming to have been incarcerated in the state's prison for the minimum term prescribed by law for the crime of second degree murder, for the commission of which offense he was duly tried and convicted, seeks by this proceeding in mandamus to compel the respondent board of prison directors to determine, as contemplated by section 1168 of the Penal Code, what length of time, if any, in excess of such minimum term he shall be so confined.

At the time of petitioner's conviction and sentence, section 190 of the Penal Code fixed the punishment for second degree murder at "not less than ten years." In 1927 (Stats. 1927, p. 1952) this section was amended to read, in part, that "every person guilty of murder * * * in the second degree is punishable by imprisonment in the state prison from five years to life; provided, however, this section is to apply to all persons now serving sentence in a state prison for murder of the second degree and the sentence of such persons may be modified or reduced to conform to this section. * * *" Claiming to have been confined for a period of approximately five years and eight months, and citing this recently enacted amendment to section 190, supra, as authority for his contention, the petitioner urges that it is now the duty of the respondent board to definitely fix and determine the length of time he is to be confined. The principal argument advanced by the Attorney General in opposition to this claim is that the quoted portion of the 1927 amendment to section 190 is violative of article 7, § 1, of the Constitution, as "an attempted usurpation by the legislature of

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the constitutional prerogative of the governor to grant reprieves, pardons and commutations of sentence after conviction."

[1-3] The conclusion we have reached makes it unnecessary that we determine the constitutional question thus raised, for, even if the validity of the amendment to section 190 were to be assumed, a point which we do not now decide, the petitioner would not be entitled to the relief here sought. To explain: If the Legislature at its 1927 session could constitutionally amend section 190 so as to reduce the minimum term of imprisonment to be served by certain persons already legally confined in the state's prison, it could equally as well amend section 1168, supra, as it in fact did (Stats. 1927, p. 1491), so as to provide that the minimum term to be served by "a person not previously convicted of a felony, but armed with a deadly weapon either at the time of his commission of the offense or a concealed deadly weapon at the time of his arrest" shall be seven years, "notwithstanding any other provision of this code or any provision of law specifying a lesser sentence." In our opinion, this amendment to section 1168, and particularly that portion thereof last above quoted, served to qualify and restrict the application of the provisions of the amended section 190, for it is settled that the Codes and the several sections thereof must be read together and so construed as to give effect, when possible, to all the provisions thereof. Petitioner freely admits that he employed a deadly weapon in the commission of the offense of which he stands convicted. If the 1927 amendment to section 190 is constitutional in so far as it purports to reduce the minimum term to be served by persons incarcerated at the time of its enactment, so must be the amendment to section 1168, which qualifies and restricts its provisions, and petitioner not having served the minimum term prescribed by the latter section is not now in a position to compel the respondent board to act in the manner prayed. Petitioner attempts to avoid this conclusion by contending that even if the seven-year period prescribed by section 1168 be taken as the minimum term applicable to his offense, he has fully satisfied the same, "inasmuch as he has been confined for five years and eight months in actual time, this term [having] earned for him in credits, well over two years, which brings his total time of servitude to approximately eight years. * * *" This contention is without merit, for it is based upon the erroneous theory that a prisoner in one of the state's penal institutions is entitled, as of right, to certain fixed credits earned by good behavior while under restraint. Since the enactment of the Indeterminate Sentence Law (Stats. 1917, p. 665), the "recognition to be given to such conduct becomes a matter of consideration and affirmative action by the board [of prison directors] in each particular case." In re Thompson, 54 Cal. App. 177, 178, 201 P. 473. The allegation that petitioner is entitled to certain credits for good behavior is insufficient. It must be made to appear that the board of prison directors by affirmative act has accorded petitioner those credits and that they have not been declared forfeited by said board. In re Thompson, supra; In re Piantanido, 56 Cal. App. 259, 260, 205 P. 17; In re Mann, 192 Cal. 165, 166, 219 P. 71.

The alternative writ is discharged, and the application for a peremptory writ is denied.

We concur: SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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101 Cal. App. 143

PEOPLE v. DUNCAN. (Cr. 1096.)

District Court of Appeal, Third District,
California. Oct. 7, 1929.

Criminal law 🔑1130(4)—Where defendant appealed, but filed no brief and made no appearance at hearing, case was affirmed (St. 1923, p. 553, § 112; Pen. Code, § 1253).

Where defendant, convicted under St. 1923, p. 553, § 112, for driving vehicle on public highway while under influence of intoxicating liquor, appealed, but filed no brief, and made no appearance at time case was called for hearing, case was affirmed pursuant to provisions of Pen. Code, § 1253.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Charles Duncan was convicted of driving vehicle on a public highway while intoxicated, and he appeals. Affirmed.

Hale Day, of Placerville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of El Dorado county of a misdemeanor, to wit, the crime of driving a vehicle on a public highway while under the influence of intoxicating liquor, to wit, violation of section 112 of the California Vehicle Act (St. 1923, p. 553).

The transcript on appeal was filed in this court September 10, 1929. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on October 7, 1929. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

101 Cal. App. 94

CASTLE et al. v. ACME ICE CREAM CO.★

(Civ. 3821.)

District Court of Appeal, Third District, California. Oct. 3, 1929.

Rehearing Denied Nov. 2, 1929. Hearing Denied by Supreme Court Dec. 2, 1929.

1. **Licenses 🔑39—Sale of stock without corporation commissioner's authority held void (Corporate Securities Act, §§ 3, 12).**

Where corporation sold and transferred stock without authority of corporation commissioner as required by Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws 1923, Act 3814), §§ 3, 12, sale and transfer were therefor illegal and void.

2. **Licenses 🔑39—Sale of stock held illegal, where corporation did not first exhibit and deliver copy of permit to sell to purchaser (Corporate Securities Act).**

Where there was failure by corporation which sold and transferred stock to comply with specific requirement of authorization to effect that true copy of permit must be exhibited and delivered to each prospective purchaser of securities before accepting subscription thereof under Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws 1923, Act 3814), sale and transfer of stock was illegal.

3. **Sales 🔑49—When part of consideration for purchase is illegal, contract is ordinarily void for impossibility to determine part inducing agreement, except where there is innocent party (Civ. Code, § 1608).**

When part of consideration for purchase of property is illegal, entire contract is ordinarily void as provided by Civ. Code, § 1608, for reason that it is impossible to determine which part of consideration was controlling factor which induced agreement to purchase, though there is an equitable exception when applied to an innocent party to contract.

4. **Licenses 🔑39—Securities seller failing to procure permit is estopped from setting up defense to action for rescission or damages that consideration is illegal (Corporate Securities Act).**

Seller of securities, who is guilty of failure to procure necessary statutory permit to sell and transfer stock as provided by Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws 1923, Act 3814), is estopped from setting up as defense to an action for rescission or for damages that part of consideration for purchase of property is illegal.

5. **Limitation of actions 🔑100(6)—Action for failure to exchange common stock purchased for preferred stock, commenced few months after discovering corporation misrepresented right to sell, held not barred (Code Civ. Proc. § 338, subd. 4; Corporate Securities Act).**

Where it was alleged and found to be true that corporation through its president falsely represented that it had legal right to sell and issue stock in question as treasury stock as required by Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws 1923, Act 3814), action for damages for breach of contract to exchange common stock for preferred stock, commenced few months after discovery, *held* not barred by provisions of Code Civ. Proc. § 338, subd. 4, providing that action for relief for fraud or mistake must be begun within three years after discovery of facts constituting fraud or mistake.

6. **Licenses 🔑39—Transfer of stock corporation issued directly without authority was not transfer of president's stock indorsed to company and canceled (Corporate Securities Act).**

Where stock owned by president of corporation was indorsed and transferred to company and canceled and other stock was issued directly from corporation to buyers of securities without authority from corporation commission as required by Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws 1923, Act 3814), transfer of stock was not from president to purchasers, but was from corporation to purchasers.

7. **Licenses 🔑39—Agreement providing that corporation purchasing business would exchange preferred stock for common stock of owners held void for lack of authority to exchange (Corporate Securities Act).**

Where original agreement of parties to purchase business specifically provided that corporation would exchange and transfer to owners of business preferred stock of corporation for one-half of value of 90 shares of common stock original owners of business possessed, that part of contract was void for lack of authority to make such exchange and transfer of stock as required by Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws 1923, Act 3814).

8. **Licenses 🔑39—Owner of stock transferred as part consideration for business sold without fraud or concealment could sue for value of stock duly tendered corporation because transfer of stock was unauthorized (Corporate Securities Act).**

Where sale of business was consummated without fraud or concealment on part of owner and transfer of stock of corporation which purchased business as part consideration therefor was illegal and void for lack of authorization as required by Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws of 1923, Act 3814), holders could maintain action for breach of contract to exchange common stock for preferred stock and recover value of stock which was duly tendered to corporation.

9. **Corporations 🔑121(7)—Amount recoverable for failure to deliver corporation stock is market value which must be alleged and proved.**

The amount which is recoverable for failure to deliver corporation stock is measured by market value which must be alleged and proved.

10. **Evidence 🔑84—There is no presumption that face value of corporation stock is real value.**

There is no presumption that face value of stock of corporation is its real value.

11. **Corporations 🔑82—Allegations that plaintiffs were damaged to agreed price because stock purchased was worthless and transfer invalid, in absence of special demurrer, held sufficient to infer claim stock was worth agreed price (Corporate Securities Act).**

Where it was alleged in action for breach of contract of corporation to exchange common

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★Rehearing denied. Hearing denied by Supreme Court.

stock for preferred stock that there was failure of consideration by virtue of invalidity of transfer of common stock because it was not authorized as required by Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws 1923, Act 3814), and that plaintiffs were damaged in sum of agreed price, and further that proceeds of stock to be transferred to plaintiffs were not placed to credit of corporation in treasury, in absence of special demurrer, allegations *held* sufficient to infer that plaintiffs claimed stock was actually worth agreed price at time of contract.

12. Licenses ⟹39—Invalid sales and statement of corporation's assets indicating stock was worth sale price, in absence of contrary evidence, prima facie showed actual value, sustaining finding purchasers were damaged in that amount (Corporate Securities Act).

Where sales of stock and statement of assets of corporation indicated that stock was actually worth $100 per share as paid and there was no evidence in record to contrary in action for breach of contract to exchange common stock for preferred stock, there was sufficient prima facie showing of actual value to sustain findings of court that plaintiffs were damaged to full amount paid for stock because sales were not authorized as required by Corporate Securities Act (St. 1917, p. 673; Deering's Gen. Laws 1923, Act 3814).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by C. H. Castle, Jr., and another against the Acme Ice Cream Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Superseding opinion in 279 P. 1011.

Joseph C. Meyerstein, of San Francisco, and H. K. Landram, of Merced, for appellant.

Edward Bickmore, of Merced, for respondents.

ROLFE L. THOMPSON, J. This is a rehearing of an appeal from a judgment in an action for damages for the breach of a contract and for partial failure of the consideration therefor.

The plaintiffs were the owners of an ice cream business in Merced, called the Castle Ice Cream Company, valued at $45,000, which was sold and delivered to the defendant corporation subject to an indebtedness of $26,679.65, which obligation was assumed by the purchaser. The sale was consummated pursuant to the terms of a written contract which was executed by the respective parties August 22, 1922. The title to the ice cream plant passed to the purchasers. In addition to assuming the indebtedness above mentioned, the balance of the purchase price agreed upon was the sum of $1,000 in cash, which was paid and the transfer of "common stock of the Acme Ice Cream Company in the amount of $9,000 par value," which was issued by the corporation and delivered to the plaintiff. In the contract for the purchase of the Castle Ice Cream Company it was agreed that plaintiffs might exchange one-half of the common stock which was transferred to them for preferred stock of the corporation of a similar value. C. O. Swanberg, the president of the corporation, was the owner and holder of 4,500 shares of common stock which had been duly issued to him in payment of a debt due to him from the corporation. In fulfillment of the contract which is involved in this action, Swanberg transferred to the corporation his stock. His certificate for 4,500 shares was indorsed and canceled and the corporation, on August 25, 1922, issued to the plaintiffs two certificates of common stock of 45 shares each of the total par value of $9,000. This stock was issued and transferred to the plaintiffs without the authorization of the corporation commissioner of California. In a contract executed by the respective parties four days subsequent to the original purchase, it was agreed that within two years therefrom the plaintiffs might exchange one-half of their common stock for preferred stock of the same value. On May 25, 1924, pursuant to the last-mentioned agreement, plaintiffs tendered to the defendant 45 shares of common stock and demanded preferred stock in exchange therefor. The defendant failed and refused to consummate this exchange. Thereafter for the first time, the plaintiffs discovered that the defendant corporation had never procured from the California corporation commissioner an authorization to sell or transfer this common stock, and that the stock transaction was therefore void. The plaintiffs then tendered to the defendant corporation the entire $9,000 issue of common stock on the ground that the issue of stock was void, and demanded in lieu thereof the sum of $9,000 in cash, which was refused. This action for damages was then commenced. Judgment for $9,000 was rendered in favor of the plaintiffs. The court found that all of the allegations of the complaint were true and upon the contrary that all of the allegations of the answer in conflict therewith were untrue, but did not specifically find the market value of the stock.

The appellant contends that the plaintiffs' sole remedy consists of an action of rescission which must fail for the reason that there was no offer to restore the entire consideration; that a suit for damages will not lie in an action which is based on a contract, the consideration for which is wholly or partially illegal; that the judgment is not supported by the evidence for the reason that there is a total lack of proof of the value of the stock in question; and that the action is barred by the provisions of the statute of limitations.

[1, 2] It is conceded this is not an action for rescission. A return of the entire consideration was not tendered. Rescission is a proper remedy for cancellation of an unlaw-

ful contract when the invalidity does not appear on the face of the instrument. Section 3406, Civ. Code. It is, however, not the only remedy for loss sustained under facts similar to those which exist in the present case. Clearly, the stock transaction was illegal and void for two reasons: First, because the defendant corporation sold and transferred the stock without authority of the corporation commissioner; and, second, assuming that the corporation possessed an authorization to sell the stock in question, there was a failure to comply with the specific requirement of the authorization to the effect that a true copy of the permit was required to be exhibited and delivered to each prospective purchaser of securities before the subscription therefor was accepted.

The California Corporate Securities Act (St. 1917, p. 673, Act 3814, Deering's Gen. Laws of 1923, § 3) provides in part: "No company shall sell * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." And section 4 of said act further provides in part: "The commissioner may impose such conditions as he may deem necessary to the issue of such securities. * * *" Section 12 of the act renders void any securities issued in violation of the provisions of this statute.

[3-5] When a part of the consideration for the purchase of property is illegal the entire contract is ordinarily void (section 1608, Civ. Code; Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285, 291, 13 C. J. 513, § 471), for the reason that it is impossible to determine which part of the consideration was the controlling factor which induced the agreement to purchase the stock. There is, however, an equitable exception to this rule. The rule does not apply to an innocent party to the contract. The seller of securities who is guilty of failure to procure the necessary statutory permit to sell and transfer the stock is estopped from setting up this defense to an action for rescission or for damages. In the Tatterson Case, supra, it is said: "The penalties prescribed by the Corporate Securities Act being all laid on the seller and none on the buyer, and the statute being for the benefit and protection of buyers, the parties are not in pari delicto, and the buyer may have judgment for the money paid out by him under the illegal contract." In the present case it was alleged and found by the court to be true that the plaintiffs were ignorant of the fact that the defendant corporation had failed to procure a permit to sell or transfer the stock in question, and that they did not learn of this fact until April, 1926, which was but a few months prior to the instituting of this action. It was further alleged and found to be true that the defendant corporation, through its president, Swanberg, falsely represented to the plaintiffs that it had a legal right to sell and issue the stock in question as treasury stock. This action was therefore not barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure. Lightner Mining Co. v. Lane, 161 Cal. 689, 698, 120 P. 771, Ann. Cas. 1913C, 1093; McWilliams v. Excelsior Coal Co. (C. C. A.) 298 F. 889.

[6, 7] It is argued that since the 90 shares of common stock of the defendant corporation of the par value of $9,000 were owned individually by Swanberg, the president of the company, and that the sale and transfer of his private stock required no authorization from the corporation commissioner, this transfer of stock was not in violation of statute or void. The contract, however, was with the corporation for 90 shares of its common stock and not with its president as an individual. The record shows: "There was issued to C. O. Swanberg a certificate for 4,500 shares of common stock in accordance with the terms of the permit of the commissioner of corporations then in force; that certificate was duly endorsed by C. O. Swanberg, turned in, cancelled, and out of it in addition to other stock, there was issued on the 25th day of August, 1922, to C. H. Castle, Jr., and Mabel Pearl Castle, certificate C-15 for 45 shares and certificate C-16 for 45 shares." This may have been a circuitous way of avoiding the statute. In any event, it was not a transfer of stock from Swanberg to the plaintiffs. His stock was indorsed, transferred to the company, and canceled. Other stock was issued directly from the corporation to the plaintiffs without authority from the corporation commissioner. Furthermore, the original agreement to purchase the Castle Ice Cream business specifically provided that the corporation would exchange and transfer to plaintiffs preferred stock of the corporation for one-half of the value of 90 shares of the common stock held by plaintiffs. This part of the contract, was also void for lack of authority to make such exchange and transfer of stock.

The only authorization which was obtained from the corporation commissioner prior to the sale and transfer to plaintiffs of the stock in question was dated June 14, 1922, and permitted the sale only of 2,000 shares of *preferred stock*. The sale of no common stock was authorized. Moreover, this authorization provided: "That a true copy of this permit be exhibited and delivered to each prospective subscriber for or purchaser of said securities before his subscription shall be taken therefor or any sale made thereof to him." Respecting this provision the plaintiff C. H. Castle, Jr., testified: "Q. * * * Did anyone ever exhibit any copy or any permit of the Acme Ice Cream Company to sell stock? A. No, sir." The failure on the part of the defendant corporation to comply with this condition of the authorization to sell stock also rendered the sale void. Otten v. Riesener Chocolate Co., 82 Cal. App. 83, 254 P. 942.

[8] The sale of plaintiffs' ice cream business having been consummated without fraud or concealment on their part, and the transfer of defendant's stock as part consideration therefor being illegal and void for lack of statutory authorization, the plaintiffs are entitled to maintain this action to recover the value of the stock, which was duly tendered to the defendant corporation. Tatterson v. Kehrlein, supra.

[9-11] The appellant, however, contends that neither the pleadings nor the proof will support a finding of damages for the reason that the plaintiffs failed to allege or prove the actual market value of the stock. It is true that the amount which is recoverable for failure to deliver corporation stock is measured by the market value which must be alleged and proved. Peek v. Steinberg, 163 Cal. 127, 134, 124 P. 834; 4 Thompson on Corp. (2d Ed.) 699, § 4172. There is no presumption that the face value of stock is its real value. 14 C. J. 718, § 1099. We are of the opinion that the allegations of the complaint sufficiently assert the value of the stock, since the question was not raised by a special demurrer. Likewise we are of the opinion that the evidence constitutes a sufficient prima facie showing of the actual value of the stock in the absence of testimony to the contrary. The complaint alleged with respect to the value of the 45 shares of stock in question that "there has been a failure of consideration for plaintiffs entering into said agreement [by virtue of the invalidity of the transfer of stock] in the sum of $4500.00. * * * and by reason of said failure of consideration therein, plaintiffs have been damaged in the sum of $4500.00." It was further alleged that Swanberg, the president of the defendant corporation, represented to plaintiffs that the proceeds from the sale of the 90 shares of stock which were to be transferred to plaintiffs would be placed to the credit of the corporation in its treasury and that this was not done, and therefore "none of said consideration of $9,000 actually accrued to the benefit of the corporation. * * *" It was further alleged that: "Said shares of the common stock of said corporation of the par value of $9,000 have depreciated in value, and became and now are worthless, to the damage of plaintiffs in the sum of $9,000." These allegations, in the absence of a special demurrer, are sufficient to infer that plaintiffs claimed the 90 shares of stock were actually worth $9,000 at the time of the execution of the contract.

[12] In proof of the actual value of the stock in question our attention is called to the record which does show that the statement was made and filed with the corporation commissioner by the defendant corporation in its application to transfer to Swanberg, the president thereof, 4,500 shares of its common stock, that the value of this stock was $100 per share, for it was transferred to him in payment of an indebtedness of $450,000. This statement was in the nature of an admission on the part of the corporation that the stock was actually worth $100 per share. This authorization also recites that the corporation "proposes to sell and issue 2000 shares of its preferred stock *at par* for cash." The defendant Mabel Castle testified: "I talked with Mr. Swanberg and Mr. Ayers * * * and neither of these gentlemen * * * told me that the 90 shares of stock, *to the extent of $9,000 in value*, was to be transferred to Mr. Castle and myself from the private stock of Swanberg. * * * And *this stock was given as the equivalent of $9,000 in cash.*" The sales of stock and the statement of the assets of the corporation indicate that the stock was actually worth $100 per share. There is no evidence in the record to the contrary. This is a sufficient prima facie showing of the actual value of the stock to sustain the findings of the court.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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101 Cal. App. 146

EL DORADO OIL WORKS v. OAKLAND ELEVATOR & MILLS CO. (Civ. 6432.)

District Court of Appeal, First District, Division 2, California. Oct. 8, 1929.

1. Warehousemen 🔑25(5)—What constitutes "prompt and efficient service" within storage contract held determinable from circumstances of case unless but one reasonable inference can be drawn from undisputed facts.

Where written contract for storage of copra in defendant's elevators provided that defendant would make "prompt and efficient deliveries" when called for, question of what constitutes "prompt and efficient service" is one determinable from all circumstances of particular case unless but one reasonable inference can be drawn from undisputed facts.

2. Appeal and error 🔑1011(1)—Trial court's finding on fact issue on which evidence is conflicting should not be disturbed.

Where evidence on issue of fact involved is conflicting, trial court's finding thereon should not be disturbed on appeal.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by the El Dorado Oil Works, a corporation, against Oakland Elevator & Mills Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. F. Williamson, Roscoe E. Jordan, and W. R. Wallace, Jr., all of San Francisco, for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondent.

NOURSE, J. Plaintiff sued to recover storage charges paid to defendant under protest. Defendant had judgment, from which plaintiff has appealed upon typewritten transcripts.

Plaintiff stored with defendant a large quantity of copra under a written contract in which defendant agreed to weigh and store the copra in its elevators and to make "prompt and efficient deliveries" when called for. The plan of storing copra in elevators such as those used by defendant was an experiment and known to be such by both parties. When demand was made for deliveries the defendant found that the copra had caked in the bins in such a way that it was impossible to remove it from the bins as rapidly as plaintiff demanded. Upon evidence which was uncontroverted the trial court found that "all said copra was so delivered within such time as it was possible to make delivery thereof in the rendition of prompt and efficient service."

[1, 2] It is conceded that the storage charges which are the basis of this action were estimated in full accord with the terms of the contract. The controversy is this: The plaintiff contends that the defendant should have made more prompt deliveries of the copra and thus shortened the period of storage; that this the defendant was required to do by its agreement to render "prompt and efficient service." The question of what is prompt and efficient service, like the question of due diligence, is one which must be determined from all the circumstances of each particular case, except in cases where but one reasonable inference can be drawn from the undisputed facts. 6 C. J. 1163. Where, as here, the evidence on this issue is conflicting, the finding of the trial court should not be disturbed.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

101 Cal. App. 67

GOLDMAN v. DANGERFIELD et al.

(Civ. 3833.)

District Court of Appeal, Third District, California. Sept. 30, 1929.

1. Guaranty 🔑38(2)—Guaranty of payment for merchandise up to stated amount held continuing, in view of circumstances evidencing that single purchase was not contemplated (Civ. Code, § 2814).

Under Civ. Code, § 2814, defining as continuing guaranty one which relates to future liability of principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, guaranty of merchandise purchased from M. by S. up to amount of $1,500 *held* continuing guaranty, in view of circumstances evidencing that guaranty was not intended to cover single purchase.

2. Guaranty 🔑38(1)—Question of continuing guaranty must be gathered from instrument or from course of dealing or from both.

Whether a contract of guaranty is a continuing undertaking is question of intention to be gathered from instrument itself, or from course of dealing between parties, or from both.

3. Guaranty 🔑38(1)—Contract will be construed as continuing guaranty if future course of dealing for definite time or succession of credits was apparently contemplated by parties.

Where it appears that future course of dealing for definite time or succession of credits to be given was contemplated by parties, contract of guaranty will be construed as continuing.

4. Guaranty 🔑38(1)—"Continuing guaranty" is prospective and generally intended to provide limited security in respect to future transactions.

"Continuing guaranty" contemplates succession of liability, and is prospective in operation and generally intended to provide limited security in respect to future transactions.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Continuing Guaranty.]

5. Guaranty 🔑38(1)—Unless guaranty is limited by fair implication from words, it is generally regarded as continuing until revoked.

Unless words of guaranty fairly imply that guarantor's liability is to be limited, it is generally regarded as continuing until guaranty is revoked.

6. Guaranty 🔑59—Continuing guaranty is not discharged unless payments of principal discharge full debt to which guaranty attaches.

Payments by principal do not discharge guarantor under continuing guaranty, unless they discharge the full debt to which the guaranty attaches.

7. Guaranty 🔑91—Evidence held not to sustain finding that guaranty was not continuing.

In action on guaranty of mercantile account, evidence *held* not to sustain findings of trial court that guaranty was not continuing.

Appeal from Superior Court, Tehama County; H. D. Gregory, Judge.

Action by A. S. Goldman against William Dangerfield and another. Judgment for defendants, and plaintiff appeals. Judgment reversed.

M. J. Cheatham, of Red Bluff, for appellant.

McCoy & Wetter, of Red Bluff, for respondents.

PLUMMER, J. The plaintiff, as the assignee of Meyer Cloak & Suit Company, instituted this action to recover judgment against the defendants upon a written guaranty signed by them, in the words and figures following, to wit:

"We hereby guarantee payment for all merchandise purchased from Meyer Cloak & Suit Company, and Granada Knit Mills by Mrs. N. L. Stucky of Red Bluff, California, up to the amount of Fifteen Hundred Dollars ($1500.00).

"Wm. Dangerfield
"E. J. Baker

"Witness: C. E. Patterson
"Dated: March 3, 1925."

The defendants had judgment, and the plaintiff appeals.

The crucial question involved in this case is whether the guaranty just set forth constituted a continuing guaranty. If so, the judgment of the trial court should be reversed, the court having held that the instrument just set forth did not constitute such a guaranty. The record is silent as to transactions between Mrs. Stucky and the Meyer Cloak & Suit Company and the Granada Knit Mills prior to March 3, 1925. However, the record does show that on March 3, 1925, Mrs. Anna L. Stucky was, and prior thereto had been, engaged in the business of selling ladies' furnishing goods, and had a store in the city of Red Bluff where such business was conducted by her. The record further shows that the guarantors knew of the business conducted by Mrs. Stucky, and had been aware of her conducting such business for at least some time prior to the execution of the guaranty. The record shows that after the execution of the guaranty Mrs. Stucky opened an account with the Meyer Cloak & Suit Company, and continued to buy merchandise from said company up to and including December 15, 1926, purchasing in all merchandise of the value of something over $5,000, and paid thereon, from time to time, sums aggregating $3,944.63. There is nothing in the record to show that at the time of the execution of the guaranty it was contemplated that Mrs. Stucky was buying a complete stock of goods, or that the guaranty was intended to cover a single transaction. The account admitted in evidence, to which we have referred, shows that the merchandise was bought from time to time as wanted by Mrs. Stucky in dealing in the furnishing goods referred to. On the 15th day of September, 1926, the defendants, Dangerfield and Baker, signed and delivered to the assignor of the plaintiff a notification that they thereby canceled, terminated, and withdrew from the guaranty dated March 3, 1925. As bearing upon the question of whether the guaranty was a continuing one, the court admitted the following testimony (we quote from the testimony of the defendant Baker):

"Q. By Mr. McCoy: Mr. Baker, you were shown this morning by counsel for the plaintiff the paper that is sued upon and called a guaranty, and it has been introduced here and marked 'Plaintiff's Exhibit 1.' * * * Now, handing you the paper, that you may see what it is again, I will ask you if you understood at the time you were signing that paper, and all the time since, that your obligation under that paper was a continuing or not a continuing guarantee? A. No, sir.

"Q. Well, what did you understand? A. I understood that when she got the first bill of goods that whenever she paid any money in for those bills that it was to be credited on that first bill. Now, that was the way I believe that guarantee was, just like an open account, and as fast as she paid her credit was to be paid on the first bill bought.

"Q. Well, did you understand that that was to be continued from time to time and indefinitely? A. Not for a long time." In this connection we quote from the transcript three letters, one from the Meyer Cloak & Suit Company to E. J. Baker, a reply thereto by Dangerfield, and a letter by Baker stating that he was familiar with the Dangerfield letter:

"San Francisco, Jan. 26, 1926

"E. J. Baker, Red Bluff, Calif.—Dear Sir: In the matter of Nancy Lee Stucky, we have a guarantee executed by you to cover the amount of $1,500.00. This guarantee was made on March 3rd, 1925, and at the present time the account of Nancy Lee Stucky is considerably beyond the guarantee, namely $1,500.00, and her account has never been reduced enough to bring the balance down to $1,500.00.

"On the other hand, we feel that not only the amount beyond the $1,500.00, but the $1,500.00 as well should have been paid long ago. If you had figured interest on same, it would amount to a considerable sum. Please let us know as to the settlement of the account.

"We have made a proposition to Mrs. Stucky, in which we would be only too willing to send merchandise on consignment instead of selling her outright, and in this way, she would benefit on the sale of each and every garment, and would at the end of the accounting period, which is about ten days, settle the entire transaction, namely, return the merchandise not sold, and send us her check for the garments sold, but before this proposition can be considered, the account must be closed in some satisfactory way.

"We would like to hear from you by return mail, as to just what you think of the matter and how to adjust same satisfactorily.

"Yours truly
"Meyer Cloak and Suit Co.
"H. J. Schmidt."

"Red Bluff, Cal. Jany 28, 1926.

"Meyer Cloak & Suit Co., 130 Sutter St., S. F. —Dear Sirs: I am in receipt of your letter of the 26th instant. I fail to see why you should be uneasy in regard to Mrs. Stucky's acc.

"In the short time during which she has been in business she has paid you well over $3,000.00. I understand that she has offered you notes for the small balance over the $1,500.00 and these notes will be duly sent. The only thing is to reduce the $1,500.00 so that you may supply her with more goods, and this she should be in a position to do early next month, when her collections come in.

"You must be quite aware that it is hard to get money out of customers at the moment, but Mrs. Stucky's book debts are all good and she only requires time to come along all right. She has undoubtedly the best class business in this town.

"It would appear to me to be your own interest to help her along as a good future customer.

"I am,
"Yours truly, Wm. Dangerfield."

"Red Bluff, Calif., Jan. 29th, 1926.

"Meyer Cloak Co., San Francisco, Cal.—Gentlemen: Your letter 26th Mr. Dangerfield advises me he has answered yours to him which is the same as to me. He has kept in touch with Mrs. Stucky's affairs and has written you about all that can be said just at present I cannot add anything as he says he has explained conditions fully.

"Yours truly, E. J. Baker."

[1] The transactions which we have heretofore referred to show conclusively that the guaranty was not intended to cover a single purchase. By its own terms it refers to and covers "all merchandise purchased," and thus section 2814 of the Civil Code directly applies. That section reads: "A guaranty relating to a future liability of a principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty." Here, the guaranty covers successive transactions of the principal, Mrs. Stucky. Her liability was renewed from time to time as she purchased merchandise on the open account. There was no time limit in the guaranty. The only limitation therein contained was and is as to the extent of the obligation. The obligation of the principal, Mrs. Stucky, was continued and renewed from time to time as she purchased merchandise, as shown by the account set forth in the transcript.

To sustain the judgment of the trial court the respondents first cite the case of Nason & Co. v. Kennedy, 40 Cal. App. 159, 180 P. 349. The circumstances of that case are almost the antithesis of the case at bar. In the Nason Case, L. C. Kennedy, the son of Mrs. Kennedy, who signed the guaranty, was desirous of obtaining a stock of goods, and had ordered a stock of goods from Nason & Co. in excess of the sum of $750. This order Nason & Co. declined to fill in that sum, but reduced the same to $750, and informed Kennedy that if his mother would sign a guaranty in the sum of $750, the order would be filled to that value. The mother thereupon signed the guaranty involved in that action. The evidence introduced upon the trial of the case justified the conclusion of the trial court that the guaranty was only intended to cover the initial order of L. C. Kennedy for goods to the value of $750.

In the case of Lean v. Geagan, 20 Cal. App. 260, 128 P. 792, it is said: "A guaranty limiting the amount for which the guarantor will be bound, but without limitation as to time, and without circumstances to evince a contrary intention, will, in general, be construed to be a continuing guaranty and operative till revoked. The guarantor will be held liable to the extent of his guaranty, though the principal debtor may have during the existence of the guaranty contracted debts equal to or greater than the sum named therein. The limitation [mentioned] in the guaranty refers to the amount of the guarantor's liability and not to the amount of the dealing between the purchaser and the one who gives the credit."

A case identical in principle, though differing somewhat as to the facts, is that of Sinnige v. Oswald, 170 Cal. 55, 148 P. 203, 204, where the guarantor had guaranteed the payment of rent up to the amount of $1,000. The total rent involved in the lease was a very much larger sum. We find the following language in the opinion: "The defendant Furniture Company contends that its contract of guaranty did not extend beyond the sum of $1000 agreed to be paid by the principal as rent under the lease; and that, since the evidence shows payment by the lessee of more than $1000 of such rental, it follows that the guaranty is fully satisfied. This contention cannot, we think, be sustained. * * * The purpose of the guaranty was to provide the lessor with security for these successive payments of rent. The total rent aggregated over $40,000, and the words 'up to the amount of $1000' were designed to fix a limit to the guarantor's total liability."

In 28 C. J. 961, where the amount of the guaranty is limited but time is not, the law applicable is thus stated: "Where the guaranty contains a limitation as to the amount for which the guarantor will be bound, but contains no limitation as to time, and there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will, in general, be construed to be a continuing guaranty and operative without limitation, except as to the amount of liability, until revoked. The limit mentioned in such a guaranty has reference to the amount of dealing between the principal and the guarantee and the guarantor will be held liable to the extent of his guaranty, notwithstanding the principal debtor may have, during the existence of the contract, contracted debts to an amount equal to, or greater than, the sum named in the guaranty, and paid them. But where it is apparent, either from the language of the guaranty itself or from such language in connection with the circumstances, that the intention was to limit the guaranty to the amount specified for the first transaction, or series of transactions, it is not a continuing one and will not extend to other transactions after such limit has once been reached." In the case at bar it is evident that there is nothing in the surrounding circumstances to show that the intention was to limit the guaranty to any particular transaction. It was simply a guaranty covering "all merchandise purchased," without any limitation as to time, and had no reference whatever to any initial stock of goods or any particular order for goods. The letters which we have set forth show that there was no intent to limit the guaranty to any particular order. The best that can be made of it is that the defendant Baker thought the guaranty was not to continue "for a long time," which justifies only the conclusion that he knew the guaranty covered successive transactions.

In 13 California Jurisprudence, p. 95, in treating on the subject of guaranty, the text is as follows: "Whether or not a guaranty is continuing must be determined from the language of the instrument, or in case of an ambiguity, by resort to parol evidence of the situation surrounding all the parties, and the guaranty interpreted in the light of such circumstances. The tendency of the decisions in this country, however, has been against construing guaranties as continuing, unless the intention of the parties is clearly manifested so that if there is any doubt as to what was intended, the presumption is against holding the guaranty to be continuing." Here, the circumstances surrounding the parties at the time of the execution of the guaranty show that Mrs. Stucky was engaged in the business of buying and selling ladies' furnishing goods, and that in the pursuit of her business it was necessary to purchase such goods from time to time as the trade warranted. There is nothing in the guaranty itself which appears to be ambiguous or uncertain. It was for all goods to be purchased, and limited only as to amount, the parties executing the guaranty having knowledge of the kind of business the person was conducting, for whom they were becoming guarantors. Further quoting from 13 California Jurisprudence, p. 96: "A guarantor may limit the amount for which he will be liable, or the time for which his guaranty will run, or may limit his liability to a single transaction between the principal debtor and the creditor, as distinguished from a continuing guaranty. However, a limitation as to the amount for which the guarantor will be liable does not militate against the construction that the guaranty is a continuing one. Such a limitation is not construed as a condition as to the extent of credit to be given, the breach of which would release the guarantor so the guarantor will still be liable even though the creditor has, at various times, contracted and paid debts equal to, or greater than the amount of the guaranty."

[2-6] In the note to Scovill Mfg. Co. v. Cassidy, reported in Ann. Cas. 1918E, 602, beginning on page 609, is collated a large number of cases dealing with the subject of guaranties. The principal case there cited is to the effect that where a written guaranty shows that the parties look to a future course of dealing or a succession of credits, the guaranty is considered as continuing; that a limitation as to the amount of the guaranty is only a limitation of the obligation of the guarantor, and does not change its continuing character. On page 611 of the volume referred to, a number of cases are cited supporting this statement of the law where, by the terms of the guaranty, it is evident that the object is to give a standing credit to the principal, to be used from time to time either indefinitely or for a certain period, it is generally deemed a continuing character. "Whether a contract of guaranty is a continuing undertaking is a question of intention which must be gathered from the instrument itself, or from the course of dealing between the parties, or from both. If it appears that a future course of dealing for a definite time, or a succession of credits to be given, was contemplated by the parties, the contract will be construed as a continuing guaranty." This exactly applies in the case at bar. The course of dealing and everything connected therewith shows that there was in contemplation a succession of credits. The guaranty gave to the principal creditor a credit to the extent of $1,500. Again, as there said: "A continuing guaranty contemplates a succession of liabilities for which, as they accrue, the guarantor becomes liable. It is prospective in its operation and is generally intended to provide security in respect to future transactions, within certain limits." This, again, is exactly the situation presented by the case at bar. On the same page, citing a number of authorities, we find the following: "Unless the words in which a guaranty is expressed fairly imply that the liability of the guarantor is to be limited, it is generally regarded as continuing until the guaranty is revoked." And further: "While the courts differ as to what words constitute a continuing guaranty, they seem to agree that if the contract is found to be a continuing guaranty the payments by the principal do not discharge the guarantor, unless they discharge the full debt to which the guaranty attaches." A number of illustrations of guaranties, held to be continuing, are found in the note referred to. Thus, a guaranty of payment for all goods which a person may buy from another is held to be continuing. This is almost identical with the language of the guaranty under consideration.

[7] In the case of Kierulff & Ravenscroft v. Koping, 271 P. 353, this court had occasion to consider the same questions presented on the present appeal. The opinion in the Koping Case takes up and sets forth, somewhat at length, the authorities bearing upon guaranties, and there cited the same cases which are referred to herein. Upon this appeal both parties rely somewhat upon the Koping Case. An examination of that case reveals the same state of facts that exist in the present case. The guaranty was not given to cover simply an initial purchase, but was given to cover successive purchases as they might be made from time to time. In the present case the guaranty was not given to cover an initial purchase. The facts which we have hereinbefore set forth show that it was intended to cover a succession of orders. In the Koping Case the guaranty read as follows: "I hereby guarantee Mr. Koping's account to the amount of $500.00. Signed, Teresa E. Koping." True, in addition to the guaranty there was a recitation of the property owned by the guarantor, and, also, in the recitation, a statement that it was given for the purpose of establishing Mr. Koping's credit. In the present case the guaranty does not contain a statement of the property owned by the guarantors, but in the language used, and under the circumstances existing when it was given, the character of the business being conducted by Mrs. Stucky lead irresistably to the conclusion that it was intended to give credit to Mrs. Stucky to the extent of at least $1,500. Not being given to cover an initial purchase, there is nothing upon which to base a finding that the guaranty was not a continuing one. The whole record shows a continuing business, a succession of orders, a continuing liability, and therefore necessitates the conclusion that the guaranty was a continuing one, just as provided for in section 2814 of the Civil Code. We do not deem it necessary to quote at length from the opinion in the Koping Case, and will confine ourselves to the simple statement that the principles therein enunciated, showing the guaranty there involved to be a continuing one, are applicable here.

From what we have set forth, it is evident that the findings of the trial court in this case are unsupported by the evidence, and that the judgment must be reversed. It is so ordered.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

101 Cal. App. 84

PEOPLE v. BRYANT et al. (Cr. 1624.)★

District Court of Appeal, Second District, Division 2, California. Oct. 2, 1929.

Rehearing Denied Oct. 29, 1929. Hearing Denied by Supreme Court Oct. 31, 1929.

1. Indictment and information 🔑159(2)—Allowance of amendment to indictment for obtaining money by false pretenses to show amounts specified related to each lot mentioned held not erroneous (Pen. Code, § 1008, as amended by St. 1927, p. 1040, and § 952, as amended by St. 1927, p. 1043).

Under Pen. Code, § 1008, as amended by St. 1927, p. 1040, allowance of amendments to indictment for obtaining money by false pretenses to show that amounts named therein related to each of twelve different lots mentioned *held* not erroneous, particularly in view of Pen. Code, § 952, as amended by St. 1927, p. 1043, relating to sufficiency of indictment.

2. Criminal law 🔑419, 420(1)—Testimony by witness employed by defendants as agent therefor, that she transmitted certain representations to purchasers, held not hearsay.

In prosecution for obtaining money by false pretenses in sale of trust deed, admission of testimony as to representations made by one employed by defendants as an agent for that purpose and paid a commission *held* not erroneous as against objections that statements were hearsay.

3. Criminal law 🔑442—Escrow directions signed for prospective purchaser by another were properly admitted in prosecution for obtaining money by false pretenses.

In prosecution for obtaining money by false pretenses in sale of trust deed, admission of certain escrow instructions signed on behalf of prospective purchaser by another was not erroneous, in view of fact that they were also signed by defendant.

4. Criminal law 🔑1035(3)—Complaint could not be made on appeal as to remarks by court without having called attention of judge thereto during trial.

Where counsel never at any time during trial called attention of judge to remarks claimed to constitute misconduct or gave him any opportunity to correct harm, if any was done, complaint thereof could not be made on appeal.

5. Criminal law 🔑427(1)—Conspiracy may be proved to establish that act of one conspirator in furtherance of conspiracy was act of both.

Conspiracy may be proved to exist between two defendants for the purpose of establishing the fact that the act of one in furtherance of the conspiracy is in legal contemplation the act of both, and for which both may be convicted.

6. Criminal law 🔑982, 1147—Action of trial court as to application for probation rests in its sound discretion, and will not be disturbed unless capricious or arbitrary (Pen. Code, § 1203).

Where trial court gives consideration to merits of application for probation under Pen. Code, § 1203, the discretion so exercised is not governed by fixed principles of law, but the ac-

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★Rehearing denied. Hearing denied by Supreme Court.

tion rests in sound discretion of court, and will not be disturbed unless it appears to be capricious or arbitrary.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

J. F. Bryant and E. I. Bryant were convicted for obtaining money by false pretenses, and they appeal; the appeal being dismissed as to defendant last named by reason of his death. Affirmed.

See, also, 278 P. 1025.

Charles W. Ostrom, John Henderson Pelletier, and Elliott H. Barrett, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J. The defendants, J. F. Bryant and E. I. Bryant, were convicted on six counts of an indictment charging them and Marion R. Bryant with obtaining money by false pretenses, and acquitted on one count. The jury found the defendant Marion R. Bryant not guilty. Since this appeal from the judgments pronounced upon the verdicts and the order denying the motion for a new trial was perfected, the appellant E. I. Bryant has died, and the appeal by him has been dismissed, leaving as the only appellant J. F. Bryant.

[1] Before reciting the facts in general, we shall consider the statement of appellant that defendants should have been discharged because they were never arraigned or given an opportunity to plead. The situation which counsel contends justifies this assertion is as follows: The original indictment was returned by the grand jury September 26, 1927. On November 22, 1927, the district attorney was permitted to file amendments to the indictment. Reading of the same was waived by counsel, and the trial of the cause was continued until December 14, 1927. Two other continuances carried it over until January 16, 1928. As soon as the jury was sworn to try the cause, or, to phrase it differently, as soon as the defendants were placed in jeopardy counsel for the defense made a motion to discharge the defendants and dismiss the jury on the ground that they had never been arraigned or pleaded to the amended indictment. The amendments which had been permitted were great in number, but all of them may be illustrated by one example: The indictment, after charging the defendants with the offense of obtaining money by false pretenses, with the words or letters omitted by the amendments being indicated by a line of obliteration and the inserted words by italics, alleged that the defendants "with intent to defraud Mrs. Eliza Keogh" represented to her "that one J. E. Hopkins had purchased from them, the said J. F. Bryant, E. I. Bryant and Marion R. Bryant, twelve lots in Blocks 1 and 2, in Tract 1763 in the City of Ontario, State of California; that the said J. E. Hopkins had purchased the said lots for $4,500.00 *each;* that the said J. E. Hopkins had paid $2,500.00 down upon *each of* said lots and had given them, the said J. F. Bryant, E. I. Bryant and Marion R. Bryant, ~~a~~ trust deed*s* for $2,000.00 *each* as the balance of the purchase price of *each of* said lots; that ~~this~~ *a certain* trust deed *covered by one of said lots* was worth the sum of $2,000.00, but that they would discount ~~the~~ *one of* said trust deed*s* to her, the said Mrs. Eliza Keogh for the sum of $1,200.00; that there was a great demand for housing in this locality, and that a bungalow court was being built upon said lots. * * *"

The question raised by counsel necessarily involves the right of the court to permit the amendments illustrated by the foregoing instance, without resubmission thereof to the grand jury. Section 1008 of the Penal Code, as amended in 1927 (St. 1927, p. 1040) reads as follows: "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. The court may order its amendment for any defect or insufficiency, at any stage of the proceedings; and the trial shall continue as if it had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable continuance, not longer than the ends of justice require, may be granted. If the defect or insufficiency be one that cannot be remedied by amendment, the proceeding shall be dismissed, but the defendant shall not be discharged if the court shall direct the filing of a new information or the submission of the case to the same or a new grand jury. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." It is obvious that the section just quoted contemplates the kind of amendments permitted in the instant cause. The cases of People v. Rippe, 32 Cal. App. 514, 163 P. 506; People v. Miller, 34 Cal. App. 641, 168 P. 574; People v. Thal, 61 Cal. App. 48, 214 P. 296; People v. Hinshaw, 194 Cal. 1, 227 P. 156; and People v. Dempster (Cal. App.) 274 P. 592—conclusively establish the discretionary right of the trial judge to permit amendments of such nature so far, at least, as concerns informations. In Ex parte Chambers, 32 Cal. App. 476, 163 P. 223, 224, the trial judge permitted the district attorney to amend an indictment charging perjury to show "what the true facts are," and the appellate court said: "The district attorney did file an amended indictment almost identically the same as the original, but adding, as we have seen, the averment that it was material to know whether the note set out in the indictment was written on January 15th or January 22d, and the further averment that it was written February 5th. But the offense was not changed. The amendment constituted, at most, an additional specification of the perjured testimony, and could not have prejudiced the substantial rights of the accused. In fact, the amendments simply made the indictment more certain in the respect indicated." So here a different offense was in no way attempted to be charged. The amendment stated at most a more flagrant misrepresentation than first alleged. Again, in People v. Donaldson, 36 Cal. App. 63, 171 P. 442, it was held proper to permit the district attorney to amend an information by setting up new and specific pretenses, ancillary to the main inducing cause. We are bound to conclude that the amendments were not improperly allowed, and that appellant could not possibly have been prejudiced thereby, particularly in view of the subsequent continuances which enabled him to thoroughly assemble any additional testimony which may possibly have been made necessary by the amendments.

Counsel relies upon such authorities as People v. Monaghan, 102 Cal. 229, 36 P. 511, to sustain the contention that the failure to rearraign the appellant after the amendments were filed is fatal error. In the cited case no plea was interposed after the demurrer was overruled, and it was held that the cause was never at issue. This is entirely different from the problem confronting us. It is more like the situation presented to us in People v. Dempster, supra, where the soundness of the contention was denied. There the defendants had pleaded not guilty to an offense the nature of which was set forth in the indictment. Furthermore, section 952 of the Penal Code, as amended by St. 1927, p. 1043, providing that the indictment shall be "* * * sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made * * * in any words sufficient to give the accused notice of the offense of [with] which he is charged, * * *" had not been enacted. Undoubtedly, had the amendments been of such a nature as to warrant counsel in seeking to interpose a motion to set aside or a demurrer, the court would have entertained their motion to withdraw the pleas for that purpose. Instead, however, they waived the reading of the amendments and stood upon the pleas already entered. Furthermore, it is not suggested in what manner the appellant was prejudiced. The trial was had in all respects as though the pleas of not guilty to an amended indictment had been interposed. In the case of People v. McCalla, 63 Cal. App. 783, 220 P. 436, no plea at all was interposed on behalf of the defendant corporation, and yet, that case being subsequent to the adoption of section 4½ of article 6 of the Constitution, the court held that the irregularity of procedure did not prejudice the substantial rights of the defendant so as to require a reversal.

Without detailing a considerable mass of testimony, it is well to state at this juncture that the evidence discloses a very crude plan for the speedy and unlawful accumulation of money. The defendants owned quite a number of lots in a comparatively new subdivision in Ontario. Conveyances were made to some person who was agreeable to act as a mere dummy, of one or more lots. The vendee in each instance then signed a note and trust deed, in most cases leaving the name of the beneficiary blank. The defendants, particularly E. I. Bryant, now deceased, advertised the trust deed or deeds for sale, agreeing with the prospective purchaser of the note to make a substantial reduction. Although the prosecution's testimony discloses that the lots were of little value, ranging between $250 and $300, the statement was freely made by E. I. Bryant that the lots had sold for $1,500 apiece; that the purchaser had paid $2,500 in cash and given the note and trust deed for the balance. In one instance it was said that the lot was worth $5,500, and that a deal was pending in escrow for the erection of a large building on it. Similar statements were made to a Mrs. Lou Johnson, whose office was on the same floor of the building as that of the defendants, for the purpose of securing her to aid them in the disposal of the notes and trust deeds.

[2] This last statement brings us to the point where we may discuss the next contention of appellant. He asserts that the court committed error when it permitted Mrs. Johnson to testify that she had transmitted to the prospective purchaser the representations made by the defendant E. I. Bryant for the purpose of inducing the sale. The objection that these statements were hearsay is not well founded—the witness, employed as an agent for the purpose, and paid a commission, acted only as the vehicle for conveying the information imparted to her by the defendant.

[3] The next objection of appellant requiring notice is to the effect that certain escrow instructions should not have been admitted because, at the request of Mrs. Keogh, Mrs. Johnson signed them for and on behalf of the former. Appellant apparently ignores the very potent fact that they were also signed by him. This assertion of error on the part of counsel is on somewhat the same footing, and apparently involves the same lack of merit as is obvious in their contention that a check for $1,500 was improperly admitted on account of a lack of foundation when subsequently in the trial it was stipulated that the defendant E. I. Bryant had received the amount which it was sought to prove he had received by the check.

The appellant assigns ten different instances of misconduct on the part of the district attorney. We have carefully examined each of them, and find that the court on many occasions advised the jury to disregard the remarks of counsel; that at no time did the deputy who was in charge of the trial make any remarks which could have affected the verdict of the jury without an admonition from the trial judge. In those instances where he failed to advise them, either counsel for the defense failed to ask that the remarks be stricken and the jury admonished, or the remarks were entirely harmless and in keeping with the line of duty of the prosecutor. We find no error in any of the assignments.

[4] Also the appellant asserts that the judge was guilty of misconduct seven different times during the course of the trial. It is a complete answer to say, assuming that the court made remarks which were not proper, that counsel never at any time called the attention of the judge to the situation or gave him any opportunity to correct the harm if any was done. Furthermore, there is not only no indication that the judge would have refused to avoid all error with its possible effect upon the jury, but there is abundant support in the record for the belief that he would most earnestly have endeavored to prevent any remark of his from influencing the jury in the slightest degree. In fact, he told them several times that they were to pay no attention to the discussions between counsel and himself. Nor is there anything to indicate that any irreparable harm was done. Under such circumstances, and by virtue of a well-known rule of law, appellant may not be heard to complain.

[5] The next point urged by appellant as a ground for reversal is that the trial court erred in the giving and refusal of certain instructions relating to conspiracy. Counsel labor under the misapprehension that a conspiracy may not be proved to exist between two defendants for the purpose of establishing the fact that the act of one in furtherance of the conspiracy is in legal contemplation, the act of both and for which both may be convicted. They have the erroneous notion that, when a conspiracy to commit a criminal act is shown to exist, the conspirators may only be convicted of the criminal conspiracy and not of the crime actually committed. Such is not the law. The books abound with cases where conspiracies have been proved and where the jury under appropriate instructions must have found, of necessity, the existence of a conspiracy in order to have returned a verdict of guilty as to one or more of the defendants. It is sufficient for our purposes to make reference to People v. Matthew, 68 Cal. App. 95, 228 P. 417; People v. Ferdinand, 194 Cal. 555, 229 P. 341, and People v. Seitz (Cal. App.) 279 P. 1070.

Counsel also urge the refusal of the court to give an instruction which would have had the effect of telling the jury that the testimony of Mrs. Johnson was improperly admitted and that the representation which she repeated or conveyed to two purchasers of trust deeds could not be "considered as against the defendants." What we have already said upon this question in discussing its admissibility disposes of the contention.

[6] Counsel also assert that the action of the court in denying probation to appellant was error, and rely upon People v. Jones, 87 Cal. App. 482, 262 P. 361, to support them. In the cited case, the District Court of Appeal declared that, where the trial judge attempts to deal with the question of whether a particular case or a particular defendant comes within the scope of the probation law (Pen. Code, § 1203), he is then undertaking to deal with a fixed principle of law which may be reviewed on appeal. But it also there stated that where, as in the instant cause, the court gives consideration to the merits of the application, the discretion thus exercised is not governed by fixed principles of law, but the action rests in the sound discretion of the court, and will not be disturbed unless it appears to be capricious or arbitrary.

There are a number of other assignments of error, some wholly without merit and many others unsupported by either argument or citation of authority. We have called the attention of the profession to the rule that we are not burdened with the responsibility of undertaking their labors in this regard so frequently of late that we now deem it appropriate to say that, unless counsel refrain from mere assignments of error without anything of a substantial character to indicate the sincerity of their belief in the error assigned, more drastic measures will of necessity be adopted to put an end to the practice.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 58

KLING v. GUSTASON. (Civ. 5530.)★

District Court of Appeal, Second District, Division 2, California. Sept. 30, 1929.

Rehearing Denied Oct. 30, 1929. Hearing Denied by Supreme Court Nov. 25, 1929.

1. Interest ⟹19(1)—Allowing interest before judgment on attorney's fees found due upon quantum meruit held error.

Where finding of indebtedness owed attorney for attorney's fees was solely upon cause of action pleading quantum meruit, allowance of interest on amount of indebtedness as found prior to verdict or judgment *held* error.

2. Appeal and error ⟹1151(2)—Error in including interest before judgment on attorney's fees found due upon quantum meruit may be corrected by modification.

Error in including interest on amount of attorney's fees where finding of indebtedness was solely upon cause of action pleading quantum

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★Rehearing denied. Hearing denied by Supreme Court.

meruit *held* not one in itself necessitating reversal, but one which might be corrected by modification of judgment to that extent.

3. **Trial 🔑395(2)—Finding regarding counterclaim that allegations in complaint, answer, and counterclaim or cross-complaint, and their answers, "inconsistent with foregoing findings are untrue," held insufficient as indefinite.**

Finding, on counterclaim in action for attorney's fees, to effect that all allegations contained in complaint, answer, and counterclaim or cross-complaint, and answer to counterclaim or cross-complaint, "inconsistent with foregoing findings of fact are untrue," *held* insufficient as being indefinite and uncertain, since allegation of counterclaim as to respondent's alleged negligence and damage to one counterclaiming are not necessarily inconsistent with fact of rendition of legal services and indebtedness of defendant therefor.

4. **Pleading 🔑8(17)—Counterclaim in action for attorney's fees, alleging plaintiff's negligent services caused defendant loss, held sufficient without specifying act or omission.**

Counterclaim in action for attorney's fees, alleging that plaintiff wrongly counseled and advised with defendant and was careless and negligent in handling of defendant's affairs so that by reason thereof defendant was subjected to series of civil and criminal actions to his loss and damage, *held* sufficient pleading of negligence which may be alleged in general terms without specifying particular act or omission which rendered conduct negligent.

5. **Appeal and error 🔑548(1)—Appellate court cannot consider sufficiency of evidence and rulings thereon, where no engrossed bill of exceptions was filed and five months elapsed between filing appeal notice and order settling bill of exceptions (Code Civ. Proc. §§ 650, 950).**

District Court of Appeals cannot consider questions as to sufficiency or lack of evidence in action for attorney's fees relating to issues tendered by defendant's pleadings as well as those having to do with rulings on evidence, where record did not include proper bill of exceptions as required by Code Civ. Proc. § 950, and no bill of exceptions was engrossed and presented to judge for certification within ten days, as required by section 650.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Action by David G. Kling against Dr. David G. Gustason. Judgment for plaintiff, and defendant appeals. Affirmed in part as modified, and for purposes of retrial reversed and cause remanded.

Van Lee Hood, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

BURNELL, Justice pro tem. This appeal is from a judgment for the plaintiff for attorney's fees. The complaint set up three causes of action—the first alleging the performance by plaintiff of legal services of the reasonable value of $2,145.42, of which sum $319.75 had been paid; the second an open, mutual, and current account; and the third an account stated. The answer consisted of specific denials as to each cause of action, and as a separate defense, "and by way of counterclaim" it set up alleged negligence on the part of respondent while acting as appellant's attorney, claiming that, by reason thereof, the latter had been damaged in the amount of $2,000.

The court found that the services had been rendered and were reasonably worth $1,030, and that $304.30 of that sum had been paid, leaving a balance due of $725.67. With this finding appellant has no quarrel except that he points out an obvious error in the figures; the complaint having admitted a credit of $319.75, which would make the balance due $710.25. Respondent concedes this point. A reversal is sought by appellant for reasons which we shall discuss seriatim.

[1, 2] The first contention advanced has to do with the allowance of interest on the sum found due, amounting to $163. The finding of indebtedness was solely upon the cause of action pleading a quantum meruit. There was therefore no support for the finding that "said sum of $725.67 became due and payable on the 17th day of February, 1923, and that plaintiff is entitled to have and recover interest on said sum from said date." "In an action to recover the reasonable value of services performed by a plaintiff, the amount, character, and value of which can only be established by evidence in court, * * * the plaintiff is not entitled to interest prior to verdict or judgment." Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 44 P. 719, 720; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; Erickson v. Stockton & Tuolumme County R. Co., 148 Cal. 206, 82 P. 961; Edwards v. Arp, 173 Cal. 472, 160 P. 551. While we are in accord with appellant's contention that interest should not have been allowed, the error in including it is not one in itself necessitating a reversal, but is one which may be corrected by a modification of the judgment to that extent. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 P. 731; Supreme Lodge v. Los Angeles Lodge, 177 Cal. 132, 169 P. 1040, and Edwards v. Arp, supra.

We glean from the ill-prepared record before us that the court below attempted to cure this error as well as that in the computation of the credit due to appellant, since we find in "Plaintiff's Bill of Exceptions" (but not elsewhere in the transcript) reference to an order denying a motion for new trial "upon plaintiff's failing to consent to a reduction of judgment as follows: $163.00 interest as of date of entry of judgment, $15.45 error in computation of credits," and providing that, "unless such consent is filed in five days after notice of this order, motion for new trial is granted." But, as to whether or not such consent was filed or as to the date of the order, the record before us is silent.

[3] Appellant's second point is that the court failed to find on the issues presented by the counterclaim (which appellant also refers to as a cross-complaint) and the answer thereto. The only finding as to the counterclaim is as follows: "The court further finds that all the allegations contained in the complaint of the plaintiff, the answer and counterclaim, or cross-complaint of the defendant, and the answer of the plaintiff to counterclaim, or cross-complaint of defendant, inconsistent with the foregoing findings of fact are untrue." This is not sufficient as a finding. The allegations of the counterclaim as to respondent's alleged negligence and the damage to appellant caused thereby are not necessarily inconsistent with the fact of rendition of legal services by respondent and the indebtedness of appellant therefor. Findings of fact should be definite and certain. De Cou v. Howell, 190 Cal. 741, 214 P. 444; Chambers v. Gibson, 178 Cal. 416, 173 P. 752. A finding similar to that above quoted was thus criticized in Goodnow v. Griswold, 68 Cal. 599, 9 P. 837: "The court below found: 'The court finds that the several allegations of said complaint not in conflict with the foregoing findings are true.' We are not informed which of the other findings were, in the opinion of the court below, in conflict with the findings referred to as the 'foregoing findings.' In Harlan v. Ely, 55 Cal. 340, a finding, 'all and singular the allegations of the amended answer are untrue, except so far as the same accord with the foregoing facts,' was held insufficient. This court there said: 'The court below should have assumed the labor of comparing the allegations of the answer with the facts by it found. As it is, we are not informed which of the allegations of the answer were, in the opinion of the court below, true; which untrue. We cannot assume the function of determining for the first time the truth or falsity of any of them, either by reference to the testimony or to the facts actually found.' The finding here is subject to a like objection, and on the authority of Harlan v. Ely the judgment and order should be reversed." Mr. Justice Thornton, in a concurring opinion in the same case said: "The court finds that several matters are not true, and then proceeds to find that the several allegations of said complaint not in conflict with the foregoing findings are true. This is not in accordance with the statute (Code Civ. Proc. § 632) which requires the court below to find facts. Such duty is not imposed on this court. The court below must find facts and place them in its decision, so that this court may see, when an appeal is taken, what facts the lower court has found, and whether the correct judgment has been pronounced on them. This court is not called on to determine what allegations of a complaint are not in conflict with certain matters found not to be true." See, also, Perkins v. West Coast Lumber Co., 5 Cal. Unrep. 674, 40 P. 982.

Appellant earnestly asserts that "sufficient evidence was produced by the defendant to establish a prima facie claim for damages on account of the defendant's counterclaim or cross-complaint, which said damages were not found by the court," and that, if there had been a finding on the issues presented by the counterclaim, the amount of respondent's recovery would inevitably have been diminished, if not entirely eliminated. He also complains of numerous rulings of the trial court on questions of the admission or exclusion of evidence.

Respondent with equal fervor contends that the counterclaim fails to state facts sufficient to constitute a counterclaim or cause of action, that there was no evidence which would have justified or supported a finding in appellant's favor, and hence that this is a proper case for the application of the rule that failure to find upon an issue raised by answer or cross-complaint is not reversible error where, if the finding had been made, it would necessarily have been adverse to the appellant. Reveal v. Stell, 56 Cal. App. 463, 205 P. 875; Cross v. Thiele, 51 Cal. App. 780, 197 P. 974; Llano Inv. Co. v. Minton, 190 Cal. 752, 214 P. 855.

[4] We think the counterclaim, while somewhat carelessly drafted, contained sufficient facts to raise an issue as to respondent's alleged negligence and appellant's claim of loss therefrom. Stripped of its unessentials, it alleges that "as such attorney the plaintiff counseled and advised with defendant and represented defendant in certain collection cases"; that "the advice and counsel given by plaintiff was wrongful * * * and that the plaintiff was careless and negligent in the handling of defendant's affairs"; and that by reason of this defendant was subjected to a series of criminal and civil actions, to his loss and damage in the sum of $2,000. This was a sufficient pleading of negligence, which may be alleged in general terms without specifying the particular act or omission which rendered the conduct negligent. Stein v. United Railroads, 159 Cal. 368, 113 P. 663; Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 P. 713.

[5] The questions as to the sufficiency, or lack, of evidence relating to the issues tendered by appellant's pleadings, as well as those having to do with the trial court's rulings on evidence, we are precluded from considering on this appeal, by reason of the condition of the record before us. The appeal is

taken under the original method, which requires the preparation and inclusion in the record of a bill of exceptions when it is sought to review the evidence and the rulings thereon. Section 950, Code Civ. Proc. The requirements as to the contents of such a bill, the time within which it must be served on the adverse party, the time and method of proposing amendments thereto and of presentation thereof to the court for settlement are set forth in section 650 of the Code of Civil Procedure, which further provides that, after settlement of the bill of exceptions by the trial judge, "the bill must thereupon be engrossed and presented to the judge to be certified, by the party presenting it, within ten days." There are few, if any, of the requirements of this section which appear to have been compiled with in this case.

The transcript on appeal, in addition to the judgment roll which shows that the judgment appealed from was entered May 10, 1926, and that the notice of appeal was filed May 17, 1926 (there is no indication of service thereof on the respondent), contains two documents styled, respectively, "Bill of Exceptions" and "Plaintiff's Amendments to Defendant's Bill of Exceptions." These are followed in the transcript by an order reading as follows: "It is hereby ordered that the foregoing Bill of Exceptions and Amendments thereto be, and the same is hereby settled and approved and I hereby certify that the same constitutes the Bill of Exceptions on appeal herein of the defendants therein named. Dated: October 28th, 1926. P. E. Keeler, Judge of the Superior Court." The "Bill of Exceptions" is signed by counsel for appellant, but is accompanied by no proof, by affidavit of service, admission of receipt of copy, or otherwise, that it or a copy thereof was ever served on the adverse party as required by the Code section last referred to. The document styled "Plaintiff's Amendments," etc., is equally devoid of any indication of service on defendant. The transcript following the court's order above set forth contains the following: "Endorsed: Filed Oct. 28, 1926. L. E. Lampton, County Clerk; by J. D. John, deputy." There is nothing specific to indicate what this refers to, but we may be justified in assuming, from the order immediately preceding it and from the clerk's certificate, that it refers to both of the documents we are discussing.

Apart from the unexplained lapse of more than five months' time between the filing of the notice of appeal and the order settling the "Bill of Exceptions and Amendments Thereto," no *engrossed* bill of exceptions has ever been filed. The situation here is almost identical with that in Fritsch v. Stampfli, 117 Cal. 441, 49 P. 559, where the appellant relied upon alleged insufficiency of the evidence to support the findings. We quote from the opinion in that case: "There appears in the transcript on appeal a paper entitled 'Bill of Exceptions,' purporting to set forth evidence received at the trial, concluding with the statement that 'The foregoing was substantially all the evidence touching the said tract of land.' Following this is another document, headed 'Defendants' amendments to plaintiff's bill of exceptions." The amendments cover several pages of printed matter, and are proposed to be inserted at sundry places, designated by reference to numbers of lines and pages in the original draft of the plaintiff's bill, as we surmise, but there is nothing in the transcript here to indicate the points of insertion. Next is a stipulation of counsel that the amendments suggested were correct, and 'that the plaintiff's bill of exceptions herein, with the defendants' amendments thereto attached, be settled,' etc. Then appears an order, signed by the judge, settling and allowing the 'within bill of exceptions.' There was no engrossment, no incorporation of the proposed bill and amendments in one paper, and the statement at the close of plaintiff's proposed bill, that the matter preceding it 'was substantially all the evidence,' was permitted to stand. For the reason that the so-called bill of exceptions is unintelligible, and is not presented in a manner to be considered in this court, the judgment must be affirmed. Marlow v. Marsh, 9 Cal. 259; Skillman v. Riley, 10 Cal. 300; Baldwin v. Ferre, 23 Cal. 461; Kimball v. Semple, 31 Cal. 657."

In Vierra v. Fontes, 135 Cal. 126, 66 P. 241, 242, the question of the necessity for an engrossment of the proposed bill of exceptions and of the allowed amendments thereto was again before the Supreme Court. The transcript in that case contained a "certificate" signed by the trial judge attached to the draft of a bill of exceptions presented by the appellant, wherein it was certified that "the foregoing bill of exceptions, with the amendments thereto offered by the defendant, which are allowed, is true and correct, and is hereby allowed and settled."

It also contained what appeared to be defendant's proposed amendments. This was held not to comply with the requirement that, after having been settled, "the bill must thereupon be engrossed and presented to the judge to be certified, by the party presenting it, within ten days." Section 650, Code Civ. Proc. Said the court: "The bill of exceptions, as completed by the amendments, was not engrossed, and, of course, there was no engrossed bill certified by the judge; which has been held necessary by numerous decisions of this court. Fritsch v. Stampfli, 117 Cal. 441, 49 P. 559, and cases there cited. For these reasons there is no bill of exceptions before us." Referring to the judge's certificate in that case, the court pointed out that "what the amendments allowed were does not appear in anything that precedes the certificate." So here there is nothing in the certificate or elsewhere in the transcript to indicate which, if any, of the defendant's amendments were allowed and should have been incorporated in an engrossed bill of exceptions, certified by the trial judge to be correct.

Because of the trial court's failure to find upon the issues tendered by the counterclaim and the answer thereto, the cause must be remanded. There is no necessity, however, for a retrial of the issues as to the rendition of legal services by plaintiff as set forth in the complaint and as to the reasonable value thereof. As to these matters the judgment is modified by deducting from the amount thereof the sum of $163, interest erroneously allowed, and the further sum of $15.45, the difference between the credit admittedly due to appellant and the figures erroneously incorporated in the findings, thus reducing the amount awarded respondent to $710.25. As so modified, that portion of the judgment is affirmed, subject, however, to whatever, if any, diminution of the amount thereof the court, on a retrial of the issues raised by the counterclaim and the answer thereto, may find and determine the defendant to be entitled to. For the purpose of a retrial as to such issues, the judgment is reversed, and the cause remanded.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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101 Cal. App. 144

DUGAN v. FORSTER et al. (Civ. 6901.)

District Court of Appeal, First District, Division 1, California. Oct. 8, 1929.

1. Appeal and error 🔑653(1)—In absence of contrary statute, appellate court has power to cause correction of record before it any time during pendency of appeal.

In absence of statute to contrary, appellate court has power to direct and cause correction of record before it at any time during pendency of appeal, irrespective of Code Civ. Proc. § 473, relating, among other things, to amendment of pleadings.

2. Appeal and error 🔑653(1)—Record will, when necessary, be corrected by appellate court, unless adverse party's right is injuriously affected thereby.

Technical objections are not favored, and record may, and will when necessary, be corrected by appellate court, unless right of adverse party is injuriously affected thereby.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by James O. Dugan against William J. W. Forster and another. From the judgment, plaintiff appeals. On motion to amend record on appeal. Granted.

Charles L. James and C. K. Bonestell, both of San Francisco, for appellant.

Walter E. Dorn and L. W. Lovey, both of San Francisco, for respondents.

TYLER, P. J. Application to amend the record on file herein. It appears from the affidavit in support of the motion that in the preparation of the bill of exceptions to be used on appeal certain evidence was inadvertently omitted, which evidence is necessary to present to this court the alleged error of the trial court in making its findings that plaintiff was entitled to recover the amount of judgment rendered in his favor. It is not denied that the evidence sought to be included in the bill of exceptions was received by the trial court, but it is insisted that petitioner had ample time and opportunity to have included the same in the record, and, not having done so, he is concluded by the provisions of section 473 of the Code of Civil Procedure.

[1] An appellate court, in the absence of statutory mandate or authoritative expression to the contrary (and in this state there is none), has, in the exercise of its jurisdiction power to direct and cause the correction of a record before it at any time during the pendency of the appeal, and this without reference to the provisions of section 473 of the Code of Civil Procedure.

[2] It has repeatedly been held that technical objections are not favored, and that a record may and will, when necessary, be corrected, unless a right of the adverse party is injuriously effected thereby. Appellate courts look with favor upon an amendment, the effect of which is to enable them to review the decision of the lower court, in view of all the facts which that court had before it when it made its decision. McMahon v. Hamilton, 202 Cal. 319, 325, 260 P. 793.

The motion to amend the record is granted.

We concur: KNIGHT, J.; CASHIN, J.

PEOPLE v. WRIGHT. (Cr. 1094.) ★

District Court of Appeal, Third District, California. Oct. 7, 1929.

Criminal law 🔑1182—Judgment should be affirmed, where no brief was filed and no appearance was made for appellant when case was called for hearing (Pen. Code, § 1253).

Where case was regularly placed on calendar for oral argument, and no appearance was made for appellant at time case was called for hearing, and no brief had been filed, judgment and order appealed from should be affirmed under Pen. Code, § 1253.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Floyd Wright was convicted of rape, and he appeals. Affirmed.

★Superseded by opinion in 282 P. 413.

Blaine McGowan, of Eureka, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Humboldt county of a felony, to wit, the crime of rape.

The transcript on appeal was filed in this court August 28, 1929. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on October 7, 1929. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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101 Cal. App. 77

COOK et al. v. CAPPELLINO et al.

(Civ. 6239.)

District Court of Appeal, Second District, Division 2, California. Oct. 1, 1929.

1. Mechanics' liens 🔑189—Mechanic's lien could not be maintained against property of one owner embracing improvements on properties of others.

Where claimants furnished materials and services in construction of buildings on different lots at instance of prospective purchaser of lots, such claimants could not maintain lien against property of one of owners for total amount embracing improvements on properties of others.

2. Mechanics' liens 🔑183—Mechanic's lien for total amount of materials and services in construction of buildings on different lots could not be charged against all without proportionate segregation.

Where claimants furnished materials and services in construction of buildings on different lots at instance of prospective purchaser, claimants could not charge one lien for total amount against all lots owned by different persons without a proportionate segregation.

3. Mechanics' liens 🔑291(5)—In action against owners of different lots, no mechanics' liens could be declared against particular landowners where no specific liens were pleaded.

Where claimants furnished materials and services in construction of buildings on different lots at instance of prospective purchaser thereof, and in suit against such prospective purchaser and the lot owners to establish liens no specific lien was pleaded or sought to be established against any particular landowner, no judgment could be rendered for declaration of liens which were not pleaded.

Appeal from Superior Court, Los Angeles County; Gesner Williams, Judge pro tem.

Action to foreclose mechanics' liens by B. L. Cook, doing business as the Cook Lumber Company, and R. M. Gregg, doing business as the R. M. Gregg Lumber Company, and others, against Joe Cappellino and others. From the judgment, plaintiffs named appeal. Affirmed.

Garner White, of Inglewood, for appellants.
Andreani & Haines, John L. Bisher, Jr., and Dana R. Weller, all of Los Angeles, for respondents.

CRAIG, J. Various parties plaintiff in this proceeding, claiming to have furnished services and materials at the instance of the Economy Home Builders, a corporation, for the construction of buildings upon real property alleged to have been owned by several persons who had contemplated selling the realty to the corporation, filed mechanics' liens thereon, and thereafter instituted this action against the owners and the corporation, to establish a lien upon all of the property. In their complaint it was alleged that Forkner had performed services and furnished materials under employment of the Economy Home Builders as agent of the owners, of the value of $3,479.05, of which $1,854.75 had been paid, leaving a balance due in the sum of $1,624.30; that Gregg furnished materials to the corporation as agent of the owners, of the value of $708.02; and that Cook had furnished materials of the value of $2,088.56. Twelve parcels, consisting of some twenty lots, described in detail, were alleged to have been required for the convenient use and occupation of the structures for which the plaintiff Forkner furnished services and materials; three lots, separately described. were alleged to have been required for the use and occupation of buildings for which Gregg furnished materials, and like allegations applying to thirteen lots, embraced in ten separate descriptions, were pleaded on behalf of the plaintiff Cook. The three plaintiffs prayed judgment for said sums, respectively, of $1,624.30, $708.02, and $2,088.56, with costs, "that the sums be adjudged a lien upon the real property and buildings thereon," and that if there should be a deficiency, "that plaintiff have judgment for such deficiency against the defendant Economy Home Builders, a corporation."

At the trial the respective claimants proceeded to offer evidence in proof of the fact that the plaintiff Cook delivered materials upon ten different jobs, for which ten distinct liens were filed, and that the other plaintiffs had likewise furnished materials for the various lots described, upon each of which they had filed a separate lien. It appearing that the amount claimed under each lien had not been separately pleaded, but that they had all been combined by each of the plaintiffs, it was objected by the defendants that there was a variance between the pleadings and the proof. The trial court nevertheless heard all of the evidence, but found that said corporation acted in its own behalf and not as agent for the owners, that no action had been instituted within the time required to establish the liens, and rendered judgment in favor of Cook and Gregg, against the corporation only, denying relief as against the owners. The two last-named plaintiffs appealed, contending that it all constituted but one transaction.

[1-3] We think the appellants' theory is untenable, and that the assertion of one inclusive demand as to each plaintiff against the corporation for judgment, and that "the sums be adjudged a lien upon the real property," furnishes a complete answer to their argument. It is admitted that there may have been but one transaction between the plaintiffs and the corporation, but about thirty-five other defendants were named in the complaint as owning or having an interest in the properties upon which apparently more than twenty liens had been filed. It cannot for a moment be successfully contended that a lien for $708.02 in favor of Gregg, or a lien for $2,088.56 in favor of Cook, could under the circumstances be maintained against the property of one of the owners, embracing as it must improvements upon the properties of all, nor could one lien for either total amount be charged against all, as prayed, without a proportionate segregation. It is apparent that no specific lien was pleaded or sought to be established as against any particular landowner, and that no judgment could have been rendered for the declaration of liens which were not pleaded.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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101 Cal. App. 79

SMITH v. UNITED STATES NAT. LIFE & CASUALTY CO. (Civ. 5556.)

District Court of Appeal, Second District, Division 1, California. Oct. 1, 1929.

Insurance 🔑467—Where insured worked five weeks between date of accident and date of death, beneficiary could not recover for death under accident policy.

Where insured was disabled for 17 days by dog's bite but later returned to work and worked for period of 5 weeks before death resulted from hydrophobia induced by the dog's bite, beneficiary could not recover for his death under accident policy providing for payment of sum specified for death resulting from injuries immediately, wholly, and continuously from date of accident disabling insured from performing every duty pertaining to his occupation.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Betty Smith against the United States National Life & Casualty Company upon a policy of accident insurance. From a judgment for plaintiff, defendant appeals. Reversed.

Kemp, Partridge & Kemp, of Los Angeles, for appellant.

Willis O. Tyler, of Los Angeles, for respondent.

HAHN, Justice pro tem. The action which gives rise to this appeal is one wherein the plaintiff and respondent brought suit against the defendant and appellant upon an accident policy, issued by defendant corporation to one Robert Smith, deceased husband of the plaintiff. The policy in question provided for monthly payments to the insured in the event of partial or total disability caused by an accident, and the payment of $600 to the wife of the insured in the event of death resulting from an accident. The action was filed by the plaintiff as surviving widow of the insured, named as beneficiary in the policy, and is based upon the claim that the insured met his death as the result of a dog bite. Judgment was rendered for the plaintiff for the sum of $600, from which judgment defendant has appealed.

It appears from the evidence that Robert Smith, the deceased, was bitten by his own dog on October 6, 1924. Surgical treatment was administered, but Smith, who was a cement worker, was incapacitated for work because of a badly lacerated thumb. On the day following the injury, the deceased forwarded a written report to the insurance company, as required by his policy. In this report, the deceased gave it as his opinion, based upon the advice of his doctor, that the period of his disability would be about 12 days. Dr. E. B. Lewis, his physician, in his report to the insurance company estimated the period of Smith's disability as 12 days. On or about October 12th, one J. C. Lane, an agent for the defendant insurance company, called to see Smith with a view to discussing the matter of payment for his injury. There were present at this conversation, besides deceased and Lane, Mrs. Smith and her daughter. Smith stated that he felt quite sure that he would soon be able to go back to work and would be satisfied to accept compensation for 12 days at the rate of $2 per day for his disability. Thereupon Lane gave Smith a check for $24, and required that Smith sign a receipt, which in its wording acknowledged satisfaction in full for any claim arising out of the injury. The widow and daughter testified that the receipt was not read to or by Smith at the time it was signed. Lane testified, however, that he explained the conditions of the receipt to Smith.

On October 21, Smith returned to his regular employment and continued at his work daily until the 26th day of November, when he became ill and was taken to a hospital, where his case was diagnosed as hydrophobia. On November 29th he passed away. According to the testimony of his attending physician, death was the result of hydrophobia induced by the dog bite.

A few days after Smith's death, plaintiff and respondent called at the office of the insurance company for the purpose of filing a claim for the $600 which she claimed as beneficiary under the policy. Lane, the agent for the company, told her he could do nothing for her, for the reason that her husband had signed a receipt releasing the company from any other or future claim arising out of the dog bite. No written claim or proof of loss was filed. Fifty-four days after the death of the insured, this action was filed.

The appellant urges four grounds for reversal of the judgment: First, that the evidence clearly shows that the death of the insured was not covered by the policy. Second, that the action was instituted prematurely. Third, that the insured prior to his death released the defendant from liability for the injury. Fourth, that the court failed to make a finding on a material issue, to wit, whether or not deceased was continuously disabled from the time of the injury.

Inasmuch as we have concluded that the judgment must be reversed for the reasons urged by appellant in his first ground, we will confine our discussion to the points therein raised, which in effect cover the fourth assignment of error.

The evidence without conflict shows that the insured returned to his work two weeks after he suffered the injury and continuously followed his employment for a period of about five weeks thereafter. Plaintiff was entitled to recover, if at all, under the paragraph in the policy designated under the letter "C," and which, so far as is important for our consideration, reads as follows:

"If the injuries described in paragraph A shall, independently of all other causes, immediately, wholly and continuously from the date of accident disable and prevent the insured from performing every duty pertaining to his business or occupation and shall, during the period of such disability and within ninety days from date of accident, result in any one of the following specific total losses * * * the company will pay, in lieu of all other indemnity except that arising under paragraph N, * * * Life * * * Six Hundred and no/100 Dollars (the principal sum of this policy). * * *"

The language in the section just quoted clearly states that the payment for loss of life of the insured would be made only in the event that death resulted from the injury during a total disability, such disability following "immediately, wholly and continuously from the date of the accident." The evidence here shows without dispute that for five weeks between the date of the accident and his death the insured daily followed his regular occupation as a cement worker. Hence, the total disability required by the policy for the period between the injury and death was not continuous.

Respondent contends that because the effects of the hydrophobia were not made manifest until November 26, from which date the insured was totally disabled until his death, the conditions of the policy were substantially met. We cannot agree with this view. If Smith, urged on by a spirit of industry, had returned to his work for a few hours or even a day or two, but found the pain suffered or his incapacity to be such as to prevent his continuing at his employment, it might well be urged that the abortive attempt to resume his work did not preclude him from claiming a "continued total disability." Smith's total period of inability to work between the accident and his death was about seventeen days, while the period he did work and so far as the record shows, without any inconvenience or pain, was a period of five weeks. No reasonable interpretation of the language referred to can bring Smith's death within the terms of the policy.

In the case of Laventhal v. Fidelity & Casualty Co. of New York, 9 Cal. App. 275, 98 P. 1075, the plaintiff, who was the insured, was injured in the stomach by coming in contact with a suitcase, as he was about to alight from a train. He continued with his regular business for a period of twenty-two days, when he was required to take to his bed by reason of his suffering, and for twenty-seven weeks thereafter was totally disabled. The policy under which he sought to recover compensation provided that the insured would be entitled to compensation where the injury "immediately and wholly disabled and prevented him from performing every duty pertaining to his occupation." This court held that in view of the fact that for twenty-two days after the injury the plaintiff was able to continue his employment, he was not entitled under his policy to recover for the disability he suffered.

In the case of Vess v. United Benev. Soc. of America, 120 Ga. 411, 47 S. E. 942, the court in considering a policy having similar language to that contained in the policy of Laventhal v. Fidelity & Casualty Co. of New York, supra, held that where the insured had been injured and continued at his employment for twenty-four days after the injury, although during that period he suffered from the injury and could not use his hands to any extent, he was not entitled to recover under the policy.

In the case of Masonic Protective Association v. Farrar, 73 Ind. App. 19, 126 N. E. 435, as also Preferred Masonic Mutual Accident Association v. Jones, 60 Ill. App. 106, and

Letherer v. U. S. Health and Accident Ins. Company, 145 Mich. 310, 108 N. W. 491, similar provisions under substantially the same conditions have been interpreted to deny to the insured the right of recovery.

The cases cited by respondent are not in conflict with this interpretation of the terms of the policy, nor with the cases wherein a similar interpretation has been given to language of like import.

In view of our conclusion that upon the merits of the case, respondent is not entitled to recover under the policy, and the further fact that the inherent weakness in the evidence resting upon respondent's admission that the insured was not continuously disabled from the time of the injury, will preclude another trial of the case, we deem it unnecessary to discuss the other points raised by appellant.

The judgment is reversed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

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101 Cal. App. 153

MERCED IRR. DIST. v. SAN JOAQUIN LIGHT & POWER CORPORATION.

(Civ. 3838.)

District Court of Appeal, Third District, California. Oct. 8, 1929.

1. Appeal and error 🔑1011(1)—Conflict in evidence must be resolved in favor of judgment.

In action on contract for sale and delivery of electric energy, conflict in evidence must on appeal be resolved in favor of judgment.

2. Electricity 🔑11—Under contract to buy entire output of 25,000 kilowatt hydroelectric plant, buyer must accept maximum production of plant commonly known to trade as 25,000 kilowatt plant; "capacity"; "power"; "about."

Where contract for sale and delivery of electric energy called for entire output of "hydroelectric generating plant of about 25,000 kilowatt capacity," buyer *held* required to accept and pay for entire actual output of plant commonly known in trade as 25,000 kilowatt plant as long as output was within maximum figure of such plant, which is 31,250 kilowatts, and slight excess over such maximum may be included within definition of word "about" as used in contract, since ordinary meaning of "capacity," which is maximum ability, is too narrow a definition for purpose of construing such contract, and "power" means rate at which work of transforming or producing energy is performed.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, About; Capacity.]

3. Evidence 🔑518—Construction of contract for sale of electric energy presented proper subject for expert testimony.

While it is ordinarily province of court to construe language of contract, there were so many scientific factors involved in determining kilowatt capacity of electric generating plant in construing contract for sale and delivery of electric energy that it became proper subject for expert testimony.

4. Electricity 🔑11—Whether term "capacity" was used in technical sense in contract for sale of electrical energy held for jury.

In action on contract for sale and delivery of electric energy, question whether term "capacity" was used in contract in its ordinary sense, or in technical trade sense, *held* for jury.

5. Attorney and client 🔑86—Unintentional, impulsive statement of counsel against interest, made in turmoil of trial, will not bind client.

An impulsive statement of counsel against interest, made in turmoil of trial and apparently not intended, will not bind client.

6. Electricity 🔑11—Buyer contracting for entire output of 25,000 kilowatt hydroelectric plant was not harmed if larger plant was used, provided quantity furnished was less than maximum contracted for.

In action on contract for sale and delivery of electric energy calling for entire output of 25,000 kilowatt hydroelectric generating plant, buyer *held* not harmed if electricity was generated in 39,000 kilowatt plant instead of 25,000 kilowatt plant, so long as quantity furnished was less than maximum amount contracted for.

7. Electricity 🔑11—In action on contract for sale of entire output of 25,000 kilowatt hydroelectric plant, instruction that defendant must accept entire output of plaintiff's plant, if of capacity of about 25,000 kilowatts, held proper.

In action on contract for sale and delivery of electric energy calling for entire output of hydroelectric generating plant of about 25,000 kilowatt capacity, instruction that jury must determine whether power house constructed by plaintiff was of capacity of about 25,000 kilowatts and, if so, that defendant was bound to accept entire output, *held* proper.

8. Electricity 🔑11—Instruction that word "about" in contract to buy output of hydroelectric plant of "about 25,000 kilowatt capacity" permitted only slight departure from such amount held properly refused.

In action on contract for sale and delivery of electric energy calling for entire output of hydroelectric generating plant of about 25,000 kilowatt capacity, instruction that word "about" must not be understood to permit of more than small or slight departure from amount named in contract of 25,000 kilowatts *held* properly refused as leaving out of consideration maximum possible production of 25,000 kilowatt plant.

9. Trial 🔑232(5)—In action on contract for sale of electric energy, instruction correctly defining word "capacity" held properly refused, where misleading unless application was explained.

In action on contract for sale and delivery of electric energy calling for entire output of hydroelectric generating plant of about 25,000 kilowatt capacity, instruction giving correct definition of word "capacity" *held* properly refused, where it would be misleading, in view of state of record, unless application were explained.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by the Merced Irrigation District against the San Joaquin Light & Power Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Murray Bourne and F. H. Pearson, both of Fresno (Thelen & Marrin, of San Francisco, of counsel), for appellant.

Downey, Brand, Seymour & Dunn, of Sacramento, and George W. Mordecai, of Madera, for respondent.

ROLFE L. THOMPSON, J. This is an appeal from a judgment upon a contract for the sale and delivery of electric energy.

The respondent is an irrigation district organized and operating under the California Irrigation Act. The appellant is a public utility corporation organized for the purpose of supplying consumers with electric power and light. In February, 1924, the respective parties executed a written contract by the terms of which the appellant agreed to purchase from respondent the entire output of a 25,000 kilowatt hydroelectric generating plant for a term of 20 years at 4½ mills per kilowatt. The contract provided in part: "Irrigation District expects and intends hereafter to construct, operate and maintain a storage reservoir * * * and a hydro-electric generating plant of about 25,000 kilowatts capacity at or near Exchequer on the Merced River. * * * The parties hereto agree as follows: 1. Irrigation District undertakes and agrees [to] * * * sell to Power Company the entire electric output thereof, * * * and Power Company upon its part agrees * * * to receive, accept and pay for such electric output. 2. (a) All electric energy to be delivered and received pursuant to this agreement shall be three phase, sixty cycle, alternating current. * * * Power Company agrees that it will receive *said* electric energy to the total output possible from the water passing through said plant, whether from storage or natural flow, * * * but reserves the right to vary the power factor within the ampere and excitation capacity of the electric generators; but at no time shall Power Company require the operation of the plant at a power factor which will act to reduce the electric energy that could be generated by the available water. * * *"

[1] In due time the plant was constructed by building a concrete dam across the Merced river which formed a reservoir impounding the water, from which it flowed in two units through gates, penstocks, and turbine-wheels to the generators. This water power had a variable head with a maximum depth of 300 feet, but the average head was 240 feet. The plant was constructed with two complete units. The manufacturer's rating of each of these units as indicated by the label plates attached to each of the generators was "15,625 K. V. A. (kilovolt amperes) at 8–10 power factor." Expert witnesses testified this meant each of these generators operated at 80 per cent. power factor would produce 12,500 kilowatts of electric energy per hour, with a capacity of 15,625 kilowatts when operated at unity which is full power factor. This gives the combined units a possible capacity of 31,250 kilowatts. Testimony was adduced indicating that these generators were designated by the manufacturer and known to the trade to be 12,500 kilowatt machines, and were intended to be operated at 80 per cent. power factor, allowing the remaining possible 20 per cent. of its maximum capacity as a safety margin to prevent overloading and consequent danger of burning out the coils and damaging the machinery. It is a mere matter of mathematical calculation to determine that the combined output of two electric units designated as 12,500 kilowatt generators operated at only 80 per cent. of their power factor would produce 31,250 kilowatts when operated at full capacity. Mr. Barre testified that "the kilowatt capacity of a plant is the load which that plant can deliver as a maximum under all the conditions of operation existing at the site." The statements to the effect that these two units combined were designated by the manufacturer and known by the trade to constitute a 25,000 kilowatt plant operated at 8–10 power factor, with a possible capacity of 31,250 kilowatts, was contradicted by appellant's expert witnesses. This conflict, however, must be resolved in favor of the judgment.

The evidence based upon the daily log records of the plant indicates that the average output which was actually generated by the plant during a period of 329 days from July 1, 1927, to July 1, 1928, was 23,844 kilowatts, except that for a brief period of about six days, when the head of the water supply was at a maximum height of 300 feet and conditions were most favorable, the plant developed 32,400 kilowatts. At no other time did the plant exceed its maximum capacity of 31,250 kilowatts.

It was stipulated that pursuant to the foregoing contract the respondent generated in 1927 and transferred to the appellant's power lines a total quantity of electric energy aggregating 126,588,850 kilowatt hours; that between April 1st and August 31, 1927, respondent produced 86,655,470 kilowatt hours, which last-mentioned figures contained an output of 13,630,180 kilowatts in excess of 25,000 kilowatt hours, and which entire output was fully paid for according to the terms of the contract except said amount of 13,630,180 kilowatts, which at 4½ mills per kilowatt was valued at $61,396.23. This sum was not paid. For this amount the jury rendered a verdict in favor of respondent, and a judgment was entered accordingly.

The vital questions to be determined in the present case are: What is the maximum capacity of a hydroelectric generating plant commonly termed a 25,000 kilowatt plant? Was the reference to a plant of this character a limitation of agreement to purchase only 25,000 kilowatts, or was it merely descriptive of the general character of a plant, the entire output of which was bargained for?

The appellant contends that it contracted to purchase only a maximum of 25,000 kilowatt hours of electric energy, instead of the entire output of the plant, and that it has fully paid respondent to the extent of its obligation. Its position is concisely stated as follows: "The Power Company's obligation is limited to its agreement to take and pay for the output of *said* plant, and *said* plant is referred to as a plant to be constructed by the Irrigation District and to be a plant of *about 25,000 kilowatts capacity.*" It must be conceded that the parties contracted with relation to the output of a hydroelectric plant of "about 25,000 kilowatts capacity," but that the appellant clearly agreed to purchase "the total output from the water passing through said (25,000 kilowatt) plant," and that at no time would the appellant "require the operation of the plant at a power factor which will act to reduce the electric energy that could be generated by the available water."

The chief controversy centers around the application of the words "about" and "capacity" as they are employed in the contract.

[2] The energy which may be produced by a hydroelectric plant depends upon the capacity of the plant and the power factor which is derived from the water supply. The term "power" means the rate at which the work of transforming or producing the energy is performed. The amount of work which is performed in a given period of time is therefore the unit of power. In mechanics the rule adopted by James Watt is still accepted as the basis upon which to measure power. He estimated that the "horsepower unit" was equivalent to 33,000 foot pounds of work per minute. This is still the rule in steam or hydraulic engineering. The term "watt" as it is used in electrical engineering is the rate at which the work is performed in an alternating circuit with a current of one ampere and an electromotive force of one volt. Seven hundred and forty-six watts are equivalent to one horsepower. The power factor of such a plant as the one which is involved in this case depends upon the capacity of the generating apparatus and the head and velocity of the water supply which furnishes it power. Assuming that a hydroelectric plant of 25,000 kilowatts supplied with a water power at a head of 240 feet, operated at 80 per cent. power factor, would produce 31,250 kilowatts when operated at unity, or 100 per cent. power factor, the maximum output clearly would be 31,250 kilowatts, in spite of the fact that it was commonly termed and known to the trade as a 25,000 kilowatt plant. The appellant, which is a public utility corporation engaged in supplying its customers with electric power and light, and which knew of respondent's plans for the construction of the reservoir with a maximum head of 300 feet, must be presumed to have known and contracted with relation to a variable and not a static head, and that the output of such a plant would necessarily fluctuate, in a measure which would be dependent upon the season, the quantity of water in the storage reservoir, and surrounding conditions. It must also have been deemed to have contracted for the entire output of the plant of "25,000 kilowatts capacity," with knowledge that the trade commonly referred to such a plant at 80 per cent. only of its possible output, and that it might be capable of producing 31,250 kilowatts. The appellant therefore should be required to accept and pay for the entire actual output of the plant within the maximum figure of 31,250 kilowatts. It is not disputed that the entire output for which the judgment in this case was rendered was within this amount except that for a period of a few days 32,400 kilowatts were produced. This slight excess of 1,150 kilowatts over the maximum estimated output of the plant for a few days only comes within the rule of de minimis non curat lex and may be included within the definition of the word "about" as it was used in the contract. 35 Cyc. 206; 23 R. C. L. 1352, § 176. This slight excess is not sufficient variance to defeat the respondent's claim.

The foregoing conclusion is based upon the technical meaning of the phrase which is used in the contract, to wit, "a plant of about 25,000 kilowatt capacity," as it was construed by respondents' expert witnesses. The word "capacity" does ordinarily mean the maximum ability to retain contents or perform work. But we think this is too narrow a definition for the purpose of construing the contract in the present case. It is not unreasonable to assume that the electrical trade may designate a generating plant by reference to the approximate load which it is ordinarily designed to produce with a 20 per cent. margin of safety and a thorough understanding that under favorable conditions its maximum capacity may be increased to that extent. In the same sense a vessel is described as one of 5,000 tons burden, or a truck as one of 10 tons capacity. A contract to purchase the entire cargo of the first or load of the latter would not necessarily limit the obligation to the mere figures employed in the description of the conveyance.

[3-5] While it is ordinarily the province of the court to construe the language of a con-

tract, there are so many scientific factors involved in determining the kilowatt capacity of an electric generating plant that it becomes a proper subject for expert testimony. United States Heater Co. v. Jenss, 128 Wis. 162, 107 N. W. 293. It became a question for the determination of the jury as to whether the term "capacity" was used in its ordinary sense or in a technical trade sense. Nor do we think that a fair construction of the record binds the respondent to a stipulation that it was employed only in its ordinary sense. It is true that in a lengthy controversy between respective counsel and the court, Mr. Downey, one of respondent's attorneys, addressing himself to the court, did say: "I might call your Honor's attention to the fact that the directors of the Merced Irrigation District were not electrical engineers and when they used the term 'capacity' in a contract, they are using it as ordinary men understand it, not as some handbook of the American Institute of Electrical Engineers may follow. That is the question for the jury." The entire colloquoy and the chief issue in the case were with respect to the import and intended meaning of the term "an electric plant of about 25,000 kilowatt capacity." Following the foregoing remark of counsel, in response to Mr. Pearson's effort to construe this into a binding stipulation against respondent, Mr. Downey denied his intention to so stipulate, saying: "Well, I hadn't been aware of the fact I had conceded anything. * * *" An impulsive statement of counsel against interest which is made in the turmoil of trial, and appears not to have been intended, will not bind the client.

[6] The appellant contends that, even though the plant which was installed by the respondent was originally one of 25,000 kilowatts operated at 80 per cent. power factor, changes were subsequently made by the respondent, including the substitution of mica for cotton insulation to permit the increase of temperature without burning out the coils, a two-inch increase of diameter of the water wheel shafts to enable them to carry a heavier load, and a cooling system to lower the temperature of the water in the reservoir, each of which was designed to increase the maximum capacity of the plant. The appellant introduced expert testimony to show that these changes did actually increase the capacity of the plant to a maximum output of from 36,000 to 39,000 kilowatts. This testimony was disputed by the respondent, in proof of which contradiction it was pointed out that the highest output of the plant under most favorable conditions was but 32,400 kilowatts for a period of only a few days. It seems immaterial, however, whether changes were made which actually resulted in the possibility of increasing the capacity to an amount of energy in excess of the maximum output of a 25,000 kilowatt plant, so long as that result was not accomplished, and the appellant is not asked to accept or pay for electric energy beyond the maximum product of a 25,000 kilowatt plant. The appellant did not contract for the output of a specific machine. The quality or character of the electric energy is not questioned. The quantity is the only element in dispute. The appellant merely bargained for a quantity of electric energy equivalent to the maximum output of a plant of about 25,000 kilowatts. The appellant is not harmed, nor may it complain if a quantity of electricity less than the maximum amount contracted for was actually generated in a 39,000 kilowatt plant instead of a 25,000 kilowatt plant.

[7] The appellant charges error in the giving and refusing of certain instructions. Instruction No. 7, which is challenged, was given as follows: "You are instructed, therefore, that it is your duty to determine whether or not the power house constructed by the Merced Irrigation District is of a capacity of about 25,000 kilowatts, and if you so find, then you must further find that under the provisions of the contract in evidence, defendant is and was bound to accept the entire electrical output therefrom." This was a correct declaration of the law. It was a question of fact as to whether a plant which was capable of producing 31,250 kilowatts per hour operated at unity power factor was in truth such a 25,000 kilowatt plant as was referred to in the contract. Upon this point the evidence was conflicting. Expert witnesses disagreed as to this issue. It therefore became a question of fact for the jury to determine. There is no dispute over the fact that, if it was a 25,000 kilowatt plant according to the contract, the appellant would be required to accept and pay for the entire output. Incidentally, it was also the province of the jury to determine whether the changes which were made in the machinery had the effect of increasing the kilowatt capacity of the plant, although the state of the record would seem to make it immaterial whether the modifications did in fact change the capacity of the plant, as heretofore suggested.

[8] Error is charged in the refusal to give appellant instruction No. 3, which included the following statement: "* * * The word (about), however, must not be understood by you to permit of more than a small or slight departure from the amount named in the contract *of 25,000 kilowatts.* * * *" This instruction is erroneous, since, in view of the record, it leaves out of consideration the maximum possible production of a 25,000 kilowatt plant operated at unity factor so as to actually generate 31,250 kilowatts per hour. The instruction limits the variation to only a slight departure from the figure of 25,000, rather than the maximum output of a "25,000 kilowatt plant." It was therefore not error to refuse to give this instruction.

[9] Appellant's instruction No. 2 was also

refused. It is a correct definition of the word "capacity," but would be misleading in view of the state of the record, unless its application were explained. It reads as follows: "In determining the question as to what is the kilowatt capacity of the power house of the Merced Irrigation District, you are instructed that the word 'capacity' shall be taken by you to mean, as it is applied to the facts in this case, the number of kilowatts which the power house is capable of generating or producing. In other words, the word 'capacity' means the measure of the maximum ability of the power house to produce kilowatts."

While this is a true statement or definition of the word "capacity," standing alone, it was not necessarily the maximum capacity of the particular Merced power plant as it stood, which determined appellant's obligation under the contract. That power plant was not yet constructed when the contract was executed. Upon the contrary, it was the maximum capacity of a plant equivalent to one which is ordinarily termed a "25,000 kilowatt plant," which is involved in the present case. There was therefore no error in refusing to give this instruction.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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101 Cal. App. 122

McPHETRIDGE v. SMITH et al.
(Civ. 3486–3788.)

District Court of Appeal, Third District, California. Oct. 7, 1929.

1. Pleading 🔑127(1)—Denial on information and belief of fact that there was only $2,000 lien on property exchanged admitted existence of lien of only $2,000 on record.

In action against real estate brokers and sureties to recover money obtained by fraudulent representation regarding amount of lien on property exchanged, denial on information and belief of allegation that there was only $2,000 lien on property exchanged admitted existence of lien of only $2,000, where trust deed was public record, and showed on its face that it secured only the payment of $2,000.

2. Pleading 🔑121(4)—Existence of fact ascertainable from inspection of public record within defendant's reach cannot be put in issue by denial on information and belief.

Existence of alleged fact which may readily be ascertained from an inspection of the public record within reach of defendant may not be put in issue by denial based solely on information and belief.

3. Principal and agent 🔑48—Agent must act honestly toward principal and inform him of every fact material to principal's advantage.

Agent has duty to act honestly toward his principal and inform him of every fact material to advantage of principal.

4. Principal and agent 🔑48—Gratuitous agent, on entering into performance of agency, must exercise utmost good faith in dealing with principal.

Gratuitous agent, on entering into performance of agency, is, in common with all other agents, bound to exercise the utmost good faith in dealing with his principal.

5. Conspiracy 🔑1—Where two or more persons are sued for civil wrong, it is the civil wrong and not a conspiracy which constitutes cause of action.

Where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damages, and not the conspiracy, which constitutes the cause of action.

6. Conspiracy 🔑14—Conspiracy renders each participant in wrongful act responsible as joint tort-feasor for all damages ensuing from wrong, regardless of degree of his activity.

Conspiracy renders each participant in wrongful act responsible as joint tort-feasor for all damages resulting from wrong, irrespective of whether or not he was a direct actor, and regardless of degree of his activity.

7. Conspiracy 🔑14—Plaintiff is entitled to joint recovery of damages against defendants cooperating in inflicting wrong.

Plaintiff is entitled to joint recovery of damages against such defendants as he can show have united or co-operated in inflicting the wrong on him.

8. Principal and agent 🔑48—Agent is liable to principal for injury resulting from failure to make known to principal every material fact concerning transaction within his knowledge.

Agent must make known to principal every material fact concerning his transactions and subject-matter of agency that comes to his knowledge or is in his memory in course of agency, and, if he fails to do so, he is liable in damages to principal for any injury incurred or loss suffered in consequence of failure so to to.

9. Pleading 🔑9—Complaint against brokers and sureties for fraud sufficiently charged conspiracy by facts without the word "conspiracy."

In action against real estate brokers and sureties for fraudulently obtaining money from plaintiff by misrepresentation regarding amount of lien on property exchanged, complaint alleging acts constituting conspiracy *held* to sufficiently allege conspiracy, though word "conspiracy" was not used.

10. Brokers 🔑34—Brokers' concealment of true amount of lien on property exchanged, and representation it was $1,000 in excess of true amount, constituted fraud.

Concealment by brokers of true amount of lien on property exchanged for plaintiff's property, and representation that it was $1,000 in excess of true amount, constituted fraud.

11. Brokers 🔑34—Plaintiff's real estate broker was liable to plaintiff for misrepresentation regarding amount of lien on property exchanged whether he profited thereby or not.

Plaintiff's real estate broker was liable for concealment regarding amount of lien on property exchanged, and for representation that lien was $3,000 instead of $2,000, where co-worker received $900, and purchaser of trust deed received $100 of the $1,000 excess, whether broker profited by concealment and misrepresentation or not.

12. Appeal and error 🔑1170(4)—Joinder of actions against plaintiff's broker and another broker and their sureties for fraudulent representation regarding amount of lien on property exchanged held not prejudicial (Const. art. 6, § 4½).

Joinder of actions against plaintiff's broker and another broker and their sureties to recover amount obtained by fraudulent representation regarding amount of lien on property exchanged for plaintiff's property *held* not to result in miscarriage of justice under Const. art. 6, § 4½, in view of fact that Code Civ. Proc. § 379a, as added by St. 1927, p. 477, which became part of the Code after trial of action, authorizes such procedure.

13. Conspiracy 🔑19—Conspiracies may be established without direct proof.

Fraudulent designs and conspiracies may be established without any direct proof.

14. Conspiracy 🔑19—Evidence held to show that plaintiff's broker and another broker acted with common purpose of representing to plaintiff that lien on property exchanged was $3,000 instead of $2,000.

Evidence *held* to show that plaintiff's broker and another broker acted with common purpose in concealing amount of lien on property exchanged for plaintiff's property and in representing that lien was for $3,000 instead of $2,000.

15. Appeal and error 🔑1010(1)—Where evidence supported findings on material facts, objection that evidence did not support some of immaterial findings would not warrant reversal.

Where evidence supported findings on material facts and issues, objection that some of immaterial findings were not supported by testimony, if correct, would not warrant reversal of judgment.

16. Brokers 🔑4—Default judgment against real estate broker could not be considered as proof against his bondsmen.

Judgment against real estate broker could not be considered as proof against his bondsmen, since sureties are not bound by judgments against their principal, unless undertaking so provides, and in other cases the surety is not prevented from making any defense that might have been interposed by his principal.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action for damages for fraud by C. L. McPhetridge against E. P. Smith, the Hartford Accident & Indemnity Company, the Globe Indemnity Company, and another. From the judgment, the Hartford Accident & Indemnity Company and E. P. Smith appeal, and the Globe Indemnity Company takes a separate appeal. Affirmed.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, and Ralph H. Lewis and George E. McCutchen, both of Sacramento, for appellants.

Grant & Bailey, of Woodland, for respondent.

PLUMMER, J. While this cause is presented to us upon two separate appeals, one by the Hartford Accident Indemnity Company and E. P. Smith, upon a reporter's transcript prepared under the provisions of section 953a of the Code of Civil Procedure, and one by the Globe Indemnity Company, upon a bill of exceptions or transcript on appeal prepared according to the old method, we will, nevertheless, for convenience, consider the cause as presented upon one record, referring to nothing except what appears in the transcript on appeal as well as in the reporter's typewritten copy of the evidence introduced upon the trial.

The action was begun by the plaintiff to recover from the defendants the sum of $1,000 alleged to have been obtained from him by reason of the unlawful and wrongful acts of the defendants E. P. Smith and Glenn Newton, and from the Hartford Accident & Indemnity Company, a corporation, as the surety of E. P. Smith, and against the Globe Indemnity Company, as the surety of the defendant Glenn Newton. The defendants E. P. Smith and Glenn Newton were, at all the times mentioned in this action, real estate brokers or real estate dealers, the defendant Glenn Newton having his place of business in the city of Oakland, and the defendant E. P. Smith having his place of business in the city of Sacramento. The complaint alleges that on and prior to the 11th day of May, 1925, the plaintiff was the owner in fee of certain real estate in the city of Oakland, subject to an incumbrance in the sum of $6,000; that at the same time one Thomas E. Garner was the owner of certain real property situate in the county of Yolo, subject to a trust deed in favor of Mary A. Bostwick, to secure a promissory note for the sum of $2,000; that during the months of April and May, of the year 1925, the said Garner and the plaintiff were desirous of exchanging their respective properties, and that the defendants E. P. Smith and Glenn Newton, and each of them, for a compensation, negotiated and acted for the plaintiff in the exchange of said property; that the negotiations were carried on by said E. P. Smith and Glenn Newton, and that the plaintiff had no personal interviews with the said Thomas E. Garner. While not alleged in the complaint, the record shows that Thomas E. Garner was represented by a real estate broker living in

Sacramento by the name of Howard Kerr. The complaint then contains the following allegations:

"XI. That in order to negotiate said exchange, it was stated and represented to plaintiff by the said E. P. Smith and Glenn Newton, and by each of them, during the said months of April, and May, 1925, and before the final passing of deeds between plaintiff and the said Thos. E. Garner, that the said Thos. E. Garner was willing to exchange properties with plaintiff if this plaintiff would assume the payment of a $3,000.00 note secured by deed of trust on the Yolo County property of the said Thos. E. Garner, which said deed of trust the said defendants, E. P. Smith and Glenn Newton, and each of them, then and there stated and represented to plaintiff was a first lien on the lands of the said Thos. E. Garner so located in Yolo County. That the said defendants E. P. Smith and Glenn Newton, at said time stated and represented to plaintiff that the exchange price of the lands of Thos. E. Garner in Yolo County was the said lands so owned by Thos. E. Garner in Yolo County, and the assumption of a note secured by deed of trust, then and there constituting a lien on said lands, and which said note so secured by deed of trust was then and there stated and represented to plaintiff to be in the sum of $3,000.00. That the said E. P. Smith and Glenn Newton and each of them, attended to the drawing of the conveyances and to ascertaining the title to the lands of the said Thos. E. Garner in Yolo County, and also attended to the securing of a policy of title insurance on the lands of the said Thos. E. Garner in Yolo County.

"XII. That said statements and representations so made by the said defendants E. P. Smith and Glenn Newton and by each of them, as aforesaid, were made for the purpose of defrauding and cheating this plaintiff, and of inducing him to make and enter into said exchange, as aforesaid, and to induce him to deliver to the said defendants E. P. Smith and Glenn Newton the difference between the represented incumbrance on the Yolo County property and the actual incumbrance on said property, to-wit, the sum of $1,000.00, and that said representations so made as aforesaid were and are false, fraudulent and untrue, and were known by said defendants and each of said defendants at said time, and at all times to be false, fraudulent and untrue.

"XIII. That in truth and in fact there was a note secured by a deed of trust constituting a first lien on the lands of Thos. E. Garner in Yolo County in no greater sum than $2,000.00, and that said note and deed of trust were held by Mary A Bostwick of Sacramento, and that no more than $2,000.00 was due upon said note so secured by deed of trust at any time.

"That there was not and never was a note secured by a deed of trust, or other writing, constituting a lien on the said lands of Thos. E. Garner, in Yolo County, in the sum of $3,000.00, or any other sum greater than $2,000.00. That the exchange price of the lands of Thos. E. Garner in Yolo County, as aforesaid, in truth and in fact was the Yolo County lands and the assumption of the said note secured by a deed of trust to Mary A. Bostwick in the sum of $2,000,00, and no more.

"XIV. That the said defendants Glenn Newton and E. P. Smith at all times concealed from this plaintiff the true trading price of the said lands of Thos. E. Garner in Yolo County, and that the said defendants at all times kept and concealed from this plaintiff the certificate of search prepared by the Yolo County Title Abstract Company, a corporation, and also concealed from this plaintiff the policy of title insurance placed on the said Yolo county property of Thos. E. Garner, and that the said defendants, and each of them, at all times concealed from said plaintiff the fact that the note secured by a trust deed to Mary A. Bostwick was no greater than the sum of $2,000.00.

"XV. That this plaintiff did not know or ascertain the falsity of said representations, and the fact of concealment as aforesaid by the said defendants, until the last of May, 1925.

"XVI. That the plaintiff believed and relied on the said representations of said defendants as aforesaid, and upon each and all of said representations, and believed and trusted the said defendants, and each of them, and that so believing and trusting the said defendants, and each of them, and the said representations made by them, and each of them, plaintiff and the said Thos. E. Garner made the said exchange as aforesaid, and that plaintiff by deed of conveyance executed and delivered on the 11th day of May, 1925, conveyed to the said Thos. E. Garner, his real estate heretofore mentioned and situated in the County of Alameda, State of California, and that the said Thos. E. Garner in a deed of conveyance joined in by his wife, deeded to this plaintiff the said Yolo County lands above mentioned and described by deed of conveyance delivered the 11th day of May, 1925.

"XVII. That on the consummation of said exchange the said defendants, Glenn Newton and E. P. Smith, and each of them, were paid a brokers commission for making said exchange.

"XVIII. That at the time the said deeds were made and executed between the said plaintiff and the said Thos. E. Garner, the said defendants E. P. Smith and Glenn Newton, and each of them, stated and represented that it was necessary for this plaintiff to execute a new note and deed of trust in the sum of $3,000.00 to the beneficiary, and that the said defendants drew up and presented to this plaintiff for his execution a note and deed of trust in the sum of $3,000.00 in favor of the said Mary A. Bostwick, which said note and deed of trust the said defendants and each of them, stated and represented to plaintiff was to take the place of the note and deed of trust in the sum of $3,000.00 theretofore constituting a first lien upon the said property of Thos. E. Garner; whereas, in truth and in fact the said note and deed of trust should have been executed for the sum of $2,000.00 only.

"That this plaintiff believing and relying upon said statement executed said note and deed of trust for $3,000.00 and delivered the same to said E. P. Smith and Glenn Newton, and each of them, for their delivery to the said Mary A. Bostwick. That said new deed of trust was executed and delivered on the 11th day of May, 1925.

"XIX. That the said defendants and each of them, thereupon had the said Mary A. Bostwick assign said note and deed of trust to one L. T. Allee, who thereupon gave to the said Mary A. Bostwick the sum due her on her former note and deed of trust, to-wit, the sum of $2,000.00, and that the said L. T. Allee paid to the said Mary A. Bostwick the whole amount due on said $2,000.00 note secured by a deed of trust, and took an assignment of the said new note for $3,000.00, secured by said new deed of trust.

"XX. That the said L. T. Allee thereafter on the 19th day of June, 1925, paid to the said defendant, E. P. Smith, the sum of $1,000.00, being the difference between the amount due the said Mary A. Bostwick on her note for $2,000.00, secured by the deed of trust that constituted a first lien upon the lands of Thos. E. Garner at the time the negotiations and exchange were made, and the sum called for in the new note and deed of trust so executed by plaintiff as aforesaid.

"XXI. That the said sum of $1,000.00 so paid by the said L. T. Allee, to the said E. P. Smith was not a commission for making the said exchange, and that said sum was not a part of the exchange price paid by plaintiff to the said Thos. E. Garner, and that the said note and deed of trust in the sum of $3,000.00 which was executed by plaintiff to the said Mary A. Bostwick, and which was by her assigned to the said L. T. Allee, is now a first lien upon the properties of this plaintiff so taken in exchange by him from the said Thos. E. Garner, as aforesaid.

"XXII. That plaintiff is informed and believes and therefore alleges that the said sum of $1,000.00 so received by the said E. P. Smith as aforesaid, was divided by the said defendants, E. P. Smith and Glenn Newton in proportions unknown to this plaintiff.

"XXIII. That by reason of the said false and fraudulent representations and concealment of the said defendants, Glenn Newton and E. P. Smith, as aforesaid, this plaintiff has been cheated and defrauded out of the said sum of $1,000.00, together with interest thereon from the 11th day of May, 1925, to the date of judgment, all to plaintiff's damage in the sum of $1,000.00, as aforesaid."

[1-3] The complaint also sets forth allegations relative to the execution of bonds by the respective indemnity companies to insure the faithful performance by the defendants Smith and Newton of their duties as real estate brokers, and compliance with the act of the Legislature of the state of California providing for the licensing and bonding of real estate dealers, each of the defendant companies executing a bond in the sum of $2,000. The answers of both of the appellant companies deny all of the material allegations of the complaint, but the fact of there being only a $2,000 lien on the Garner property is denied only upon information and belief, and, as the trust deed securing the payment of the lien thereon was a public record, and showed upon its face that it secured only the payment of $2,000, the answers of the appellants admit the existence of the lien of only $2,000 and what the public record exhibited, and raises an issue only as to the representations of a lien against the Garner property in the sum of $3,000 and the concealment by the defendants Smith and Newton of the fact that the trust deed was for no greater sum than $2,000.

As stated in 21 California Jurisprudence, p. 150, § 101: "It is settled that the existence of an alleged fact which may readily be ascertained from an inspection of a public record, within the reach of a defendant may not be put in issue by a denial based solely on information and belief."

The defendant Newton made default, and his liability is not considered herein further than it is necessary to review the testimony to ascertain if there is sufficient in the record to support the judgment against the Globe Indemnity Company. In this particular it may be stated at the outset that a reading of the record shows very clearly that much more testimony might have been introduced relative to the actions of the defendant Glenn Newton, in relation to the issues involved, had not the respondent labored under the mistaken idea that the default of Newton could be considered in this case as evidence against his surety, Globe Indemnity Company. The law in relation to this question will be considered later on. As to the sufficiency of the testimony to sustain the judgment against E. P. Smith and his surety, the Hartford Accident & Indemnity Company, an affirmative answer appears to be amply supported. The real question is as to whether there is sufficient in the record to support the judgment against Newton and his surety, not considering Newton's default.

In order to support the judgments in this case as against the appellants, it must appear from the record that the defendants E. P. Smith and Glenn Newton acted jointly or co-operated in inducing the plaintiff to execute a trust deed in the sum of $3,000, whereas, in truth and in fact, it should have been executed only for the sum of $2,000. The appellants here advance the argument that, as McPhetridge was willing to execute a trust deed in the sum of $3,000 in the exchange of the properties, he obtained just what he bargained for, and, therefore, was uninjured. This, of course, overlooks entirely the law relative to the duty of an agent to act honestly toward his principal and inform him of every fact material to the advantage of the principal. Nor does it matter whether Newton or Smith benefited by the proceeds of the fraud. While not made a defendant in this action, in order to understand the situation it is necessary to set forth and consider the acts of Howard Kerr, the agent for Thos. E. Garner, the owner of the real estate in Yolo county. This, for the purpose of showing that Kerr, Newton, and Smith co-operated in securing an extra $1,000, to the intent and purpose that all three of the agents might in some manner obtain compensation. The liability of Kerr to Garner to answer for the fact that the plaintiff was paying his principal $1,000 more than his principal had knowledge of is not in issue here, and is not passed upon, but the testimony in relation thereto is set forth simply to show how the three agents co-operated. While not in the order as it appears in the transcript, we will begin with the testimony of T. E. Garner, and the acts which characterize what we will call the moral status of the transaction from the very beginning. Mr. Garner testified as follows:

"I formerly lived in Yolo County where I owned 820 acres of land; I traded my property with plaintiff; the exchange was made through Howard Kerr, a real estate agent of Sacramento, acting for me; Newton handled the transfer for McPhetridge; at this time my property in Yolo had a $2,000.00 mortgage (the trust deed was called a mortgage by most of the witnesses); I went to Oakland with Mr. Kerr, examined the property, looked at the records in the recorder's office and came to Sacramento to close the deal with Mr. Kerr; I signed a written agreement that provided I was to exchange my ranch in Yolo County subject to a $2,000.00 mortgage, for the McPhetridge property in Oakland subject to a $6,000.00 mortgage; I placed the property in the hands of Mr. Kerr to sell, and after several months' time he came over to my place in Capay Valley and asked me how I would exchange; he said he had a party who wanted to trade for some land; I told him I didn't know; we made an appointment to go down and look over the Oakland property; when I got down there they represented the property in Oakland as having an $8,000.00 mortgage on it, which they wanted to exchange for my place; by 'they' I mean Mr. Kerr and Mr. Newton; he was the man that handled the McPhetridge side of the case; I went to look the property up and found that there was only $6,000.00 against the property, and this $2,000.00 was to be put on it for some other purpose; they represented to me the $2,000.00 was to go on there as they would have to have $2,000.00 more; by 'they' I mean Mr. Newton and Mr. Kerr; when I found that they were asking $8,000.00 on the place, I took the train and went home, and Mr. Kerr came over and wanted to know what kind of a trade I would make; I told him what I would do, and that was all; I would just exchange the properties as they stood; of course I was to pay him a commission; there was a mortgage of $2,000.00 against my property; the exchange agreement that I signed provided to exchange my ranch in Capay Valley subject to a $2,000.00 mortgage, for the Oakland property subject to a $6,000.00 mortgage; Mr. Newton said that the Oakland property would have to be increased to $8,000.00; that Mr. McPhetridge wanted this money to pay bills, or something; that is the way he represented the trade; I had nothing to do with that proposition."

This witness testified that, after the exchange had been made, in conversation with the plaintiff he told the plaintiff that the lien on the Yolo county property was for $2,000 only, whereupon the plaintiff replied that he had given a $3,000 trust deed, as he was told that that was the amount of the trust deed to be placed on the property. It may be here stated that the record does not show that the holder of the $2,000 note, for which Garner had executed a trust deed as security on the Yolo property, had made any demand for payment, nor does the record disclose that Mrs. Bostwick, to whom the original $2,000 note was given, and to secure which the trust deed was executed by Garner, had any knowledge of why a new trust deed was executed in place of the $2,000 one. The whole transaction appears to have been carried through and the negotiations had for the sale of the $3,000 trust deed in order to secure the $1.000 which the complaint alleges was wrongfully obtained. The reasons for boosting the lien on the Yolo county property in the sum of $1,000 was an entirely silent transaction so far as the beneficiary under the original trust deed was concerned, and likewise as to both the plaintiff and Garner, the owners of the properties being exchanged.

The plaintiff testified at considerable length, and we take from the testimony the following excerpts: "I now live in Yolo County; I formerly lived in Oakland; I own some property in Oakland; I accompanied Mr. Newton and Mr. Smith to see the Garner property that was subsequently deeded to me; I had business dealings with Smith and Newton in April and May, 1925; these men, Smith and Newton, came to me one afternoon in Oakland and they said they had a trade for me; they wanted me to get in a machine and come up and look at the property; we were to meet Mr. Kerr of Sacramento at Madison; it was known as the Garner property; I signed an escrow agreement delivered to the Central Title Company of Oakland, California, agreeing to convey my property subject to a $6,000.00 mortgage, for the Garner property, to include about 840 acres, subject to a $3.000.00 incumbrance; I agreed to pay Newton $1,400.00 if he made an even exchange of the properties. Mr. Newton said the property in Yolo County had a $3,000.00 incumbrance; I did not examine the title to the Yolo property prior to the exchange of deeds; about five or six days after the deal was closed Mr. Garner told me the Yolo property was mortgaged for only $2,000.00; I paid Newton $700.00 commissions; after Mr. Smith and Mr. Newton and myself visited the Garner property, Mr. Newton and I returned to Oakland and there I signed the agreement to pay $1,000.00; after I told Newton I would pay him $1,000.00 if he made an even exchange, he said he would see what he could do, and within a few days he came out to see me and said there was a $3,000.00 mortgage against the Yolo place, and that was the best he could do; I said I would trade; each was to assume the other's mortgage; Mr. Newton said he would cut down his commissions to $700.00; I never saw an abstract to the Yolo property; I got a title insurance; I was in the Abstract Company's office at the time the deal was closed; Mr. Smith and Mr. Newton were there also; it was in the office of the Central Abstract Company in Oakland where I signed the papers; after the deal was closed the papers concerning the title to the Garner property were returned to me, if I remember rightly; the deal was finally consummated at Oakland at the office of the Central Abstract Company; I did not inquire as to how the title stood; I signed a note and trust deed for $3,000.00 and the exchange was made; it was in accordance with the agreement or instructions to the Title Company; I did not look at the title report that had been prepared by the Yolo County Title Abstract Company concerning the title to the property I was to acquire. In regard to the title, I had this conversation with Mr. Newton: I told Newton I had never done but very little business, and said I should get a lawyer to attend to this, and he said, 'I have known you for a long time and you have treated me fair and I will see that you get a square deal in this case;' I knew they were making a search; they said the title was going through but I did not see the papers; they said that they were getting the abstract and to deliver a deed to the property; I never came up to Woodland to examine the records as to how the title stood; I left it all to Mr. Newton; Mr. Newton said there were 840 acres, and finally got down to 820; Mr. Newton told me that the papers were being prepared in Woodland; the abstract was being made here in Woodland; I didn't get the papers until after the deal was closed; I left that up to Mr. Newton, as he told me he was a friend of mine and he would attend to all these matters and save me hiring an attorney, and so I left it up to him and he did the work; Mr. Newton told me that the preliminary report did not show the correct number of acres; he said that instead of 140 acres it was either 118½ or 120—I mean 820 instead of 840, as he told me first; I only mentioned incumbrance on the property at the time he told me; that was before the transaction started—that there was a $3,000.00 mortgage, and that was all that was said; I didn't know anything about the $2,000.00 incumbrance until after it was all over; Mr. Newton and I came up from Oakland and met Mr. Smith in Sacramento, and we went out to look at the property; they said he and Newton were working together.

"Q. And Mr. Newton was working for you, and Mr. Smith was representing the seller of the country property, is that correct? A. I presume so, yes, sir.

"Q. And that is the same situation that existed in this deal, wasn't it? A. No; I couldn't answer that question because I don't know, because they both seemed to officiate in this matter and Mr. Smith was there Johnnie on the spot when this deal was put through. Mr. Newton told me that he split the commission three ways; I said to him: 'You didn't make much out of this deal, did you?' He answered: 'No, I split the commission with Mr. Kerr and Mr. Smith.'"

The defendant E. P. Smith was called as a witness, and from his testimony we set forth the following: "I had a conversation with Mr. Newton about the exchange of the McPhetridge and Garner properties; on the day Mr. McPhetridge, Mr. Newton and myself came to view the Yolo property I phoned to Mr. Howard Kerr of Sacramento asking him to meet us at Madison. Mr. Kerr was paid a commission on the deal; I don't know how much; I didn't make any arrangement about the title to the Yolo property nor record the deeds; I was entrusted with some papers to deliver to the Yolo Title and Abstract Company but I don't know what the documents were."

Witness was shown a check for $900, and stated that he received that sum from the trust deed heretofore referred to as the $3,000 trust deed, and that the $3,000 trust deed was sold to a man by the name of Allee for $3,000; that he kept $900 as his own profit, and gave Mr. Allee $100 for buying the paper; that Mr. Kerr told him there was a $2,000 trust deed on the Garner property, but he did not remember whether Kerr told him that prior to, or during, the negotiations or afterwards; that he possibly knew about the incumbrance before the deal was closed; that he was not negotiating for the sale of the property, but that he was trying to bring the parties together; that he was not working for Howard Kerr, that he was working for himself; that he did not know anything about the exchange price; "I possibly heard some figures mentioned," but that the exchange prices were usually matched to fit specific cases; that he had a conversation with Mr. Newton about the exchange of the two properties; that he and Newton and McPhetridge went out to look at the Yolo property; that he (the witness) expected to participate in the deal; that he brought some papers which were intrusted to him by the Central Title Company of Oakland and turned them over to the Yolo County Title Abstract Company, and they recorded them; that he brought up the trust deed, the one which Mr. McPhetridge signed; that he did not read the trust deed, and could not say that it was for $3,000; that Mr. Kerr told him that there was a $2,000 trust deed on the property.

The witness further testified he was trying to bring the parties together; that Mr. Newton rang him up on the phone and said: "There is an offer in escrow to trade McPhetridge's property on Flint Street subject to a lease and subject to a trust deed for the Yolo County property, subject to $3,000.00, and McPhetridge agrees to sign a trust deed for $3,000.00."

"Q. You had talked it over prior to that time? A. Certainly; I brought the parties together with the expectation of getting some remuneration.

"Q. You expected to get your remuneration by increasing that trust deed, didn't you? A. No, sir.

"Q. Where did you expect to get your remuneration? A. Commission.

"Q. From whom? A. Mr. Kerr and Mr. Newton; I asked them both."

The witness further testified, after stating that he expected to participate in the deal:

"Q. Well, whom were you representing? A. I was a broker; nobody employed me; I employed myself; that is my business.

"Q. In just plain language, you butted into the deal, is that the idea? A. Do you butt into a deal when a man brings you a case?

"Q. I am asking you? A. I have got a broker's license.

"Q. (In relation to the $2,000.00) Then you knew it before the deal was closed, didn't you? A. I didn't say I didn't.

"Q. You did know it? A. Possibly I did; I didn't say I did, but possibly I did.

"Q. Did you ever tell Mr. Newton that there was a $2,000.00 mortgage or deed of trust on the Garner property? A. Not to my knowledge. Q. Did you ever tell him that there was a $3,000.00 trust deed or mortgage on the property? A. I didn't.

"Q. Never told him that? A. No.

"Q. You are negotiating a sale of this property? A. I wasn't negotiating anything.

"Q. You were trying to put the deal through? A. I was bringing two parties together.

"Q. You were bringing two parties together? A. Yes.

"Q. And trying to raise $900.00, yet you never told him the purchase price? A. That's right, I never quoted the purchase price to anyone."

The witness Smith further stated that he sent a telegram to Glenn Newton about this deal. The telegram was then handed to the witness, and it reads as follows: "Sacramento, Cal., May 18, 1925. Glenn Newton, 3450 Woodruff Ave., Oakland, Cal. Kerr sent title for McPhetridge to see some days ago. Must have return of same before Huston will give up $900.00. Rush on this. Have another deal ready for you. Call me on phone at once or get action on that policy so we can close. Signed, E. P. Smith." This telegram, of course, was sent after the exchange of properties had been had, but it shows when the title policy was sent to Mr. McPhetridge, and, so far as the transcript on appeal shows, was admitted without objection, and left the court at liberty to draw the conclusion that the $900 referred to in the telegram was the $900 which Smith was to get as his part of the commissions for bringing the parties together, and that Glenn Newton knew all the circumstances, and would hasten the return of the paper called for, so that Mr. Smith might get what he called his remuneration for participating in the deal, and also justifies the conclusion of the trial court that Mr. Newton knew of the difference between the actual lien upon the Garner property in the sum of $2,000 and the sum at which he represented such lien against the Garner property, which, as we have heretofore shown, Newton stated to the plaintiff to be $3,000, which brings home to the defendant Newton actual knowledge of the incumbrance which was upon the property, different from what he stated to the plaintiff. The duty of the agent is to inform his principal of the actual facts concerning the transaction. From what we have said it is evident that Newton did nothing of the kind, although the short excerpts from the testimony establish his knowledge, and further shows that he laid the foundation by lulling the plaintiff into security, telling him that it was not necessary to employ a lawyer, that he (Newton) was the plaintiff's friend, and would see that he got a square deal.

The defendant Smith was placed upon the witness stand in his own behalf, and proceeded to tell the story as to Mr. Kerr informing him how his profit might be secured by negotiating a sale of the $3,000 trust deed and paying Mrs. Bostwick the amount of her $2,000 note. This testimony does not specially involve Mr. Newton, but is illuminating in the fact that the $2,000 trust deed appears to have been satisfied or canceled and the $3,000 trust deed transferred to Mr. Allee for the sum of $3,000, Mrs. Bostwick paid the amount actually due her, and the remainder distributed as we have here said, all without the knowledge of Mrs. Bostwick. The cross-examination of Mr. Smith, when placed upon the witness stand in his own behalf, shows that Mr. Newton had the preliminary report of the Garner property in his possession.

The record which we have set forth discloses that Kerr and Newton failed in their attempt to get $2,000 in the first instance by boosting the mortgage on the McPhetridge property situated in Oakland, but that by boosting the trust deed on the Garner property in Yolo county, in addition to there being paid to Newton the sum of $700 and $400 to Mr. Kerr, Mr. Smith was enabled to clean up a profit of $900 and give Mr. Allee a bonus of $100 for buying the trust deed.

[4] The fact that Mr. E. P. Smith may have been a volunteer or a gratuitous agent in the inception of the transactions to which we have referred, or even during the course of the progress of the negotiations, is wholly immaterial. This is abundantly shown by the rule cited in 1 California Jurisprudence, p. 790, par. 79, to-wit: "While a gratuitous agent cannot be compelled to enter upon performance of an agency, nor be mulcted in damages for his failure to do so, when he does enter upon such performance he is, in common with all other agents, bound to exercise the utmost good faith in dealing with his principal. * * * An agent for hire is bound to exercise a greater degree of care and diligence than an agent acting gratuitously, but the latter has no greater license to indulge in misrepresentations, concealments or other breaches of good faith than the former. * * * Even a gratuitous agent is therefore liable to his principal for damages resulting from a gross neglect of duty which he owes to his superior." And, as further said in the same volume, p. 805, § 91: "In entering upon the relation of principal and agent, the principal bargains for the exercise of the skill, ability and industry of his agent, and the agent agrees that he has reasonable skill and will do the work with reasonable care." A number of authorities are cited to support the language of the text.

[5-8] Again, as said in the case of Revert v. Hesse, 184 Cal. 295, 193 P. 943, 946: "It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action. Herron v. Hughes, 25 Cal. 555; Davitt v. Bakers' Union, 124 Cal. 99, 56 P. 775; Dowdell v. Carpy, 129 Cal. 168, 61 P. 948; Menner v. Slater, 148 Cal. 284, 83 P. 35. In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor, and regardless of the degree of his activity. Cohen v. Fisher, 135 App. Div. 238, 120 N. Y. Supp. 546; White v. White, 132 Wis. 121, 111 N. W. 1116; Miller v. John, 208 Ill. 173, 70 N. E. 27. A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or cooperated in inflicting a wrong upon him. Herron v. Hughes, supra; More v. Finger, 128 Cal. 313, 60 P. 933; Nevin v. Gary, 12 Cal. App. 1, 106 P. 422." And further, as said in 2 C. J., p. 714, § 369: "Loyalty to his principal's interest requires that an agent shall make known to his principal every material fact concerning his transactions and the subject matter of his agency that comes to his knowledge or is in his memory in the course of his agency, and if he fails to do so, he is liable in damages to his principal for any injury incurred or loss suffered in consequence of such failure."

[9-11] The court found that the defendants E. P. Smith and Glenn Newton at all times mentioned conspired and operated, worked and schemed together to cheat and defraud plaintiff, and that the said defendants and each of them acted in union, concert, and collusion in the making of false representations, and each of them acted as in said complaint alleged for the express purpose of cheating the plaintiff out of the sum of $1,000 as aforesaid. The appellants urge that the complaint does not in specific terms allege a conspiracy, and that the trial court so stated during the course of the trial. While this is true, the complaint does, nevertheless, set forth all the facts necessary to constitute a charge of conspiracy. That this was not considered by the trial court until it came to making its findings does not militate against the correctness of the findings. In 12 C. J. p. 630, § 216, in dealing with the subject of pleadings having to do with conspiracies, we find the following: "In an action of the nature under consideration the rule is to allow great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred; even going so far as to allow the individual acts of the conspirators to be averred. The act complained of, however, must be definitely and issuably stated, so that, if the facts themselves should be admitted, the court can draw legal conclusions. And so the opposite party will be apprised of what he is called on to answer." The complaint under consideration responds fully to all these requirements. The facts and acts of the parties are fully set forth. That the word "conspiracy" was not used in no wise

lessens the legal import of the acts, nor if the word "conspiracy" had been used would it have added anything to the legal significance of what was done and performed or the concealments indulged in by the defendants Smith and Newton.

In 5 California Jurisprudence, p. 530, § 30, this language is found, supported by abundant authorities: "In an action for damages resulting from acts of conspirators, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity. And so, a plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or co-operated in inflicting a wrong upon him." There can be no question from the facts which we have set forth that the defendants Smith and Newton co-operated in inflicting the injury alleged upon the plaintiff in this action. And likewise, in the same volume on page 533, § 34, a reading of the text, supported by authorities, shows that, if the facts are set forth constituting a conspiracy, it is unnecessary to use the term "conspiracy."

That a concealment of the true amount of the lien upon the Garner property, and the representation that it was $1,000 in excess of the true amount, constituted a fraud, requires no argument. The record in the case from which we have quoted shows that the plaintiff relied upon the statement made by Newton that he (Newton) would see that the plaintiff would get a square deal, which, of course, carries with it the implication that he (the plaintiff) would not be defrauded out of $1,000 by any of the representations made to him by the defendant Newton, irrespective of the acts of the defendant Smith. We do not need to go further into the law relative to the duty of agents to disclose to their principals every fact within their knowledge affecting the financial interests of their principals, nor is it material whether any particular agent profited by his misrepresentations or concealments. 26 C. J. 1180; Von Schrader v. Milton (Cal. App.) 273 P. 1074. In this case the trial court would have been warranted in concluding that the defendant Newton profited by the concealments, as his co-worker, by reason of the misrepresentations and concealments, was enabled to enrich himself to the extent of $900, and thus Newton was saved from splitting his fee with Smith; or it may be that this is what Newton considered splitting his fee with Smith, as he stated to the plaintiff he had done.

[12] Finally, it is argued that the court erred in overruling the appellants' demurrers on the ground of misjoinder of actions, and that there should be a reversal for such alleged error. The respondent replies that section 379a of the Code of Civil Procedure as added by St. 1927, p. 477, answers this objection. That section reads: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities." The appellants rejoin to the answer of the respondent that this section did not become a part of the Code of Civil Procedure until after the trial of this action. This contention is true, but section 4½ of article 6 of the Constitution provides that no new trial shall be granted for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The procedure followed by the court is precisely the procedure now outlined in the section of the Code just referred to, and, if the procedure which was followed by the court constitutes a miscarriage of justice, then and in that case section 379a of the Code of Civil Procedure is unconstitutional, as providing a procedure which contemplates a miscarriage of justice. No such argument is presented by appellants. It is evident that section 379a, supra, is just simply a legislative expression of what is covered by section 4½ of article 6 of the Constitution, and that, if it is now a proper procedure, and affords parties ample opportunity to be heard, then and in that case it did not in this trial result in a miscarriage of justice. An examination of the record, however, shows that the appellants had every opportunity to present their cause; that there was no testimony introduced upon the trial of the action, or at least none has been called to our attention that would not have been admissible had the defendants all been sued separately.

[13, 14] While the testimony in this case discloses that the defendants Smith and Newton did not indulge in any extended conversation relative to their acts, it does show that they both understood and acted with a common purpose. The fact that persons engaged in unlawful and fraudulent enterprises talk but little, but act with a common understanding, has led to the rule that fraudulent designs and conspiracies may be established without what is called any direct proof.

[15, 16] We think what we have stated discloses sufficient to justify the trial court in drawing every material conclusion reached by it. Objection is made that some of the immaterial findings of the court are not supported by the testimony, but, as the material facts and issues are all sufficiently supported, such objections, if correct, would not warrant a reversal of the judgment. That the default judgment against the defendant in a case similar to this cannot be considered as proof against his bondsmen needs but little consideration. The law appears to be well settled in this state that sureties are not bound by judgments against their principal unless the undertaking so provides, as where one undertakes to pay a certain sum in the event of the principal failing so to do. In other cases the surety is not prevented from making any defense that might have been interposed by his principal. See Stearns on Suretyship (3d Ed.) p. 298; 23 Cal. Jur. p. 1062; Easton v. Boston Investment Co., 51 Cal. App. 246, 196 P. 796. Other cases might be cited, but the rule announced in the citations given prevails in California.

The judgment against all of the defendants, as entered by the trial court, is affirmed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

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101 Cal. App. 167

ELLERY et al. v. PACIFIC LUMBER CO. et al. (Civ. 7046.)★

District Court of Appeal, First District, Division 2, California. Oct. 9, 1929.

Rehearing Denied Nov. 7, 1929. Hearing Denied by Supreme Court Dec. 5, 1929.

1. Trespass 🔑44—Plaintiff suing for trespass had burden of proving trespass on lands owned by plaintiff.

In action to recover damage in trespass by cutting and removing timber from lands of plaintiff, burden of proof on issue whether defendants committed trespass on lands owned by plaintiff was on plaintiff.

2. Appeal and error 🔑1011(1)—Judgment based on conflicting evidence and sustained by competent evidence will not be disturbed on appeal.

Appellate court will not disturb judgment based on conflicting evidence when there is competent evidence to sustain it.

3. Boundaries 🔑3(4)—Definite calls by course and distance to creek, which was well-defined permanent monument, prevails over indefinite locations and calls in determining boundaries.

In determining boundaries between defendant's and plaintiff's land, in action for trespass, definite calls by courses and distances to creek, which was well-defined permanent monument, must prevail over indefinite locations and calls.

4. Boundaries 🔑37(1)—Conflicting testimony as to boundary line between plaintiff's and defendant's land held sufficient to show defendants did not trespass on lands owned by plaintiffs.

In action for damages in trespass by cutting and removing timber from lands claimed by plaintiffs, conflicting testimony as to boundary line between plaintiffs' and defendants' land was sufficient to sustain finding that defendants did not trespass on lands owned by plaintiffs.

5. Appeal and error 🔑994(3)—Competency and reliability of witnesses and convincing effect of evidence held for court having all witnesses before it in determining boundary lines.

Where trial court had all witnesses before it and heard all testimony in determining boundary line between properties of respective parties, it was for court to decide which of witnesses were most competent and reliable and what of evidence was most convincing.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Actions by Franklin Ellery, Jr., and others against the Pacific Lumber Company and another, consolidated for trial. Judgments for defendants, and plaintiffs appeal. Affirmed.

John F. Barnett, of San Francisco, and W. F. Clyborne and John F. Quinn, both of Eureka, for appellants.

Nelson & Ricks, of Eureka, for respondents.

NOURSE, J. The three cases noted in the title were all instituted against the defendants to recover damages in trespass for cutting and removing timber from lands claimed by each plaintiff. The cases were consolidated for trial, were tried before the court sitting without a jury, and in each case judgment went for the defendants. The plaintiffs have joined in an appeal on typewritten transcripts.

[1, 2] The controversy arises over the conflict and uncertainty of surveys made by the contending parties showing the line of division between the lands owned by the respective plaintiffs and the defendants. This conflict, in turn, arises from the loss or obliteration of some of the government survey corners established in 1872 and particularly the common corner of sections 4, 5, 8, and 9. The case presented to the trial court was a simple question of fact—whether the defendants committed a trespass upon lands owned by the plaintiffs. On that issue the burden of proof was on the plaintiffs, and the trial court found that that burden had not been sustained. On this appeal the single point raised by the appellants is that the evidence is insufficient to support the findings. There is no rule of law involved in the appeal except the rule that an appellate court will not disturb a judgment based on conflicting evidence when there is competent evidence to sustain the judgment rendered.

[3, 4] It will serve no purpose to give a full résumé of the evidence produced on the issue tried; it is sufficient to refer to the evidence relating to the location of the common corner 4, 5, 8, 9 as indicating the wide conflict between the parties. The government field notes locating this common corner read in part: "10.00. A brook 17 links wide runs

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★Rehearing denied. Hearing denied by Supreme Court.

N.W.—39.06. Larrabee Creek 77 links wide, runs W." The surveyor employed by the respondents, basing his calculations partly on the method of proportionate distances, located this corner at a point which measured but 3 feet less in distance from Larrabee creek than that called for in the government field notes. The surveyor employed by the appellants placed the corner more than 700 feet short of that called for. The respondents relied upon a well-defined and well-known brook at the point mentioned in the field notes, while the appellants relied upon a dry depression in the land which it was admitted did not contain running water. In an effort to establish this depression as the "brook" mentioned in the field notes, the appellants asserted that the brook might have been filled by timber and débris, but the respondents had a pit dug in this depression of the ground—a pit 6 feet in depth. Witnesses experienced in the life of the woods testified that there was no indication that a brook at any time had been located at the point fixed by appellants. It is conceded that the brook referred to in respondents' survey is not as wide as that mentioned in the government field notes, but respondents rightly contend that the error in the width of the brook may be disregarded, and that the definite call by courses and distances to Larrabee creek, which is a well-defined permanent monument, must prevail over the indefinite locations and calls relied on by appellants.

[5] The foregoing is a fair sample of the differences between the parties covering the location of each corner and the running of each line of the survey. It is conceivable that both surveyors may have done some guessing in the course of their work and that their calculations may have been wrong in some respects, but these surveys, and the testimony taken in regard to them, enjoy no different character or relation to the trial of the case than other evidence which must be heard and weighed by the trial court. All we have on this appeal is the confident assertion of the appellants that the surveyor employed by them was entitled to greater credence than the surveyor employed by respondents, and that the preponderance of the evidence therefore supported their contentions. But the issue was the boundary line between the properties of the respective parties, and in determining that line the trial court had all the witnesses before it and heard all the testimony. It was for that court to decide which of the witnesses were the most competent and reliable, and what of the evidence was the most convincing.

We find no error in the record.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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101 Cal. App. 12

McFADDEN v. LICK PIER CO. (Civ. 3764.)★

District Court of Appeal, Third District, California. Sept. 28, 1929.

Rehearing Denied Oct. 28, 1929. Hearing Denied by Supreme Court Nov. 25, 1929.

1. Landlord and tenant ⚷246(1)—"Improvements" as used in lease forbidding removal until payment of rental and granting lien to owner included only building constructed by lessee.

Term "improvements" as used in lease forbidding removal thereof until all rentals had been fully paid, and giving owner of premises a lien thereon, *held* to include only building constructed by lessee and not other personal property used in operation of premises as a dance hall; such term being ordinarily employed only in the plural form and with reference to real property.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Improvement.]

2. Landlord and tenant ⚷157(1)—Owner was without right, on lessee's failure to operate dance hall, to operate same and charge expenses as personal liability against lessee.

Under lease requiring lessee to construct a building on premises and operate a dance hall, and authorizing owner in case of lessee's failure to carry sufficient liability insurance and to make necessary repairs to do so, and charge expense as so much additional rent, owner was without right to operate premises, if lessee failed to continuously do so for period of 10 months during every year and charge expenses thereof as personal liability against lessee.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Austin McFadden against Lick Pier Company, a copartnership consisting of Charles J. Lick and another, to obtain a declaratory judgment, wherein defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

Edw. F. Wehrle and George L. Reimbold, both of Los Angeles, for appellants.

Henry G. Bodkin, of Los Angeles, for respondent.

PLUMMER, J. This action was instituted by the plaintiff to obtain a declaratory judgment determining the respective rights of the parties hereto under the terms and conditions of a lease entered into between said parties on the 1st day of February, 1924. On and prior to the date referred to the defendants were the owners of certain pier rights at Venice and Santa Monica in the state of California. Negotiations were carried on between the respective parties, resulting in the execution of the lease just referred to, whereby it was provided, among other things, that the defendants should erect a pier of a certain size and dimension, and that the plain-

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★Rehearing denied. Hearing denied by Supreme Court.

tiff would thereafter erect upon said pier a dance hall according to plans and specifications set forth in a certain blueprint referred to in the lease. The lease was to continue until the 1st day of September, 1939. The complaint sets forth the completion of the pier by the defendants and the erection of a dance hall thereon by the plaintiff at an expense of $120,000. The court makes no finding as to the cost of the dance hall, but the answer of the defendants admits the construction of the dance hall and the value thereof up to any sum less than $120,000. The defendants filed a cross-complaint asking for a declaratory judgment according to their interpretation of the lease. The plaintiff had judgment, and the defendants appeal.

The provisions of the lease in controversy in this action are paragraphs indicated as A, C, E and K. Paragraph I is not involved, but is necessary to be set forth in order to obtain a full understanding of the agreement. The paragraphs referred to read as follows:

"(A) That the lessee will, at his own cost and expense, erect upon said space the dance hall hereinbefore referred to, and have the same completed and ready for operation, and begin the operation thereof not later than sixty (60) days after foundation for dance hall is completed, said dance hall to be erected, maintained, and operated by said lessee at his own cost and expense, and to be kept at all times neat, clean, and attractive, and that the same shall, whenever the same is necessary for its proper appearance, be repainted and kept in good condition and repair at all times, and to be operated at least ten (10) months of each year.

"(C) It is further covenanted and agreed that the lessee covenants and agrees to maintain and operate said dance hall continuously for the term of this agreement, and to furnish an orchestra or other music equal to that used or furnished by any other dance hall in the cities of Santa Monica or Venice, California, and to pay all expenses connected therewith; it being expressly understood that notwithstanding any provisions in this lease contained as to the participation of the owner in or to any of the receipts, income or revenue of said business, that the same shall in no sense or wise be construed a partnership, and that the only interest of the owner in said business is the specified percentage or amount to be paid, and that solely as rental for the use and occupation of said premises."

"(E) It is further agreed that the lessee shall at all times carry good and sufficient liability insurance for the payment of all damages accruing to any person, partnership or corporation on account of, growing out of, or connected with the building, erection, conduct or operation of said dance hall and to pay, and keep fully paid, the premiums upon all such insurance. And it is further agreed that in the event that the lessee shall fail to do or make any of the repairs by said lessee to be made, or to furnish or pay for any insurance or other thing to be paid for or furnished by the lessee hereunder, that then and in that event the owner shall have the right to furnish and pay for the same (but nothing herein shall be construed as imposing any obligation upon the owner so to do), and that any amount so paid out shall be repaid to the owner as so much additional rent at the next rent paying period hereunder, and for said and every purpose the payment of said percentages, or any part thereof, shall constitute the payment of rent."

"(I) It is further covenanted and agreed that in consideration of this lease, and the rights and privileges herein granted, the lessee agrees to erect and maintain at his own cost and expense, and without any cost or expense to the owner, the aforesaid dance hall, and to pay the owner as rental for the space herein leased, let and demised, the following amounts, to-wit: For and during the period of time until the lessee has been fully reimbursed out of the profits of the conduct of said dance hall, and every business therein conducted, the owner shall receive fifteen (15%) per cent of the gross receipts derived from the operations of every kind, including sales, rents, privileges and all income derived in or about said dance hall; and for the purpose of the foregoing, 'profits' are hereby defined and declared to be the gross income less the actual cost of operation; provided, however, that no person shall draw or receive more than seventy-five ($75.00) dollars per week out of the receipts until the said building is paid for as aforesaid; and it is further agreed that after said lessee shall have been fully reimbursed on account of the erection and installation of said building, that thereafter the owner shall receive as rental for the remainder of said term, twenty-five (25%) per cent of the gross receipts from every source, less cost of the orchestra and except that derived from the sale of merchandise, drinks and any article sold on said premises, and as to such articles, merchandise, drinks, etc., the owner shall at all times receive fifteen (15%) per cent of the gross sales price.

"Said percentages aforesaid shall be paid daily at the close of business, or at such other time as may be mutually agreed upon by the parties hereto; and it is further agreed that the owner shall have the right at all times to hire and keep employed a cashier to take in and account for the receipts of said business, and that the lessee shall pay the salary of such cashier, not to exceed $25.00 per week."

"(K) It is agreed that in the event (but not otherwise) the lessee shall keep and perform each, every and all of the covenants herein contained to be performed by said lessee, and shall pay at the time and in the manner herein provided all of said rentals, that then and in that event, and at the expiration of said term, the lessee may remove all improvements made or placed upon said premises by said lessee, but that the said removal shall be done in a good and workmanlike manner without injury to the premises, and that no part of said or any improvements placed thereon by the lessee shall be removed until all rentals have been fully paid, and the owner is hereby given and granted a first and prior lien upon everything brought, placed or permitted on said pier by the lessee for any rent due or to become due hereunder, and that any property which the lessee is entitled to remove hereunder shall be removed on or before the first day of December, 1939, and that any property, buildings, fixtures or other property left by the lessee upon said premises after said date, shall be and forever remain the property of said owner."

The principal contention of the appellants is that they have a lien upon all furniture, musical instruments, stock of goods, and such like property that may be brought into the dance hall during the continuance of the lease, and that, upon the failure of the plaintiff to continuously operate the dance hall for a period of ten months during each and every year, then and in that case the defendants have a right to operate the same and charge the expenses of such operation as a personal liability against the plaintiff.

The court found that under the terms of the lease the defendants were not entitled to any lien whatsoever upon the furniture, equipment, pianos, lighting apparatus, music stands, or stock of goods, or any part of such property placed in said dance hall by plaintiff, for any rent due or to become due under the terms of the lease; that the lien of the defendants was limited to the permanent improvements placed on said pier by the plaintiff. The court further found that the plaintiff had the right to remove any of the aforesaid personal property as distinguished from the improvements placed thereon by the plaintiff, and that the defendants had no right to interfere with the removal of such personal property. The court further found that, if the plaintiff failed to furnish the necessary employees and assistants, pay the taxes, etc., and operate the dance hall for a period of ten months of each year, the defendants in that event were not authorized or empowered under said lease to furnish the same, or any part thereof, or charge the same, or any part thereof, against the plaintiff as so much additional rent. The court further found that no personal liability could be charged against the plaintiff in the event that the income of operating the property was not sufficient to pay the expenses thereof. The court further found that there was no provision in the lease authorizing the defendants to operate the ballroom or dance hall in the event that the plaintiff failed so to do. The court further found that the plaintiff had no right to remove any permanent improvements placed on said pier prior to December 1, 1939, and then only in the event that the plaintiff, or his successors in interest, had faithfully carried out all the terms and conditions of the lease. While the court did not so find, it may be here stated that paragraph K of the lease provided the conditions under which the improvements placed upon the pier by the plaintiff might be removed on or before the 1st day of December, 1939, and that, if not so removed, the buildings, fixtures, etc., remaining upon the premises should be and forever remain the property of the owners.

As the remedies which the defendants might have as against the plaintiff by way of an action for damages if the plaintiff failed to operate the lease, as provided for, are not involved in this action, and were not passed upon by the court, though mentioned by counsel, we do not deem it necessary to give any attention to such questions. Nor does it seem necessary to follow counsel in the consideration of the various cases having to do with the interpretation of contracts, as the provisions of the Civil Code, beginning with section 1635 and ending with section 1661, cover all that is involved in this action, save and except as to one word, and that is the word "improvements." In 31 C. J. 307, we find the following: "The term 'improvements' is a broad signification; improvements, or, as they are commonly called 'betterments,' may be designated as the improvements on realty which are more extensive than ordinary repairs, and enhance, in a substantial degree, the value of the property. The term 'improvement' is sometimes used with reference to personal property but ordinarily it is employed in the plural form and with reference to real property only." And in the notes on page 308 of said volume appears the following pertinent statement: "Where the word 'improvements' is used, without any language defining or extending its ordinary meaning, the courts, with substantial uniformity, have held that it relates to improvements to the realty and not to articles in the nature of chattels such as trade fixtures"—citing a number of cases.

The case of Pasadena University Co. v. Los Angeles County, 190 Cal. 786, 214 P. 868, 869, setting forth a rule of construction, is applicable here. It is said in that case: "It is the rule of construction that, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 36 Cyc. 1119; 25 R. C. L. 996, 997; 2 Lewis' Sutherland's Stat. Const. 803, 804." In reading the lease in question we find no language which changes any of the general rules of construction or give to any of the words used therein a different meaning from that ordinarily attached. With this in view, we will first consider the main contention of the appellants relative to the lien upon personal property.

[1] Paragraph K, after setting forth, as herein shown, certain particulars, contains the following: "It is agreed that in the event, but not otherwise, the lessee shall keep and perform each, every and all of the covenants herein contained to be performed by said lessee, and shall pay, at the time and in the manner herein provided, all of said rentals, that then and in that event, and at the expiration of said term, the lessee may remove all improvements made or placed upon said premises by said lessee, but that the said removal shall be done in a good and workmanlike manner, without injury to the premises, and that no part of said improvements placed thereon by the lessee shall be removed until all rentals have been fully paid, and the owner is hereby given and guaranteed a first and prior lien upon everything brought, placed or permitted on said pier by said lessee for any rent due, or to become due hereunder, and that any property which the lessee is entitled to remove hereunder shall be removed on or before the 1st day of December, 1939," etc. It is this provision of the lease upon which the appellants base their claim to a lien upon personal property. The language of this paragraph is so plain that a simple reading thereof leads to the conclusion that the appellants' contention is untenable. In the very inception of the part of said paragraph relied upon by appellants, the subject of improvements and the removal of improvements is made the basis of all that is therein contained. It is covenanted and agreed that, if the lessee shall have performed all and singular the requirements and conditions of the lease, then he should have the right to remove all the improvements, in a good and workmanlike manner. The following language does not refer to any personal property that might be used by the plaintiff in the dance hall or ballroom, or in the operation thereof, but only refers to everything brought, placed, or permitted on said pier. The word "everything" is a general word following the particular statement of improvements placed upon the premises by the lessee, which the lessee was entitled to remove. It may be said that the character of the personal property referred to in the lease shows that it was of a changing character. Much of it was to be bought and sold, with proceeds thereof accounted for daily. Nor is there any prohibition in the lease relative to the removal of personal property. The subject under consideration, and the portion of paragraph K upon which the appellants rely, has to do with the removal of improvements. In this particular it should be borne in mind that what we have said in relation to the cost of the dance hall or ballroom has a significant bearing. In the event that the terms and conditions of the lease were not complied with, the plaintiff was obligated to leave upon the premises a building costing, as we have said, any sum of money less than the alleged sum of $120,000; that is, the improvement to be placed upon the premises by the plaintiff within the contemplation of the parties at the date of the execution of the lease, and which was thereafter placed upon said premises by the plaintiff, which the parties certainly had in mind when using that term and giving the right to the defendants to hold as security for the performance by the plaintiff of the obligations assumed by him.

[2] A reading of paragraph E shows conclusively that the finding of the trial court in relation thereto is correct. Under certain conditions, as provided in said paragraph, the owners may perform particular acts, and the expenses shall be charged as so much additional rent. There is nothing in any paragraph of the lease authorizing the appellants to perform any acts in the event of a failure of the plaintiff so to do and charge the expenses thereof as a personal liability against the plaintiff.

It is not intended, by any language used herein, to express any opinion as to what remedies, if any, the appellants might have by way of damages against the plaintiff for failure on his part to comply with the conditions of the lease.

The judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

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101 Cal. App. 164

BORGSTROM et al. v. BRYAN et al.

(Civ. 7051.)

District Court of Appeal, First District, Division 2, California. Oct. 9, 1929.

1. Trial 🔑398—Finding in favor of defendants on adverse possession was not contradictory with finding in their favor as holders of record title.

Finding, in action to abate an alleged nuisance on account of buildings encroaching on lot, in favor of defendants on adverse possession, was not contradictory with a finding in their favor as holders of record title.

2. Appeal and error 🔑1011(1)—Finding resting on conflicting evidence cannot be disturbed by reviewing court.

Finding of trial court on question of fact, resting on conflicting evidence, cannot be disturbed by court of review.

3. Evidence 🔑379—Map of larger tract, without showing lands involved were part thereof, held properly excluded, in action to abate nuisance because of encroachments.

Where map offered in action to abate an alleged nuisance by reason of buildings encroaching on lot showed that it was a map of a larger tract, without showing that lands involved were a part thereof, and was not map referred to in defendants' deed, objections of defendants to introduction were properly sustained.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Lee Andrew Borgstrom and another against Julia J. Bryan and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Clarence De Lancey and John S. De Lancey, both of Oakland, for appellants.

J. W. O'Neill, of Oakland, for respondent Julia J. Bryan.

STURTEVANT, J. Claiming that one of defendants' buildings encroached on their lot, the plaintiffs sued to abate an alleged nuisance. From a judgment in favor of the defendants, the plaintiffs have appealed.

The defendants' deed contains a description by metes and bounds, and it also contains the following description: "* * * All of lots 6 and 7 as said lots are shown and delineated on that certain map entitled 'Map of Subdivision of Plat 12, Watson Tract, City of Oakland,' filed April 29, 1879." The plaintiffs assert that the burden was on the defendants to prove the location of the boundary line for which they contend. They do not show wherein the defendants did not do so.

The plaintiffs also assert that the location of the boundary line between plaintiffs' and defendants' line is to be determined by first locating the point of intersection of Bay street and Brooklyn street, as such point existed in 1879. The plaintiffs do not show that this was not done, and the defendants claim it was. From our examination, we find no defect in the showing made.

The plaintiffs say there is no evidence "that the present street lines are the same as when the map was filed." The defendants assert that there is and they quote it. The quotation supports the defendants.

[1] The trial court made a finding in favor of the defendants on adverse possession, and it also made a finding in their favor as the holders of the record title. The plaintiffs contend that the two findings are contradictory. Of course, that is not so. They contend that a finding on adverse possession can rest only on evidence showing both occupation and a hostile intent. The defendants do not dispute the point. However, they show that from 1905 until this action was commenced, in 1926, the defendants occupied the disputed ground, and did so with a hostile intent as to the whole world, including the plaintiffs. In this behalf they show that, to the exclusion of others, they used the strip as a driveway for their vehicles and stock; that they used it for pasturage; that they used it in part for orchard purposes, and in part to build on, and that many years ago they dug a well on it; and that they built a tank house on the strip in dispute. They also showed that since 1925 defendants and their predecessors have erected and maintained a garage standing on that strip and other lands owned by them.

[2] The plaintiffs assert the judgment is against law. They claim there was evidence that the strip of land in controversy is a part of their lot. It may be conceded there was, but it must be conceded, also, that there was evidence to the effect that it was a part of defendants' land. The finding against the plaintiffs, resting on such conflicting evidence, cannot be disturbed by a court of review.

[3] The plaintiffs offered in evidence a map, "Watson Tract 100 Acres." It was a map of a survey made in 1867. The map was filed in the same year. No one of the defendants made it, or caused it to be made. It was a map of a larger tract, of which it is claimed the lands in suit were a part. If those lands were a part, the connection was not shown. It is clear that it is not the map referred to in the defendants' deed. The court sustained the objections of the defendants. It did not err.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

101 Cal. App. 147

LOWMILLER v. MONROE, LYON & MILLER, Inc., et al. (Civ. 7053.)★

District Court of Appeal, First District, Division 2, California. Oct. 8, 1929.

Rehearing Denied Nov. 7, 1929. Hearing Denied by Supreme Court Dec. 5, 1929.

Automobiles ⇐245(32)—Whether driver of automobile injuring plaintiff was servant of codefendant or independent contractor held for jury, where evidence was conflicting.

Where evidence in action for damages for personal injuries sustained while riding in automobile was conflicting, question whether relationship existing between driver of automobile and codefendant was that of master and servant or of an independent contractor *held* for jury.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Sallie R. Lowmiller against Monroe, Lyon & Miller, Incorporated, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

J. Hampton Hoge, of San Francisco, for appellant Monroe, Lyon & Miller, Inc.

Dinkelspiel & Dinkelspiel and Ford, Johnson & Bourquin, all of San Francisco, for respondent.

NOURSE, J. The plaintiff sued for damages for personal injuries. The cause was tried before a jury and resulted in a verdict in

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★For opinion denying rehearing, see 282 P. 537. Hearing denied by Supreme Court.

favor of plaintiff for $2,500. From the judgment following the verdict the defendants have appealed upon typewritten transcripts.

The injuries, which are the basis of the action, were caused while the plaintiff was riding in an automobile operated by the defendant Augustine. The negligence of the driver and the amount of the verdict are not questioned on this appeal, the single issue being whether the defendant Augustine at the time of the accident was an employee of his codefendant or whether he was acting as an independent contractor. The defendant Monroe, Lyon & Miller, Inc., which will hereafter be referred to as the corporation, held a contract with the owner for the sale of the lots of the Los Altos Country Club properties located near the town of Los Altos in Santa Clara county. In its office in San Francisco the corporation maintained a large corps of salesmen who had been granted licenses as real estate salesmen by the state real estate commissioner upon the approval of this corporation. Among these were Mr. Clark, Mr. Black, and Mr. Friedman. A few days prior to August 2, 1925, the plaintiff was handed a card or ticket by a lady standing some place on lower Market street. This card carried the printed signature of the corporation and purported to be an invitation on the part of the corporation to the holder to ride in "our private automobiles" to the site of the property at Los Altos and to enjoy a noonday luncheon at the temporary clubhouse without obligation on the part of the holder. This card directed the holder to telephone the office of the corporation and to ask for Mr. Black. Following the directions upon the card, the plaintiff communicated with Mr. Black and arranged to have an automobile call for her at her home in San Francisco on Sunday, August 2, 1925. Mr. Black personally engaged defendant Augustine, a licensed jitney bus driver, to call for the plaintiff and her friends. At the appointed time Augustine took the plaintiff, her daughter, son-in-law, and two neighbors down the peninsula to the Los Altos Country Club, and there, after having been served with luncheon, they were introduced to Friedman, who presented them with a card showing him to be an employee of the defendant corporation. Friedman then directed Augustine to drive the party over the premises in order to enable him to show them the lots that were for sale. After spending some hours upon the property, Augustine started back towards San Francisco with his party, and before reaching the city of Palo Alto, and while traveling at an excessive rate of speed, he drove his car off the highway and into an orchard, causing the injuries complained of.

It is the theory of the respondent on this appeal that Augustine was merely an employee of the defendant corporation employed for that particular service by one of its agents, and that the corporation is therefore liable for his negligence under the doctrine of respondeat superior. The theory of the appellants is that, admitting the contract between the corporation and the owner of the property, the corporation had orally agreed with Mr. Clark that he might work independently upon the sale of these properties, and that Black and Friedman were employees of Clark at that particular time and for that particular purpose. It is then contended that when Clark and Black arranged for this trip and for the employment of Augustine to drive the car, they were independent contractors and that in turn Augustine as driver of the car occupied the same relation.

The question which is presented on this appeal is simply a question of fact. It would serve no purpose to outline in detail the testimony of the various witnesses tending to prove the theory of the appellants or to extend in this opinion the testimony on the part of the respondent tending to prove her theory. To whatever length we should go, we would come to the same end, that upon this question of fact there was a sharp conflict in the testimony and that that conflict was one which the jury was called upon to determine. We have outlined enough of the evidence to demonstrate that if the jury believed what we have outlined, it was justified in its conclusion that on this occasion Augustine, as well as the three salesmen mentioned, were all employees of the appellant corporation and all subject to its direction and control. Other circumstances pointing to particular elements of the relation of master and servant were brought out by the respondent and are referred to in the briefs, and, on the other hand, circumstances showing elements of the relation of independent contractors were produced by the appellants and are likewise referred to in the briefs. But these merely emphasize the conflict in the evidence before the jury and illustrate the propriety of the rule that, where different conclusions might reasonably be drawn from such circumstances, the question whether the relation was that of master and servant or of an independent contractor is one which must be left to the jury. Perkins v. Blauth, 163 Cal. 782, 791, 127 P. 50; Willis v. San Bernardino L. & B. Co., 82 Cal. App. 751, 753, 256 P. 224; May v. Farrell (Cal. App.) 271 P. 789; Dillon v. Prudential Ins. Co. of America, 75 Cal. App. 266, 273, 242 P. 736.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

101 Cal. App. 791

Donald M. COLCLOUGH and Ruth Colclough (his Wife), Plaintiffs and Respondents, v. MONROE, LYON & MILLER, Inc. (a Corporation), and William Augustine, Defendants and Appellants. (Civ. 7052.) ★

District Court of Appeal, First District, Division 2, California. Oct. 8, 1929.

Rehearing Denied Nov. 7, 1929. Hearing Denied by Supreme Court Dec. 5, 1929.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

★Rehearing denied. Hearing denied by Supreme Court.

J. Hampton Hoge, of San Francisco, for appellant Monroe, Lyon & Miller, Inc.

Dinkelspiel & Dinkelspiel and Ford, Johnson & Bourquin, all of San Francisco, for respondents.

NOURSE, J. Plaintiffs sued for damages on account of personal injuries to Ruth Colclough. The cause was tried before a jury and resulted in a verdict for plaintiffs in the sum of $5,000. From the judgment following the verdict the defendants have appealed upon typewritten transcripts.

The issues involved are identical with those considered in Lowmiller v. Monroe, Lyon & Miller, Inc. (Civil No. 7053) 90 Cal. App. —, 281 P. 433. The plaintiff Ruth Colclough was a passenger in the same automobile and suffered her injuries from the same accident. In the Lowmiller Case there was one additional item of evidence which is not present in this case, and that is the evidence relating to the delivery to Mrs. Lowmiller of a card or ticket bearing the name of the corporation and entitling her to the automobile ride to Los Altos. It is not clear whether the plaintiff Ruth Colclough saw that card or knew at the time she joined Mrs. Lowmiller on the trip to Los Altos that the card purported to be an invitation from Monroe, Lyon & Miller, or that it bore the name of that corporation signifying the parties arranging for the automobile trip. However, that fact was merely one additional item in the chain of proof supporting the theory of Mrs. Lowmiller in her case, and the absence of that fact in this case does no more than make this case somewhat weaker in proof than the other. All the other facts are present here, and they are sufficient to bring this case within the rule of the Lowmiller Case, and for the reasons stated therein the same judgment should follow in this case.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

101 Cal. App. 110

In re JOHNSON'S ESTATE. (Civ. 6648.)★

District Court of Appeal, Second District, Division 2, California. Oct. 7, 1929.

Rehearing Denied Nov. 6, 1929. Hearing Denied by Supreme Court Dec. 5, 1929.

1. Judges 🔑49(1)—Trial judge held not disqualified to hear and determine issues in guardianship proceeding on ground of bias.

In guardianship proceeding, trial judge *held* not disqualified to hear and determine issues on ground that he exhibited bias during trial, where affidavit of alleged bias was late and bias, if any, was impartial as between parties litigant, although possibly single-minded as to interests of minor.

2. Bastards 🔑8—In guardianship proceeding it lay within trial court's exclusive province to believe testimony as to paternity as against mother's denials.

In guardianship proceeding, it lay within exclusive province of trial court to believe affirmative testimony as to paternity of child as against mother's denials.

3. Bastards 🔑8—In proceeding for guardianship of child born before parents' marriage, ruling legitimating child, though not improper, was unnecessary (Civ. Code, § 215).

In guardianship proceeding brought during pendency of a divorce suit between parents, determination of parentage of child, which was born before parents' marriage, and ruling legitimating child, while not improper, were unnecessary under Civ. Code, § 215, making child legitimate under such circumstances.

4. Guardian and ward 🔑13(8)—Failure to dismiss petitions for guardianship, alleging mother who had custody of child was not proper person for such custody, held not error, since rights of parties or of minor could not have been prejudiced.

In guardianship proceeding in which mother and father and mother's sister-in-law each filed petition for guardianship, failure to dismiss petitions, alleging that mother who had custody of child was not fit and proper person to have such custody, and praying for appointment of petitioning party or such other person as might be proper, *held* not error, since rights of parties or of minor, whose welfare was of main concern, could not have been prejudiced.

5. Guardian and ward 🔑13(4)—Evidence held to justify appointment of disinterested person as guardian, in view of conduct of mother who had custody of child.

In guardianship proceeding, evidence showing that mother who had custody of child entertained drinking parties far into night, and that her home was frequented by persons who drank intoxicating liquors and became boisterous, *held* to justify appointment of disinterested person as guardian.

6. Guardian and ward 🔑13(1)—Welfare of child, as well as parents' rights, is presented for determination in guardianship proceeding.

It is not alone rights of parents, but also welfare of child, that is presented for determination in guardianship proceeding, and for that reason wider discretion is afforded courts in dealing with matters pertaining to children than in many other cases.

7. Parent and child 🔑2(2)—Though preference is given parental custody of minors, parents have no property rights in children.

Preference is given to parental custody of minors of tender years, but assumption that parents have property rights in children has long since been repudiated.

8. Guardian and ward 🔑13(8)—All intendments from conflicting evidence must be resolved in favor of judgment.

In reviewing judgment appointing guardian, court must resolve all intendments from conflicting evidence in favor of judgment.

★Rehearing denied. Hearing denied by Supreme Court.

9. Bastards 🔑8—Pleadings in guardianship proceeding held to raise issue of legitimation of child (Civ. Code, § 215).

In guardianship proceeding involving child born before parents' marriage, issue of legitimation *held* sufficiently pleaded to be presented to court, though under Civ. Code, § 215, child became legitimate by subsequent marriage of parents.

10. Courts 🔑475(15)—Court held not without jurisdiction of proceeding for guardianship of child, brought during pendency of parents' divorce action, on ground that court in divorce proceeding acquired jurisdiction of child.

In proceeding for guardianship of child brought during pendency of parents' divorce action, court *held* not without jurisdiction on ground that jurisdiction of minor was acquired by court in which divorce proceeding was pending, since, if one department exercises authority in matter which might more properly be heard in another, its action constitutes at most an irregularity and does not affect jurisdiction.

11. Guardian and ward 🔑13(8)—Appointment of guardian of estate, as well as of person, of child held not prejudicial.

In proceeding for guardianship of minor, appointment of guardian of person of child and making such guardian also guardian of estate *held* not prejudicial error, regardless of whether any substantial estate existed.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate and guardianship of Frankie Johnson, also known as Frankie Darro, a minor, in which Frank Johnson and Beatrice Walton petitioned to be appointed guardian, opposed by Ada Johnson. From judgment granting letters of guardianship to L. D. Uhlman, a disinterested person, contestant appeals. Affirmed.

Roger Marchetti, of Los Angeles, for appellant.

Ben F. Gray, of Los Angeles, for respondent Frank Johnson.

CRAIG, J. The appellant, Ada Johnson, is the mother of Frankie Johnson, known in theatrical circles as Frankie Darro, a minor under the age of 14 years. It is admitted that she and the respondent Frank Johnson intermarried at Los Angeles on January 15, 1923, and that said minor was born in the city of Chicago on December 22, 1917. On or about June 30, 1928, appellant filed a suit for divorce, alleging as grounds therefor extreme cruelty, since which time she and her husband have been living separate and apart, and said suit was pending at the time of the trial in this proceeding. On September 13, 1928, the respondent Beatrice Walton petitioned the superior court that she be appointed guardian of the person and estate of Frankie Johnson. It was alleged therein that for a period of more than one year prior to the birth of said minor, Frank Johnson and its mother were cohabiting, and that respondent Johnson is its putative father; that by an order issued in the divorce proceeding, Frank Johnson was restrained from visiting his wife and child; and that the latter was in the exclusive custody and under the control and care of its mother. It was further alleged that said minor was employed by the moving picture industries at a salary of $300 per week, from which earnings Ada Johnson had paid $1,000, and had agreed to pay $75 per month toward the purchase of a residence. It was averred that owing to habitual intemperance, depravity, and association with improper persons, practices of immoral acts, and the use of degrading language in the immediate presence of her child, the said Ada Johnson is an unfit and improper person to have its care, custody, and control; that its welfare was imperiled; and that unless the environment and personal care of said minor should be improved, a valuable contract of employment would be canceled, and its estate entirely dissipated. On October 23, 1928, respondent Frank Johnson filed a petition for his own appointment as guardian of the person and estate of said minor, alleging similar facts. In each of these petitions details of deplorable occurrences at the home are set forth which it is unnecessary to relate. Appellant interposed objections to the appointment of either of said petitioners, specifically denying the allegations of neglect and unfitness, and prayed that she be appointed guardian. Pending the hearing, custody of the minor was awarded to Mrs. Walton, and payment of the minor's salary was temporarily restrained. After hearing the evidence, it was adjudged and decreed that Frankie Johnson, "the above-named minor, is the legitimate child of Frank Johnson and Ada Johnson." L. D. Uhlman, a disinterested person, was appointed guardian, and letters were ordered issued accordingly, upon the furnishing of a bond. Ada Johnson appealed from all orders and decrees, and particularly from the one last mentioned, fixing the paternity of the child.

[1] It is first contended that the trial judge was disqualified to hear and determine the issues presented for the reason, it is said, that he exhibited a bias during the trial. It is asserted that, "when the cause came on for hearing, and before any evidence in the cause had been duly introduced, or a witness in the case had been duly introduced and heard," the judge decided and announced his ruling. It is said in the briefs that he called counsel into his chambers, and in the absence of the reporter stated that he had observed the child, was interested in its welfare, and was determined that everything should be done for its benefit; that he was convinced that it had not been living in proper environment;

that he even smelled liquor upon Mrs. Johnson when she was on the stand; that Frank Johnson was the father of the child; that it would be legitimated; and that counsel might be able to agree upon the amount each party should receive of its income, and that a person unknown to either party be appointed guardian. It is said that the contestant and appellant thereupon "duly, properly, timely and regularly" disqualified the judge by filing an affidavit of disqualification on or about November 2, 1928, and that no alternative remained than to call another judge because no counter affidavit was filed. The respondent strenuously resists both the legal and the evidentiary grounds of this assertion.

It appears from the record that the affidavit assailing the attitude of the trial court in concluding from what it had observed that neither party should be intrusted with the guardianship, and that amity in behalf of the minor might be propitious, was neither verified nor filed until after evidence had been heard. Witnesses had testified on October 25th, a week previously, to facts strongly tending to support the principal allegations of both petitioners to which the appellant took exception. Mrs. Johnson had admittedly occupied the witness stand in her own behalf as contestant and petitioner, and the remark of the court that she then bore odors of liquor is conceded. She was compelled to admit several charges which she had denied by her answer and as a witness. Following a thorough direct examination of respondent Johnson, the latter was technically cross-examined until a recess was declared, with but slight, if any, effect other than to strengthen his cause. In fact, counsel for the contestant complained that this witness was "evasive," to which the court responded, as the record reveals, that he appeared "more voluble and anxious than evasive." Upon the theory that contestant was wasting the earnings of the minor in lavish and excessive entertainment of friends, a merchant was called to the stand. He testified that prior to the time when the respondent left home bills at his market for food ran from $20 to $30 per month, whereas thereafter they ran from $40 to $65, and that at the time the restraining order was issued Mrs. Johnson owed his market $80 or $90. Not only was the affidavit of alleged bias late, under the circumstances, but if there was bias at all it was impartial as between the parties litigant, although possibly single-minded as to the interests of the minor. We think subsequent developments, which we shall carefully review, wholly justified the denial of the motion.

[2, 3] It was alleged by the appellant, testified by her, and is here insisted, that while still an unmarried woman and prior to her illicit companionship and domicile with the respondent, she committed acts of adultery with one Adolph Gelle, as a result of which the minor in controversy was born to her; that Frank Johnson was not its father; that she had not so considered him nor held him out to others. It is argued that the evidence proved the boy to be an illegitimate child, that appellant was a fit and proper person to have its custody and care, and hence that the superior court had no authority to deprive her of such statutory right. As to its parentage, the respondent testified that he had intercourse with appellant for more than ten months prior to the birth of the child, that they were employed by vaudeville circuits, and traveled and cohabited together constantly as husband and wife during all of that time; that with the exception of nine or ten weeks in Chicago while absent they paid a woman to care for the boy; and that it had ever since been in the constant custody of himself and Ada Johnson. He swore that it had at all times been held out by both parties as their child, that his wife had always told him that he was the father of the child, and he had so believed. It is admitted that the minor was born on December 22, 1917, that the parties thereafter came to California, lived together, and were married in this state on January 15, 1923. Appellant was asked during cross-examination if she and Johnson had lived together as husband and wife for a number of years before the birth of the child, to which she nodded assent, but pressed for an audible reply, she said, "No." A contract with one theatrical enterprise by whom the boy was employed, which she admitted was read to her, was signed by Ada Johnson and approved by the respondent, reciting that the latter was its father. Another contract, dated April 7, 1923, was signed by them both, and recited that they were "the parents of a minor male child of the age of four years." A Miss Dione, an intimate friend of appellant who testified in her behalf, stated that Johnson passed as the father of the child. Respondent also testified that when appellant became angry she stated to him that she was going to swear that he was not the boy's father. It lay within the exclusive province of the trial court to believe the affirmative testimony as against appellant's denials, as it appears to have done. It was admitted that the parties had at the time of the trial been married for a period of about six years, and the parentage of the child having thus been determined, it follows that the ruling legitimating the minor was not improper, although it was wholly unnecessary. Cal. Civ. Code, § 215.

[4] As already observed, Beatrice Walton, appellant's sister-in-law, the respondent Frank Johnson, and appellant Ada Johnson, each filed a petition for guardianship. When the matter came to trial, counsel for appellant and for Mrs. Walton requested a dismissal of the latter's petition. A motion was also interposed for the dismissal of

Frank Johnson's petition. After the trial court had read the petition, affidavits, and objections, it appeared that each of the first two petitions alleged that the mother was not a fit or proper person to have the custody of the child, and prayed for appointment of the petitioning party or such other person as might be proper. Issues were thus presented which required judicial cognizance, and rulings upon these motions were reserved. This is assigned as error, but no substantial ground for the objection is advanced, nor can we conceive of any way in which the rights of the parties, or of the minor whose welfare was of main concern, could have been prejudiced. The pleadings of all of the parties raised the question of fitness as to the opposing petitioners, and to dismiss, or in effect strike out, those which joined issue upon the question most vital to the welfare of the minor doubtless would have worked serious injustice transcending any imaginary or selfish interests of the litigating parties. There is no merit in this contention.

[5-8] Upon the merits of the contests of the respective parties, it appeared that the father and mother were not congenial, that they separated, and the mother had instituted divorce proceedings wherein the father was restrained from visiting her or the child. Johnson was out of town much of the time. There is evidence tending to show that the boy was allowed by the mother to run in the streets without sufficient or proper food or clothing; that she entertained drinking parties far into the night; and that her home was frequented by persons who drank intoxicating liquors and became boisterous. Upon one occasion appellant was pushed or knocked against a stove and her eye was badly cut. Respondent testified that he was called to the house, where he found a man lying on his face with a bottle of whisky in his hand, and that appellant was lying on her back, bruised and bleeding; that she was so drunk that she could hardly talk; that "Frankie was there at the time and heard the whole thing"; that spirits of ammonia and black coffee were administered to revive appellant. He testified that he was present when "they were all drunk." From the testimony of other witnesses, including the neighbors, it appeared that automobiles were parked in front of her residence until early in the morning, that neighbors complained of loud noises at night, that her home was raided by the police, and that one of her guests, an uncle, was arrested. She admitted that the police department ordered that she leave Beverly Hills, whereupon she moved to Van Nuys. At the latter residence witnesses testified that there was a great deal of noise nearly every night; that they were awakened, one of them stated, by the drinking and hollering, "give me some more, I ain't half drunk yet, and such things as that"; that more people arrived at 11 and 12 o'clock at night and "stayed towards morning," finally leaving in taxicabs. When asked if other neighbors heard it, he replied, "They sure did, and if they were wanted on anything like that subject to let them know"; that he rang the bell and "did one or two things," but that they only "took it up on the other side of the house." There is proof that one of appellant's frequent visitors brought immoral pictures to the house, and that she personally brought home portions of obscene films which she stated she had seen made at the studio, which she joked about and showed to others. Respondent testified that she drank constantly, night and day, before he was compelled to leave home; that "it was agreed that something must be done; she had spent all of the child's money, had lost the car, and the home and everything else since I had been gone a few months." There were bottles of liquor around the house, according to all of the witnesses, including appellant, and it is apparent that these conditions flourished in the immediate presence of the minor. Appellant's brother Walton swore that he saw the pictures above mentioned; that they were all drinking wine and gin when he was present; that he "saw her feeling good, but never on the floor"; that she was drinking when Frankie, the boy, was running the streets. He further testified that his wife's petition for guardianship was filed because they "wanted to take some steps to stop her running around," "Frankie was being neglected," and that "something ought to be done." Asked if he believed his sister was a fit and proper person to have the custody of the boy, he replied, "Well, she is not at the present time."

We need not further pursue the question as to whether or not the trial court was warranted in concluding that the best interests of the minor would be subserved by the appointment of a disinterested person as guardian of its person and estate. Its education, nurture, and morality were of first importance, and its income, amounting to more than a thousand dollars per month, demanded conservation. The court was justified in believing, as it apparently did, that the surroundings were demoralizing and that the boy was being neglected. It may well have foreseen that the safeguards of harmonious, peaceful, cultural, and refining environment were imperative to the child's future. It is not alone the rights of the parents but the welfare of the child that is presented for determination, and for that reason a wider discretion is afforded the courts in dealing with matters pertaining to children than in many other cases. In re Gutierrez, 46 Cal. App. 94, 188 P. 1004. Much is said in the briefs of appellant regarding her constitutional rights, and the power of the court in such cases. The courts have ever recognized the preference of parental custody of minors of tender years, but the assumption that parents have property rights in children has long since been repudiated. In Anthony v. Tarpley, 45 Cal. App. 72, 187 P. 779, it was argued that unless granted the relief prayed, the parent might suffer great and irreparable injury. It was held that: "The good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this, rather than to the whims and caprice of the parties. Crater v. Crater, 135 Cal. 633, 634, 67 P. 1049; Mack v. Mack, 91 Or. 514, 516, 179 P. 557. The child is not property, but a citizen of the state of California, and as such is peculiarly under its guardianship and subject to its supervisory control." It is not in contemplation of the law that parents shall forever be deprived of the custody of a child. The court may adjudicate the status of the minor, however, and upon sufficient showing it becomes its duty to make proper provision for the guardianship, care, custody, and control of the child. As said by our Supreme Court: "The past failure of a parent to provide for his child may well coexist with a present ability to fully discharge all the duties of guardianship." In re Michels, 170 Cal. 339, 149 P. 587, 589. The most that can be said for appellant's position as to this phase of the case is that the evidence was conflicting, and resolving all intendments in favor of the judgment, as we must, we cannot say as a matter of law that it was error to deny all three petitions for guardianship, and to appoint another person meeting the court's approval.

[9] It is contended that the issue of legitimation was not before the court. In this regard it is sufficient to observe that Frank Johnson alleged that he was the father of said child. Mrs. Walton alleged in her petition that at the time of Frankie's birth his mother "was an unmarried woman, and that for more than a period of one year prior to the birth of said minor the said Ada Johnson was cohabiting with Frank Johnson." Appellant in her answer "alleges that she is the mother of said Frankie Johnson and that the said Frank Johnson, petitioner herein, is not the father of said minor," and upon the theory that the minor was illegitimate, she insisted that she was exclusively entitled to its custody. It became necessary upon this issue so joined that the status of the child be determined, and the court found from the evidence that the minor was not illegitimate for the reason that Frankie Johnson was the son of the respondent and the appellant, and that the parties had intermarried. The question was sufficiently pleaded for the purposes of this proceeding. In this connection appellant attempts to capitalize the fact that in the divorce proceeding both parties alleged that there was no issue of their marriage. Technically true as that may have been, because the child was born before the marriage of its parents, it does not result that the child was illegitimate in fact, and the court, as we have noted, found otherwise. Regardless of birth out of wedlock, section 215 of the Civil Code was enacted for the benefit of the child, that it may not be burdened with the sins of its parents. Estate of Wardell, 57 Cal. 484.

[10] Another point advanced is the contention that jurisdiction of the minor was acquired by the court in which the divorce proceeding was pending. An order restraining the father from molesting his wife and child was obtained, but the divorce case had not been set for trial or even assigned to any particular department. It does not appear that any exception was voiced as to the power of the court to hear and determine this matter when it was called. Appellant's counsel requested that the court familiarize itself with the pleadings, and proceed with the trial as though properly set therein. In any event, the different departments hold but one and the same court (Nickel v. State, 179 Cal. 126, 175 P. 641; Brown v. Campbell, 110 Cal. 644, 43 P. 12), and if one department exercises authority in a matter which might more properly be heard in another, its action constitutes at most an irregularity, and does not affect the jurisdiction. Graziani v. Denny, 174 Cal. 176, 162 P. 397; Carter v. Lothian, 133 Cal. 451, 65 P. 962.

[11] It is argued that this minor had no "estate" within the statutory definition, and that even though a guardian of the person might be appointed, such action is not justified as to the estate of the ward. We are cited to no authority holding that it is error to appoint a guardian of the person of a ward also guardian of the estate, although no substantial estate may exist. No possible prejudice can result from such action. The guardian under such circumstances can have no jurisdiction over such property as belongs to the parents. On the other hand, as guardian of the person, certain funds and personal property must come into the hands of the guardian, at least such as are necessary for the proper support and education of the minor. This, of course, the parents may be required to supply. We conclude as to this point that appellant is not prejudiced by the court's order appointing a guardian of the estate as well as of the person.

From what has been said it becomes unnecessary to consider incidental questions presented which are of necessity embraced therein.

The judgment and orders appealed from are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

101 Cal. App. 1

JOHNSON et al. v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY, et al. (Civ. No. 6601.)★

District Court of Appeal, Second District, Division 1. California. Sept. 27, 1929.

Hearing Denied by Supreme Court Nov. 25, 1929.

1. Master and servant 🔑367—If workman employed to shingle building was not independent contractor, contractor employing such workman was liable to injured shingler employed by workman (St. 1917, p. 835, § 8(b).

Where contractor employed workman to shingle house, and workman employed other shinglers, if workman was not independent contractor, the contractor was liable under St. 1917, p. 835, § 8(b), to shingler injured while working on building being erected by contractor.

2. Master and servant 🔑414—Whether shingler employed by workman working under contractor was employee of contractor held question of mixed law and fact.

Where contractor employed workman to shingle house, and workman employed other shinglers, whether relation of employer and employee existed between contractor and shingler *held* question of mixed law and fact.

3. Master and servant 🔑417(7)—Finding of Industrial Accident Commission that relation of employer and employee existed between parties was binding on reviewing court.

Where contractor employed workman to shingle house and workman employed other shinglers, finding of Industrial Accident Commission that shingler was employee of contractor was binding on reviewing court, unless there was such entire absence of evidence in record as to render finding unreasonable or in excess of powers of commission.

4. Master and servant 🔑367—Workman paid wages by piece or quantity comes within provisions of Workmen's Compensation Act.

Workman paid wages by piece or quantity comes within provisions of Workmen's Compensation Act the same as if he had been paid by the day.

5. Master and servant 🔑367—Right of control was important in determining whether workman was independent contractor or employee.

Where contractor employed workman to shingle house, and workman employed other shinglers, contractor's right of control was important in determining whether workman was an independent contractor or employee.

Proceeding under the Workmen's Compensation Insurance Safety Act by C. E. Tyler, claimant, opposed by G. H. Johnson, employer, and Chas. C. Woodward and the Pacific Employers' Insurance Company, insurer. From an order of the Industrial Accident Commission granting an award, the employer and insurer bring certiorari. Affirmed.

F. Britton McConnell, of Los Angeles, for petitioners.

G. C. Faulkner, of San Francisco, for respondent Division of Industrial Accidents and Safety.

HOUSER, J. The purpose of this proceeding is to review an order of award of compensation made by the respondent tribunal, known as Department of Industrial Relations, Division of Industrial Accidents and Safety, to one Tyler for injuries sustained by him in the course of his employment.

From the petition for a writ of review and the return thereto, briefly, but so far as are here essential, the facts which said respondent tribunal was justified in assuming were established by the evidence appear to be that one Johnson, who was a building contractor, was engaged in the construction of a house which, in due course and without delay, he desired to have shingled. To that end he made an effort to secure the services of a man who was engaged in that sort of work, but who, owing to press of business, was unable to give the matter his immediate attention. However, in order to accommodate Johnson, he communicated with another shingler by the name of Woodward. It appears that, although Woodward also was engaged on another shingling job, and consequently believed himself unable to devote his personal attention to the proposed Johnson job, he did secure the immediate services of a third shingler named Tyler. It so happened that, after Tyler had commenced work on the job, Woodward found that temporarily he could spare some time from the shingling job on which he was engaged, and consequently, during the first day of the employment, he and Tyler worked together on the Johnson job. Johnson ordered, or at least requested, that the house be shingled as soon as possible. Accordingly, Woodward endeavored to get other men to assist in the work, and succeeded in doing so on the next day after he and Tyler had started the job. So far as the employment was concerned, Tyler had no personal communication with Johnson. The compensation expected for the labor was for no definite total amount, but was understood as having been fixed at the rate of "$1.35 a thousand (shingles) and 3 cents a foot for cut work." On previous similar jobs on which Woodward had worked for Johnson, the manner in which payment had been made was that Johnson paid Woodward the total amount due for labor on the job and out of such sum Woodward paid himself and any men whom he had secured to assist in the work, less a commission of 10 per cent. usually charged by Woodward to such men for his services in procuring the employment for them. However, since the particular job had been taken at a low rate of compensation, and as Woodward personally expected to do no work on it, he had no intention of charging,

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★Hearing denied by Supreme Court.

and did not charge, Tyler or either of the other men any commission for getting the employment for them. As was testified by Woodward:

"Q. How much were you going to take on this job? A. Not a thing.

"Q. Why was that? A. Well, it had been no trouble to me other than a telephone call to get it. I didn't expect to handle the job myself. I expected to turn it over to the men that worked on it."

It also appeared that Johnson assisted in constructing a ladder for the use of the shinglers; that he furnished the shingles and the necessary nails; that, if the work was not properly done Johnson would not be required to pay for it; and that, although other than directing where the work should be commenced and requesting that the job be finished as soon as was possible, he gave no orders in connection with the job, if at any time during the progress of the work he so desired, he had the right, without liability therefor, to terminate the employment of Woodward, Tyler, or any other man employed on the job. Relating to the right on the part of Johnson to discharge Woodward from the employment, Woodward testified:

"Q. Has anybody any control over you? A. Mr. Johnson.

"Q. Could he discharge you? A. Absolutely.

"Q. What time of day? Could he discharge you any time of day? A. Any time he wanted to.

"Q. Could you turn around and ask for the money for the rest of that job? A. No, sir. Not under the conditions that the job was being done."

On the second day of his employment, and in the course thereof, Tyler was injured, and the shingling job was completed by the two other men whom Woodward had secured to assist in the work. Thereafter, on application of Tyler, an order of award of compensation was made by the respondent tribunal in favor of Tyler and against the insurer of Johnson. By the same order Woodward was discharged from liability.

So far as are here material, the findings of fact upon which the order in question was made are as follows:

"C. E. Tyler, applicant, while employed as a shingler * * * by G. H. Johnson, sustained injury occurring in the course of and arising out of his employment. * * * Chas. C. Woodward was not the employer and is entitled to be dismissed and discharged. * * *"

Petitioners herein attack the award and the findings on the ground that the respondent tribunal acted in the premises without and in excess of its power and authority, and that the evidence adduced and the proof made in the matter did not justify or support the findings of fact to which reference has been had.

[1] Obviously the paramount question to be determined is whether from the facts and surrounding circumstances the shingler Woodward, who procured the services of Tyler was an independent contractor. If Woodward was not an independent contractor, it would follow that, within the purview of the provisions of section 8(b) of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831, as variously amended), for the injuries sustained by him, Tyler was entitled to recover compensation from Johnson or his insurer. The determinative words of the statute are as follows: "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act. The term 'independent contractor' shall be taken to mean, for the purposes of this act: Any person who renders service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." St. 1917, p. 835, § 8(b).

The case of Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570, 571, is a "deadly parallel" with the case here under consideration. It is so thoroughly considered, not only as to the facts of the particular case (which are nearly identical with those in the instant case), but also with reference to pertinent authorities, that it would be a waste of time and energy on the part of the members of this court to attempt any elaboration upon the principles of law governing the situation. Among other things, it is there said:

[2, 3] "* * * Whether or not the relation of employer and employee existed in this case, under the oral contract entered into, *is a question of mixed law and fact, to be proved like any other question.* The finding of the Commission, in effect, that the relation existed between Hillen and Downing, is binding on this court. Pacific G. & E. Co. v. Ind. Acc. Comm., 180 Cal. 497, 499, 181 P. 788. Unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the Commission the court is not empowered to set it aside. Eastman Co. v. Ind. Acc. Comm., 186 Cal. 587, 598, 200 P. 17. The award of the Commission may be annulled only if there is no substantial evidence in support of its findings. Press Pub. Co. v. Ind. Acc. Comm., 190 Cal. 114, 124, 210 P. 820. * * *

[4, 5] "*A workman who is paid wages by the piece or quantity comes within the provisions of the Workmen's Compensation Act* the same as one who is paid by the day. Wages may be measured by time, by the piece, or by any other standard. [Citing authorities.] One of the best tests to determine whether the relation is that of an independ-

ent contractor or that of employer and employee is the *right of control.* It is not the fact of actual interference with the control, but the *right to interfere,* that makes the difference between an independent contractor and a servant or agent. [Citing authorities.] It is not a question of interference, or noninterference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work, but a question of the *right to act,* as distinguished from the act itself or the failure to act. [Citing authorities.] The evidence in this case fully supports the conclusion that Hillen, through his superintendent of construction or foreman could at any moment direct the details of the work done by Downing. On occasions that was done. Coincident with the right of control is the right of either the employer or the employee *to terminate the relation without liability.* This is but another way of stating the rule, for *the right to immediately discharge involves the right of control.* [Citing authorities.] * * * There is nothing in the record to indicate that Downing was not free at all times to discontinue the work without legal liability, and, as to the right of Hillen to discharge him at any time, he testified that if he was discharged the builder 'would pay (him) for what (he) put on and that would be the end of it.'"

See, also, Press Publishing Co. v. Industrial Accident Commission, 190 Cal. 114, 210 P. 820; Archbishop v. Industrial Accident Commission, 194 Cal. 660, 230 P. 1; Montezuma Mountain Ranch School v. Industrial Accident Commission, 201 Cal. 603, 258 P. 84; Fidelity & C. Co. v. Industrial Accident Commission, 86 Cal. App. 445, 260 P. 928.

It is clear that each of the principles of law hereinbefore set forth and announced in the Hillen Case has direct application to the facts in the instant case.

The award is affirmed.

We concur: CONREY, P. J.; YORK, J.

101 Cal. App. 162

CONNELL v. CRAWFORD. (Civ. 6843.)★

District Court of Appeal, First District, Division 2, California. Oct. 9, 1929.

Rehearing Denied Nov. 8, 1929. Hearing Denied by Supreme Court Dec. 5, 1929.

Homestead 🔑57(3)—Defendant who had residing on premises with her unmarried brother, 68 years old, held "head of family" under evidence (Civ. Code, § 1261, subd. 2).

In proceeding under Civ. Code, §§ 1245–1261, for appointment of appraisers to appraise homestead property, defendant who had residing on premises with her and under her care and maintenance unmarried brother, 68 years old, *held* under evidence to be "head of a family," within section 1261, subd. 2, and, as such, entitled to homestead exemption of $5,000.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Head of a Family.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Mary A. Connell against Jennie C. Lewis Crawford. From an order denying a motion to appoint appraisers to appraise homestead property, plaintiff appeals. Affirmed.

See also 268 P. 948.

Lovett K. Fraser, of San Francisco, for appellant.

Charles H. Sooy, of San Francisco, for respondent.

NOURSE, J. Plaintiff, a judgment creditor of the defendant, had levied execution upon real property of the defendant upon which defendant had filed a homestead. Plaintiff then instituted this proceeding under sections 1245 to 1261 of the Civil Code for the appointment of appraisers to appraise the homestead property. The trial court denied plaintiff's petition, and she has appealed from the order on a bill of exceptions.

Upon the hearing it was stipulated that all the allegations of the petition were true with the exception of the value of the property, which, it was agreed, was $4,500. The controversy submitted to the trial court was whether defendant was the head of a family under subdivision 2 of section 1261 of the Civil Code, and, as such, entitled to a homestead exemption of $5,000, or whether, being a single woman, she was entitled to an exemption of but $1,000.

Section 1261 of the Civil Code reads in part: "The phrase 'head of a family,' as used in this title, includes within its meaning: * * * 2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either: * * * (e) An unmarried sister, or any other of the relatives mentioned in this section, [brother] who have attained the age of majority, and are unable to take care of or support themselves."

The facts are that defendant had residing on the premises with her, and under her care and maintenance, an unmarried brother of the age of 68 years. The only question in dispute was whether this brother was unable to take care of or support himself. Two witnesses were called—the defendant and her brother. The defendant testified that her brother was not sick or feeble, that he worked as an interior decorator whenever he had a chance, and earned approximately $20 a week. The brother testified that he worked only at odd jobs, was unable to join a union because of his age and state of health; that he was troubled with rheumatism and could not work upon a ladder because he would

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★Rehearing denied. Hearing denied by Supreme Court.

faint; that he could not do a whole day's continuous work, but that when he did work he earned sometimes $4 and sometimes $5 a day; that the preceding year was "a very good year for me" having earned gross between $250 and $260, but that in the year before that he did not earn more than $60. He also testified that what money he earned he gave to his sister, but that he did not earn enough year by year to pay for his clothing and board; that his sister gave him his room, prepared and gave him his meals, and did his laundry all without charge; that he was unable, because of his advanced age and enfeebled condition, to earn enough to support himself.

Upon this evidence the trial court made the implied finding that the brother was dependent upon the defendant within the meaning of the section cited. Though there is some conflict, there is evidence to support that finding, and that ends the controversy.

Order affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

PEOPLE v. ROCCO. (Cr. 1823.)★

District Court of Appeal, Second District, Division 2, California. Sept. 30, 1929.

Hearing Granted by Supreme Court Oct. 28, 1929.

1. Criminal law 🔑641(6)—Requiring defendant in murder trial to proceed under charge of lawyers engaged in defense of one with inimical interests held erroneous (Const. art. 1, § 13).

Action of trial court in compelling defendant in murder trial to proceed under the charge of lawyers engaged in defense of other defendant whose interest was inimical to his after attempt of such lawyers to withdraw *held* erroneous, under Const. art. 1, § 13, guaranteeing right of all persons charged with crime to appear and defend in person and with counsel.

2. Criminal law 🔑641(6)—That defendant indicated desire that counsel continue to act after attempted withdrawal did not prevent error in requiring them to proceed.

Fact that defendant, in response to question by judge after attempted withdrawal of attorneys, indicated a desire that counsel should continue to act for him, did not prevent error in requiring attorneys to proceed, regardless of fact that they were engaged in defense of one whose interest was inimical to that of defendant.

3. Criminal law 🔑641(6)—Counsel's attempt to withdraw, after discovering facts showing separate trial of joint defendants was necessary, was not too late after taking of testimony.

Attempt of lawyers engaged in joint defense in murder trial to withdraw, after discovering that interests of defendants required separate counsel, was not too late, after testimony had been taken for some time, where it appeared that statement of counsel relative thereto was made as soon as facts had been ascertained.

4. Criminal law 🔑641(6)—Failure of attorneys to present reasons for attempted withdrawal from defense in murder trial by affidavits held immaterial (Code Civ. Proc. § 282, subd. 4).

Failure of counsel attempting to withdraw from defense in murder trial, after ascertaining interests of defendants required separate counsel, to present reasons by affidavits, was immaterial, in view of Code Civ. Proc. § 282, subd. 4, relative to duties of lawyer to use only such means as are consistent with truth.

5. Criminal law 🔑1144(13)—It will be presumed that evidence taken at hearing without record thereof will support findings of court.

Where question of sufficiency of evidence is presented on appeal, and it appears that some evidence was taken at a hearing of which no record was made, it will be presumed that such evidence was there heard as will support findings of court.

6. Criminal law 🔑641(6)—Action of judge in requiring counsel to proceed after attempted withdrawal could not be sustained merely because there was conference in chambers without record.

Action of trial judge in requiring attorneys appointed for defense in murder trial to proceed after attempted withdrawal could not be sustained upon the mere ground that there was a conference in chambers without record made, in view of fact that private session was sought for purpose of discussion only and to make counsel's position clear.

7. Criminal law 🔑1035(3)—Defendant appellant could raise question of counsel's disqualification, regardless of fact that counsel, after attempted withdrawal, had receded from position.

Defendant in murder trial had right on appeal to raise question of disqualification of counsel by reason of being engaged in joint defense of one with inimical interests, regardless of fact that counsel, after attempted withdrawal, had receded from position after being adjudged guilty of contempt.

8. Homicide 🔑165—Defendant's statements as to having discussed liquor question with deceased and as to close association with deceased were inadmissible to show motive.

In prosecution for murder, evidence consisting of defendant's statements as to defendant and deceased having frequently discussed liquor question and that both had been engaged in liquor business and were frequently together and in close association was inadmissible for purpose of showing motive.

9. Homicide 🔑165—Statements of defendant as to acquaintance with and relation with deceased held inadmissible under circumstances to show opportunity and knowledge.

In prosecution for murder, evidence consisting of statements by defendant as to acquaintance and relation with deceased *held* inadmissi-

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★Hearing granted. 285 P. 704.

ble for purpose of showing opportunity and knowledge of defendant, in view of circumstances of killing.

10. Criminal law ⚷396(2)—Defendant's statement showing acquaintance and association with deceased were admissible, in view of other portion of statement admitted.

Where portions of statement by defendant in murder prosecution disclosed assertions to effect that he never knew deceased, evidence as to other statements tending to show an acquaintance and association were properly admitted in evidence as showing a consciousness of guilt.

11. Criminal law ⚷396(2)—Neither party is authorized to offer severable part of conversation or statement containing nothing within issues.

Though party is entitled to introduce in evidence the whole of a conversation or statement or to offer the remainder where one party introduces a part of a conversation or statement, nevertheless such rule does not entitle either party to offer a severable part of a conversation or statement that contains nothing that is within issues at time being tried.

12. Homicide ⚷165—Objections to questions as to friendly relations between defendant and deceased held erroneously sustained.

In prosecution for murder, sustaining objections as to questions showing relations between defendant and deceased was erroneous, in view of right of prosecution to offer similar evidence.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Frank Rocco was convicted of murder, and he appeals. Reversed, and remanded for a new trial.

R. D. Knickerbocker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., J. C. Hollingsworth, Dist. Atty., and Don R. Holt, Deputy Dist. Atty., both of Ventura, for the People.

WORKS, P. J. Defendants were charged with the crime of murder and were tried together. Leo was acquitted. Rocco was convicted, and was sentenced to life imprisonment. He appeals from the judgment.

The defendants being unrepresented by counsel when the trial commenced, the trial judge appointed three certain lawyers to conduct the defense of both defendants, and these gentlemen assumed the task thus assigned to them. The counsel who appears for appellant on the present appeal was not one of those so designated, but came into the case after the appeal was perfected. The trial consumed several days. When a little more than one-fourth of the evidence, in volume, apparently, had been submitted to the jury, one of the defense counsel arose in his place, and, in the absence of the jury, addressed the court in part as follows:

"The three counsel who have been appointed by the court have entered upon and attempted to faithfully discharge their duties as officers of the court in representing the defendants jointly as ordered by the court. A situation has now developed, however, where counsel are convinced that they cannot continue to represent the defendants jointly. Counsel respectfully suggest to the court that its order as originally made should have been the appointment of separate counsel to act for each defendant. The order made requiring counsel to represent the defendants jointly was apparently predicated upon an assumption on the part of the court that the true facts in the case were as assumed by the prosecution, from the evidence given before the Grand Jury. Without disclosing to the court what the facts are or what the position of the defendants may or should be in the case, counsel take this opportunity to state to the court on their professional obligation that it has become an impossibility for them to discharge that obligation and continue to represent the defendants jointly in this case. Counsel further state to the court that because of confidential communications and knowledge which have been received from each of said defendants, while endeavoring to act jointly for the said defendants, counsel are now disqualified from representing either one of said defendants separately. Counsel therefore notify the court that it has become imperative for them to withdraw immediately from further participation in this case either as joint counsel for the said defendants or as counsel for either of said defendants separately. * * * In making this statement counsel desire to call to the attention of the court that said statement is made solely and purely because of the fact that in their opinion a fair presentation of the case requires a separation of the interests of each of the defendants one from the other. Counsel further represent that no more definite statement can be made because of the fact that to do so would tend to violate their position as counselors and their oath of office. Counsel are mindful of the language of the Supreme Court contained in the reported case of In re Cowdery, 69 Cal. 32, 35, 10 P. 47, 48, 58 Am. Rep. 545, wherein the Supreme Court states that 'one of the principal obligations which bind him [the attorney] is that of fidelity, under all circumstances, to his client; the maintaining inviolate the confidence reposed in him by those who employ him; and, at every peril to himself, to preserve the secrets of his client.' Counsel believe further, however, that it is not a violation of the duties reposed in them to state generally to the court that in the event counsel continue to act in this matter, either as joint counsel for the two defendants or as separate counsel for either of the defendants, they would find themselves in a situation similar to that occupied by counsel in the case of Weidekind v. Water Co., reported in 74 Cal. at page 386, 19 P. 173, 5 Am. St. Rep. 445, wherein it was held reversible error in a civil case for the court not to discontinue the representation of an attorney in that case who was representing one of the clients. Counsel respectfully call the attention of the court that this is not a motion on the part of counsel requesting that they be relieved from the duties incident to their appointment, and that the court appoint other counsel, but that it is a positive withdrawal under a personal privilege, necessitated by the obligation of their oath of office. Counsel therefore notify the court that it is imperative for them to withdraw from further participation in the case. Counsel are, of course, not precluded from commenting upon the evidence which has been introduced in the case, and counsel would suggest to the court that a careful perusal of the evidence introduced to date will show upon its face the surface indications of a condition which not only exists at the present time, but will become intensified as the trial proceeds and which shows an essential conflict of interest between these defendants. * * * Counsel have made and are making this statement and assuming this position after grave deliberation, and are not unmindful of the gravity of the situation and the complications which might ensue. Counsel can only state that the position which they are adopting is one in which they are in good faith following the admonition of our Supreme Court to preserve inviolate the confidences of their clients regardless of the peril in which counsel may place themselves by so doing. In further explanation of the above statement, counsel believe that it is no betrayal of the interest of their client, or the facts of the case, to state to the court that had counsel accepted the employment upon a basis of ample compensation from friends of the defendants, and a situation arisen such as now confronts counsel, it would be incumbent upon them to take the same steps which have been taken in this case, to return any unearned compensation which had been received and to withdraw from further participation in the case. While that statement is made by way of explanation rather than a part of the statement to the court, it is made as a comment merely for the purpose of further illustrating to the court the position in which counsel find themselves."

To the remarks of counsel, the trial judge made the following response:

"If this statement had been made to the court before the jury was impaneled, the court would have been well inclined to grant the request. Of course, we are in this situation here where defendants are charged with a criminal offense, and the jury has already been impaneled and certain testimony has already been taken. It is impossible now to appoint other counsel."

After a statement by the district attorney, followed by a colloquy between the judge and the defense counsel who had precipitated the argument, the record shows, in part, the following; the defense counsel in question being designated merely as "Counsel", and his two associates, respectively, as "Second Counsel" and "Third Counsel":

"[Counsel]: The court has raised the point that this statement from counsel comes too late. Your honor, we cannot state to you the reason, the judge of this court, upon our oaths as attorneys—

"The Court: I understand.

"[Counsel]: —any more than we have stated. I will, however, state to your honor that we have made this statement to the court at the earliest opportunity that it could be made.

"The Court: I have no doubt of that, Mr. ———. Everything you have said I have taken absolutely as I always have, at its face value. * * *

"[Second Counsel]: If the court please, I do not desire to add anything to the statement that Mr. ——— has made other than to state that here and now I adopt word for word the statement as read to the court and state to the court that as far as counsel are concerned we make no motion in respect to this case whatever, but we do positively and definitely here and now withdraw as counsel in this case.

"The Court: Well, the court, under the circumstances, Mr. ———, which are without precedent or authority, after the jury is impaneled, cannot permit such a thing.

"[Second Counsel]: Then, if the court please, we have no alternative under our oath of office, as we see the situation, but to persist in the withdrawal which we have made to your honor.

"The Court: No, Mr. ———, I do not think you intend to persist in your withdrawal when the court—

"[Second Counsel]: We must, your honor. We see no other way out; and not only must, but we do and we will.

"The Court: I do not see how you can. * * * That is unfair to the court and to the whole system of jurisprudence.

"[Third Counsel]: If I may be permitted to make a statement, we worked many hours into the night last night, and carefully deliberated upon our move this morning. We did not arrive at a definite conclusion until we had given the matter thorough and careful consideration. We thought of the position of the court, we thought of the position of our clients, we thought of the position of the district attorney, we took into consideration the people of Ventura county, and I am candid when I say that if there was ever a time in the lives of members of this bar when we needed Divine guidance, we needed it last night.

It might be well if the court would adjourn, if I may be permitted this suggestion, and that we discuss this matter in chambers, as the court may see fit, and perhaps we can more clearly point out our position, in order that the ends of justice may be subserved. * * *

"[Second Counsel]: Mr. ——— has stated that which is entirely proper, that it would be a violation of professional ethics to make any statements of the detailed knowledge which prompts this statement to the court. We would be entirely willing to make such statement in detail to a member of the Judicial Council on his oath of office, and we say without hesitation that in our opinion if that statement were made to any such person he would instantly and definitely advise us and advise this court that in his opinion our position was the only position that, as representatives at the bar, we can take.

"The Court: I must state, gentlemen, that it is impossible for the court to conceive of such a situation. Let me see a copy of the motion. I notice here that counsel 'further hold themselves in readiness to perform the obligations of counsel to the court in any other way that can be done without the violation of professional ethics'. Can there be a violation of professional ethics in continuing after the commencement of a criminal case in which the attorneys have spent two days or more in the examination of witnesses? I am merely making these statements for the purpose of discussion, gentlemen.

"[Counsel]: May I make a statement in aid of the court there, that we are not making a statement of the violation of professional ethics based on the matter of any testimony now in the case. Of course, that is in the record. It is not, in other words, the information that we have received through the record of this case that we have reference to.

"The Court: How in the world could the Judicial Council in any way remedy a situation which, as counsel states, has never been adjudicated? * * * This is the question before the court: Can counsel, who have been appointed by the court and who have entered upon the trial of a criminal case in which the jury has been impaneled and in which testimony has been given, withdraw from the case? When you gentlemen were appointed by this court you were appointed as officers of this court to represent the defendants. Now, can you withdraw without the permission of the court? That is the question, gentlemen. The court doubts very much whether you can.

"[Counsel]: Of course, may it please the court, each man must be the sole judge of his own feelings and belief with reference to professional ethics. I doubt even if a court can say to an attorney, 'You have not a right to be the judge of your own professional ethics according to your own conscience.' We feel that this is a duty that rests with each individual, and we have come to this decision only after thorough discussion and deliberation and hours of thought. It goes without saying that we are absolutely sincere in the position we take, your honor.

"The Court: Mr. Leo, do you desire these gentlemen to continue as your attorneys?

"Defendant Leo: Yes, your honor.

"The Court: Mr. Rocco, do you desire these gentlemen to continue as your attorneys?

"A. Yes, sir.

"The Court: Gentlemen, I don't see how, under those circumstances, I can possibly relieve you from the representation of these defendants.

"[Second Counsel]: If the court please, we would be very glad, as counsel has suggested, to discuss in chambers the matter with the court. We are definite in our statement and in our position, and if need be, and however regretful we may be, we will submit ourselves to the judgment of the court in contempt, because to do otherwise we would be violating our professional oaths, and we must maintain our position with such perils to ourselves as may be.

"[Third Counsel]: The situation, if your honor please, seems quite tense, and may I suggest that we have a short recess in order that we may confer with you a few minutes.

"The Court: Very well.

"[Third Counsel]: We believe we can present to you under such circumstances certain situation [sic] that we cannot present in court, but which we would present in open court if, after you have read them, you think they should be."

The presentation of these matters to the court began at 10 o'clock in the morning, and the judge now declared "a brief recess" until 11 o'clock. How long the recess actually lasted, or what transpired in chambers during its progress, is not disclosed by the record. It is merely shown that immediately after the termination of the interim the jury was called into court, and the judge declared a further recess until 2 o'clock. When court reconvened, the following proceedings were had in the presence of the jury:

"The Court: Are you ready to proceed?

"[Second Counsel]: Your honor, we maintain the same position as we stated to the court this morning.

"The Court: I understand, then, from that same position you and each of you attorneys refuse to comply with the order of the court which heretofore has been made, namely, that you represent these defendants in the trial of this cause?

"[Second Counsel]: That is correct.

"The Court: Is that your position, Mr. ———?

"[Counsel]: Yes, your honor, upon the statement made to your honor this morning in the absence of the jury.

"The Court: Is that your situation, Mr. ———?

"[Third Counsel]: With all due respect to the court, if the court please, that is my position."

The jury was then again excluded, and, after a short recess, the following proceedings were had, in part, the jury still remaining out of the courtroom:

"The Court: Defendants are in court with counsel, and, as I understand, they are ready to proceed for the purposes of the motion we have heretofore made.

"[Counsel]: Yes, your honor.

"The Court: For the sake of the record, gentlemen, I am going to ask you individually, Mr. ———, Mr. ———, Mr. ———, if you will comply with the order of the court to proceed with the trial.

"[Third Counsel]: We refuse at this time, if your honor please.

"[Counsel]: I make the same answer as Mr. ———.

"[Second Counsel]: Same statement, your honor.

"The Court: The court necessarily must find you gentlemen and each of you guilty of contempt. * * * [The] defendants were present in court and it was intimated by the district attorney of this county that he was informed defendants were not represented by counsel. The court interrogated the defendants and ascertained that they were not at that time represented by counsel. The court then appointed three members of the bar of this county, ———, ——— [and] ———, to represent the defendants. Counsel were then informed of their appointment. Mr. ——— and Mr. ——— appeared in court on the afternoon of the * * * 19th day of March, 1929; at that time the defendants were asked if they had any money or property with which to secure and employ counsel, and from their answers it was apparent to the court they did not. Thereafter, on the said 26th day of March, 1929, the court proceeded to the trial of this cause, at which time a jury was selected. That the jury was selected and sworn to try the cause, and thereafter for a day and a half testimony of some of the witnesses for The People was heard; they were cross-examined by the attorneys for the defendants. That on this day a motion was made by attorneys for the defendants in which they stated that it would be impossible for them to proceed in the defense of these defendants because certain information from these defendants had been received by them since the commencement of the trial, which, in their opinion, would make it unethical for them to proceed. The court heard the motion of the defendants and being fully advised in the premises the same was denied. That thereafter the court on several occasions requested you and each of you to proceed with the trial of the cause; to each request of the court there was a refusal on the part of each of you to comply with the order of the court to proceed with the trial in accordance with your appointment. Therefore, I am going to ask you gentlemen a formal question: If there is anything you have to say or legal excuse you have to offer why judgment of the court should not at this time be pronounced upon you.

"[Counsel]: May it please the court, it occurs to me, and I respectfully call the court's attention to the fact, in your honor's order just now made for the record may it also show that upon the date of the commencement of the trial of this action, and pursuant to notice given, a request for continuance was made by the attorneys?

"The Court: That is a correct statement.

"[Counsel]: Also, a little further on in your honor's order reference was made to the testimony taken on the first two days of the trial. The record will disclose the names, I take it, of the witnesses examined?

"The Court: The record will speak for itself.

"[Counsel]: Yes.

"The Court: You have no legal excuse to offer at this time?

"[Second Counsel]: If the court please, for the purposes of the record, the same statement is now made as made this morning in court.

"The Court: Is that your situation?

"[Third Counsel]: It is my position. I present the same reason.

"The Court: That is yours, Mr. ———?

"[Counsel]: Yes.

"The Court: It is the judgment of the court, Mr. ———, Mr. ———, and Mr. ———, that you and each of you be confined in the county jail of the County of Ventura until you comply with the order of the court, namely, proceed with the trial of the cause of The People of the State of California vs. Frank Rocco and Dominic Leo, you and each of you having been heretofore appointed by the court so to do. Remanded to the custody of the sheriff for execution.

"[Second Counsel]: The record now shows we are in the custody of the sheriff.

"The Court: That is what the record shows.

"[Second Counsel]: Where is the sheriff? Are we—

"The Court: The sheriff is right there.

"[Second Counsel]: If the court please, it will be understood we are in the custody of the sheriff from the present time. This leaves counsel with two courses to pursue. One course will be to accompany the sheriff to the county jail and to then issue out a writ to the court of appeal for the purpose of reviewing the order of the court just made. The other course would be to bow to the superior force which has been exerted upon counsel by this court and proceed with the trial of the case. We are agreed that if we were to go to the appellate court and present this situation to that court and that court directed us to proceed with the trial of this case that we would feel as members of the bar and officers of the court that the proposition of law had been definitely settled and that under the law and our statement of the case it would be our duty to proceed with the trial of this case. We appreciate the fact that that particular course of procedure would entail a delay certainly of several days more, probably of a week or two or three weeks, and that during that time we would have the situation of a jury of citizens of this county locked up, a situation where the orderly procedure of the trial of this case would be interfered with and disturbed. We feel that we have now made a record which will protect we three counsel, no matter what eventualities might later come about in this case. Therefore, we feel, as good citizens having the interest of the county of Ventura and the court at heart, we will take the latter of the two courses of procedure, that we will bow to the will of this court, and we now offer to proceed under protest and upon the same statement which we have heretofore made to the court.

"The Court: Do you desire any recess? If not we will proceed.

"[Second Counsel]: Very well, you may go ahead.

"The Court: Very well. Call the jury. Gentlemen, let the record show that having agreed to comply with the order of the court you have purged yourselves of contempt and are no longer in the custody of the sheriff."

We have taken thus copiously from the record—although, indeed, much that was said during the presentation of the motion has been omitted—because we think the situation disclosed by the proceedings is one of the most important, touching the duties of attorneys at law and bearing upon the relations between lawyers and courts, that has ever come before the judicial tribunals of California, as it is contended that the trial judge erred in declining to release the three counsel from the obligation he had imposed upon them, and because the various questions presented require a full statement of the facts.

[1] It is provided by section 13 of article 1 of the State Constitution that all persons charged with crime "shall have the right * * * to appear and defend, in person and with counsel." In the enlightened polity of civilized nations there are few, if any, guaranties that are more precious to the people than this. The right is so firmly fixed, not only by constitutional mandate, but in actual practice, that it is doubtful whether a case can be found in modern times in which it has been absolutely denied any person by any court in an English speaking country. In a case in which the right of one charged with crime to consult with his counsel while suffering incarceration was in question, it was said that the right "is one of the fundamental rights guaranteed by the American criminal law—a right that no legislature or court can ignore or violate" (In re Rider, 50 Cal. App. 797, 195 P. 965), and the case proceeded upon the theory that the right to consult counsel was one included within the right to defend by counsel. The question here to be decided is whether the trial court invaded the right of appellant to defend through the efforts of attorneys at law by compelling him to proceed under the charge of lawyers engaged in the defense of one whose interest was inimical to his.

[2] Respondent contends, upon various grounds, that the trial judge did not err in ordering the three lawyers to continue to act as counsel for appellant. It is said, first, that the order was proper for the reason that, in response to a question put to him by the judge, appellant indicated a desire that the counsel should continue to act for him. This point is so palpably ill-founded, for various reasons, that it seems not worth while to expend any considerable time in disposing of it. It is enough to say that the three lawyers knew the circumstances which rendered the position of Leo, as a defendant in the case, inimical to that of appellant, while appellant himself did not. At least, we cannot assume that Rocco knew the nature of any communication which Leo may have made to the three lawyers, especially considering the high-minded attitude—with exceptions hereafter to be noted—assumed by them before the court and concerning their duty to maintain inviolate all communications made to them by either of the defendants. In responding to the question put by the court, Rocco answered, therefore, without a full understanding of the circumstances upon which, only, an answer could have been based—granting, in considering this particular question, that under any circumstances he could have made an answer, founded upon his judgment alone, which would have controlled the situation.

[3] It is said by respondent that the attempt of the three lawyers to withdraw from the case came too late. We quote from the brief: "The cause proceeded to trial and testimony was taken for a period of three successive days [but the trial judge says it was a day and a half], whereupon for the first time counsel for defendant asked leave to be permitted to withdraw from the case on the ground that the interests of the two defendants were opposed to each other, and that they were entitled to separate counsel to represent them. This, we submit to the court, was, under all the circumstances, a most extraordinary request. * * * Counsel can certainly not be permitted to speculate upon the outcome of a trial, have testimony taken for several days, and then seek to have a mistrial declared, or the case indefinitely contin-

ued so that the court might appoint independent counsel to represent the defendants." The duty of the representative of the state who penned this language did not require him to take the attitude represented in part by it. Counsel's "request," as respondent terms it, was not extraordinary. Indeed, it would have been most extraordinary if counsel had not made the announcement of their withdrawal, under all the circumstances which impelled it. Again, there is not the slightest ground for the insinuation that the counsel made their announcement after having speculated on the outcome of the trial. The insinuation is not only unfair to counsel, but it does violence to the attitude of the trial judge toward them during the trying time through which they passed. One of the counsel said that "we have made this statement to the court at the earliest opportunity that it could be made." To this the judge responded: "I have no doubt of that Mr. ———. Everything you have said I have taken absolutely as I always have, at its face value." If, however, the judge had not thus testified to his faith in counsel, the result must have been the same. Fidelity to their clients forbade a disclosure of the communications which had been made to them, and their obligation as sworn officers of the court was such that it must be presumed that they spoke truth when they stated the effect which the disclosures had wrought upon their minds. Nor, in presenting their statement, did counsel "seek to have a mistrial declared" nor to have "the case indefinitely continued." In short, in closing upon the particular point now under scrutiny, the statement of counsel did not come too late. It could not have come earlier. That fact is indisputably fixed by the record.

[4] It is next contended by respondent that the reasons for the attempted withdrawal of counsel were not presented by affidavits. It is to be observed, in viewing this point, that practically no matters of fact were communicated to the court except the mere statement that some communications, the name of which were not disclosed, had been made to the lawyers by each of the defendants. The substantial matter stated was that counsel concluded that they could no longer represent the defendants jointly nor either of them separately. This assertion, necessarily, and also, as they expressly stated, they made on their "professional obligation." We cannot see how the presentation of the statement upon oath taken before a notary public could have made it more fit and proper for the consideration of the trial judge. It is a part of the duties of a lawyer "to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Code Civ. Proc. § 282, subd. 4. This obligation rests upon him throughout his professional career, and for a breach of it he may be deprived of his license as a lawyer. We think these circumstances show a sanction, securing against the falsity of counsel's statement, at least as binding as the oath which accompanies an affidavit. But, even if this were not so, the point made by respondent is not good. Neither the judge nor the district attorney suggested that the matters stated by the lawyers should be made to appear by affidavit. Not only so, but at one time, as we have already pointed out, the judge announced that he took as true everything that counsel had said up to the time the judge spoke. We think the statement of counsel was made in proper form. An affidavit from them was not necessary.

[5, 6] There are two other points involved in the action of the trial judge in forcing counsel to continue to act for the two defendants, neither of which points is made by respondent. It will be noted from the record that some sort of hearing or consultation was had in the judge's chambers while the matter presented by counsel was under consideration, and that the record fails to show what transpired at this private session. If the session appeared from the transcript to have been held for the purpose of presenting evidence to the judge, and it further appeared that evidence was heard by him thereat, the point now made by appellant would not be open to him. There is abundant authority, without citing it, for the proposition that, where a question of sufficiency of evidence is presented on appeal, and it appears that some evidence was taken at a hearing of which no record was made, it will be presumed that such evidence was there heard as will support the findings of the court. Here, however, it was suggested only, after the statement of counsel's position had been fully made to the court, that "we discuss this matter in chambers, * * * and perhaps we can more clearly point out our position." This suggestion was in effect repeated by one of the counsel immediately before the session in chambers, although one of the others added that a "situation" could there be presented which could not be disclosed in open court. After the private hearing and after the noon recess, one of the lawyers remarked that "we maintain the same position as we stated to the court this morning." During the statement he made in accompaniment to the order adjudging the lawyers guilty of contempt, the trial judge said: "That on this day a motion was made by attorneys for the defendants in which they stated that it would be impossible for them to proceed in the defense * * * because certain information from these defendants had been received by them since the commencement of the trial, which, in their opinion, would make it impossible for them to proceed. The court heard the motion * * * and being fully advised in the prem-

ises the same was denied." Soon after these remarks one of the counsel said that "for the purposes of the record, the same statement is now made as made this morning in court." The three were then sentenced and committed to the custody of the sheriff. We can see in the entire circumstances involved in the point under discussion no reason for a presumption that there were occurrences at the session in chambers which would uphold the action of the trial judge, assuming for the moment that the record as made in the courtroom fails to do so. The private session was sought for the purpose of "discussion" only and to make counsel's position "clear." We cannot assume that they disclosed to the judge in his chambers the communications which had been made to them by the defendants. Not only had they pointedly—and very correctly—declared in the courtroom that it was their duty to maintain inviolate the confidence reposed in them by their clients, although they so far forgot themselves as to offer to disclose the privileged matter to some member of the judicial council, but after the session in chambers they in effect repeated in its entirety the statement they had made in the morning. In his remarks made just before he committed the counsel to the custody of the sheriff, the judge spoke as if the judgment of contempt was rendered upon the statement made in open court. We think the judge's action cannot be sustained upon the mere ground that there was a conference in chambers and that no record was made of it.

With the exception of the offer concerning a member of the judicial council, the attitude of the lawyers before they were sentenced was highminded and praiseworthy. After the sentence they receded from the position which they had so gallantly assumed. Forgetting that they were not before the court of last resort of the state, they bowed to the force displayed by the trial judge, preferring that course to the relatively insignificant ignominy of suffering an imprisonment until their release could be procured upon application to a higher tribunal. The one of the counsel who made the principal statement to the court, after outlining the situation which confronted them, said: "Counsel therefore notify the court that it has become imperative for them to withdraw immediately from further participation in this case. * * *" He further said that "this is not a motion * * * but that it is a positive withdrawal under a personal privilege. * * *" One of the other counsel, when the judge put forth a remark to the effect that he could not "permit such a thing" as the withdrawal of the lawyers, responded, "we have no alternative under our oath of office, as we see the situation, but to persist in the withdrawal which we have made. * * *" The judge then observed: "I do not think you intend to persist in your withdrawal when the court—" And the counsel answered: "We must, your honor. We see no other way out; and not only must, but we do and we will." A little later the counsel who had been the chief spokesman of the three made this significant statement, one which was fully justified, at least as addressed to the court to which he made it: "[E]ach man must be the sole judge of his own feelings and belief with reference to professional ethics. I doubt even if a court can say to an attorney, 'You have not a right to be the judge of your own professional ethics according to your own conscience.' We feel that this is a duty that rests with each individual, and we have come to this decision only after thorough discussion and deliberation and hours of thought."

[7] It is to be regretted that the lawyers did not maintain to the end the attitude which they assumed with such apparent bravery and determination. That they did not do so gives rise to the second of the two questions which, as we have observed, are not presented by respondent. The lawyers had the entire question in their own hands. They could have settled it by refusing to act despite the fact that they had been sentenced for contempt and committed to the custody of the sheriff. Is appellant precluded from presenting the question now before us for the reason that the lawyers did not protect him from the danger of a representation by disqualified counsel when it was in their power to do so? We think not. It will be observed that the lawyers dealt with the question before the trial judge largely as one of professional ethics. So it was. But when they spoke for themselves, as they did so masterfully, they spoke also for appellant. What they referred to partially as a question of ethics was one also of vast moment to appellant, one which affected deeply his rights under the Constitution, and this, of course, they thoroughly understood. They could desert their attitude so far as it involved merely a question of professional ethics if they chose, but they could not desert it in its aspect as affecting the constitutional rights of appellant. After what they had said so vigorously as to the conscientious scruples under which they labored, a desertion of their position merely involved them in the error which was committed by the trial judge in his successful attempt to force them to act. The counsel made themselves parties to the error. In their submission to the will of the judge, they could not drag appellant along with them. In truth and in legal contemplation appellant was without counsel from the moment when they, by their statement to the court, made their disqualification an unrefuted fact in the case. We are satisfied that the point now insisted upon by appellant is open to him despite the fact that the counsel receded from the thoroughly defensible position they had taken.

As we have indicated several times during the progress of our discussion, we are convinced that the trial judge erred in the course he took in response to the statement of the three lawyers. He did all he could to deprive appellant of the important right to be heard in court by counsel, a right guaranteed to him by the Constitution. We have not been at pains to examine minutely the record, pursuant to the provisions of section 4½ of article 6 of the Constitution, in order to determine whether the error has probably resulted in a miscarriage of justice. Without an examination of the entire record, including the evidence, we find it impossible to say whether appellant would have been convicted but for the error, and we should be in exactly the same position if we were to make the examination, especially as the evidence against him was wholly circumstantial. With the scrutiny or without it, we should be bound to say that there is great probability that there has been a miscarriage of justice because of the error of the court, in which the three lawyers mistakenly joined and to which they, with erring judgment, submitted. It is to be observed that the counsel were enabled to procure an acquittal of appellant's codefendant. From the moment they determined to make to the court the commendable statement they actually presented the next day, they abode in the conscientious belief that they might do injustice to one or the other of the defendants by remaining in the case as the counsel of both or of either. Like Desdemona, in tragic contemplation of her father on the one hand and the dusky Moor on the other, they perceived a divided duty. It is impossible to say to what extent, in discharging their duty to the acquitted defendant, they did violence to their duty to appellant. By the record they have certified to us in the most positive terms, under their oaths as attorneys at law, their apprehension that, if they continued in the case they might sacrifice the rights of one or both of the defendants. The acquitted defendant, by the verdict, is placed beyond the reach of harm. We cannot say to what extent appellant was harmed by the efforts which saved his codefendant, or by a remission of effort in his behalf, caused by fidelity to the defendant whose position before the court, in the minds of the lawyers, was inconsistent with his own.

As affecting the question whether it is incumbent upon us to peruse the lengthy record of the trial, we refer to the language of the Supreme Court in a late case: "The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the constitution." People v. Mahoney, 201 Cal. 618, 258 P. 607, 610. We can conceive of no case to which this language is applicable if it is not apposite to one in which a defendant is denied the right to appear and defend by counsel. We are satisfied that a reversal must result.

In support of the view which we have adopted under appellant's claim of error upon the point of which we have just made disposition, appellant cites People v. Bopp, 279 Ill. 184, 116 N. E. 679. Respondent contends that the case is not in point. We have not attempted to settle this controversy, purely academic as it is to us. We have made no examination of the case, and cite it merely for the perusal of those who may desire to examine further into the question presented by the record before us. To us the point is plain without the aid of júdicial precedent.

It now becomes necessary to determine such points made by appellant as are likely to arise on a new trial. The prosecution offered in evidence three statements made by appellant. All three were in writing and in the form of question and answer; the material having been taken in shorthand and afterwards transcribed. The statements were each objected to as a whole, and in addition specific objection was made to every question and answer contained in each. The objections were overruled, and the statements were received in evidence.

The first statement was taken in the sheriff's office; questions being propounded to appellant by a deputy sheriff and by a captain of police. Some portions of this statement are now pointed to as having been erroneously received. We shall list and number these portions for the purpose of making convenient reference to them hereafter:

(1) "Q. Where are these girls that you were living with at the apartment in Venice? A. I don't know, I picked them up."

(2) "Q. Ever go down to Venice? A. Yes. Q. Did you go down there with these two girls, an Italian girl and a blonde? A. When? Q. A few nights ago? A. Yes, sir. Q. Where did you go down there? A. To an apartment house. Q. What is the name? A. I don't know. Q. You went in and registered there? You registered under the name of Henry Barona? A. No. Q. You went down there and stayed there under the name of Barona—stayed there with an Italian girl called Tony? A. I picked them up. Q. Who was with you? A. There was this blonde girl. Q. Who was with the blonde girl? A. She was all alone. Q. Who was down there at Venice staying with this blonde girl? A. Nobody. Q. Who was the other guy with you? A. That was my friend there, Leo. Q. Who else? A. That is all. Q. Who stayed with the blonde girl? A. Nobody. Q. You stayed with the blonde girl? A. Yes, sir. Q. Are you sure you did? A. Yes, sir. Q. As a matter of fact you stayed with the Italian girl, isn't that so? A. Yes, sir."

The second statement was taken in the office of the district attorney, the questions being asked by that officer. The portions of the statement which are now said to have been erroneously received are here listed, with a continuation of the numbering above commenced:

(3) "Q. What were you doing [at a certain specified place]? A. I had a pool room over there, and we used it to sell some stuff on the side. Q. What were you handling, a little alcohol? A. Yes. Q. Alcohol on the side? A. Yes, sir. * * * Q. Some alcohol racket between yourself and [the deceased]? A. No sir. Q. There was some alcohol in the deal? A. No, sir. * * * Q. And you talked to [the deceased] about running alcohol? A. Yes, sir. Q. And he told you he might get you in on the game, didn't he? A. No. Q. Well, but you know it was all right. You would have gone in if everything was all right there, wouldn't you? A. No, sir. Q. You would not do that? A. No. If I was in good health, maybe if I could make a few dollars—Q. Sure! If you could turn a few dollars you were going to do it. A. Well, there ain't no harm in bringing a load of stuff over. Q. You know how to bring a load over? A. Well, maybe I could bring a load. Q. I know; but you were out here from Boston and you knew how to do it, and were in the business back there. A. Why, anybody knows that racket. Q. Well, I know; but everybody don't know that racket. You knew it, didn't you? A. Why, I knew it all the time—the racket—Q. Why, sure you knew the racket all the time, and you got in with [the deceased] there, and you knew he was running alcohol; and if you could make a few dollars you were not going to throw it away, were you? A. Why, no. Q. Certainly not. You were out here in California and it was nice weather and you had a good car and about $900 in your pocket, and found you could pick up a little easy money in the meantime."

(4) "Q. Well, when did you see [the deceased] again? A. I seen him when he picked his girl up; when I picked this girl up at the Louise Hotel. Q. What girl? A. A girl by the name of Tony. Q. Was she a friend of Morosco? A. I don't know. Q. Was it Morosco? A. No, Morisco. Q. Did you know what her name was? A. No, I see in the paper what it was. Q. How did you happen to pick her up at the Hotel Louise? A. I see her in the lobby there, and she came over to me. Q. Now, when was this? Let's get the date as near as we can? A. Well, it is a little over two weeks—about 17 or 18 days. Q. Of course, this was before you had met Brady? A. Yes. I was up at the Louise Hotel and she was living there with somebody. Q. Tony was? A. Yes, sir. Q. Who? Do you know? A. Some fellow by the name of Patty. Q. What was his last name? A. I don't know his last name. Q. Who introduced you to Tony? A. Nobody introduced me to her. Q. You just picked her up? A. Yes, sir. Q. Where, in the lobby? A. Yes; and then we went to have something to eat, and then we went to the room. Q. Went there to your room 311? A. Yes; and stayed there awhile until half past three or four o'clock in the morning, and she went off again. Q. How long did she stay in your room? A. She stood [sic] there about seven or eight hours. Q. Was Leo there at the time? A. No, sir. Q. Where was he? A. I made him sleep with this other fellow. Q. Who? A. This 507. Q. You made Leo go over with 507? A. Yes, sir. Q. Who was in 507? A. Fellow by the name of Jimmie. Q. You mean Jimmie, the Priest? A. Yes, sir. Q. Well, you stayed in the room with Tony? A. Yes, and then about half past three or four o'clock in the morning she went away to her own room and she says, 'In the morning I am going to pack my clothes and bring them down.' Q. In other words, she was going to bring them into your room? A. Well, she said she couldn't stay there. Q. She would come down in the morning? A. Yes, sir."

The third statement was also taken at the office of the district attorney and the questions were put by that officer and by the sheriff. We list the portions to which objection is now urged, continuing the same scheme of numbering:

(5) "Q. * * * Listen here, Rocco. You said you were telling me the truth. A. Yes. Q. But you did not. A. I did. Q. No, you did not, and I will tell you where you were not. You brought your wife out here. A. Yes, sir. Q. You lied to me. I asked you who came out here with you and you told me just the two of you. Leo brought your wife down to New York to meet you. What did you keep that back for?"

(6) "Q. What was the difficulty with your wife? A. She didn't want to stay here; she didn't like to stay here. Q. Why didn't she? What was the racket you had in the hotel that night—the night before she left? * * * You had trouble with your wife, then. What was it? A. Oh, I always have trouble with my wife. Q. Well, you were having a quarrel with her? A. Yes."

(7) "Q. Does your wife know about your going there with this other girl Tony? A. No, sir. Q. Right away after your wife left you picked up with this other girl, Tony Morisco? A. A few days after she went. Q. You went right down with Tony, didn't you? A. Yes."

(8) "Q. Now, you were in the penitentiary once before, weren't you? A. Yes, sir. Q. Where? A. At 59th street. Q. 59th street? A. Yes, sir. Q. New York City? A. Yes, sir. Q. Under what name? A. Frank Rocco. Q. What were you sent there for? A. Vagrancy. Q. Did you go to the penitentiary for vagrancy? A. Workhouse, that is what they called it—not penitentiary. Q. How long did they send you up for? A. Six months."

At the conclusion of the reading of the three statements, one of the counsel for appellant assigned the presentation of them to the jury as misconduct of the district attorney. The trial judge remarked, merely: "Note the assignment of the attorney for the defendants and proceed."

Respondent contends that these matters were all properly received in evidence upon six grounds, to which, for convenience, we shall hereafter refer by the letters A, B, C, D, E, and F.

[8] Respondent's proposition A is to the effect that the evidence was admissible for the purpose of showing motive. Prefacing with the statement that the name of the man with whose death appellant was charged was Brady, we quote from respondent's brief: "It was certainly competent in the case at bar to introduce evidence by way of statements voluntarily made by appellant showing the relations existing between the two men, that they had frequently discussed the liquor question, that they had both been engaged in the liquor business, and that they were frequently together and in close association; and furthermore that the defendant Rocco knew that the deceased Brady was about to leave for the north to bring through 'a load,' evidently referring to illicit liquor." We think that no motive for the killing of Brady by appellant was disclosed by any part of the record above quoted through a showing that the two "had frequently discussed the liquor question," or "that they had both been engaged in the liquor business," or "that they were frequently together and in close association." The fact that "Rocco knew that the deceased Brady was about to leave for the north to bring through 'a load'" is entirely beside the mark, as the circumstance was not made to appear by any of the questions or answers to which appellant now takes exception.

In further developing proposition A respondent says in the brief: "In this connection it will be noticed that after the finding of the body of the deceased with the pockets turned inside out, a further search of the body at the undertaking parlors showed that the deceased had the sum of $220.00 in his inside shirt pocket, which was evidently overlooked when his pockets were turned inside out." We cannot perceive that this assertion aids in determining either the propriety or impropriety of allowing the jury to have any of the questions or answers embraced above in paragraphs numbered from 1 to 8 inclusive.

[9] Proposition B is that the evidence was admissible "to show opportunity and knowledge on the part of appellant." We cannot conceive how any of the questions or answers stated in paragraphs 1 to 8 helped to show "opportunity or knowledge," when it is observed that the death of Brady was unconnected with any event disclosed by those questions and answers. Other evidence in the record showed without dispute that Brady and the two defendants, at 10:30 on a certain evening, left an apartment house in Venice, in the county of Los Angeles, in an automobile belonging to appellant, with appellant at the wheel, and, omitting certain occurrences in the interim, that the body of Brady was found in a field in the county of Ventura at 4:30 on the next morning. We think no question or answer in the eight paragraphs added in any degree to this complete showing of "opportunity and knowledge."

[10] It is contended, as proposition C, that the evidence was "admissible to show a consciousness of guilt." In support of this contention, respondent points out that some of the questions and answers set forth in the eight paragraphs show that appellant was well acquainted with Brady and was in close association with him immediately before his death, while portions of the statements made by appellant and not contained in those paragraphs disclose assertions by him to the effect that he never knew Brady. Under these circumstances we think that all questions, together with the answers thereto, which tend to show an acquaintance and an association between Brady and appellant, and which are shown in paragraphs numbered 3 and 4, were properly admitted in evidence.

Proposition D presents the contention that the evidence was admissible "to show the relations and situation existing between the defendant [Rocco] and the deceased." This ground is well taken in so far as the questions and answers tend to show an association and relationship between the two men. Such questions and answers are to be found in paragraphs numbered 3 and 4.

[11] It is insisted by proposition E that each of the three statements of appellant was admissible in its entirety "under the doctrine of verbal completeness." By this we understand that respondent invokes the well-known rule of evidence to the effect that a party is entitled to introduce in evidence the whole of a conversation or statement, or that, where one party introduces a part of a conversation or statement, the other party may offer the remainder. This rule, however, does not entitle either party to offer a severable part of a conversation or statement that contains nothing which is within the issues at the time being tried by the court. 27 Cal. Jur. 105; Jones, Ev. § 822. Certainly the rule cannot permit the prosecution in a criminal trial to offer, as a part of its case, admissions by the defendant that he has committed other crimes or indulged in immoral practices or pursuits, merely on the ground that the admissions are contained in the same conversation or statement in which are disclosed matters relevant to the inquiry in progress. Respondent's proposition E adds nothing to the contentions advanced in the five other propositions which accompany it.

Proposition F is that "the statements were admissible in their entirety as a part of the prosecution's main case." Disposition is made of this point by what is said in the last preceding paragraph of this opinion.

We are satisfied that the trial court committed error and that the district attorney was guilty of misconduct in giving to the jury all the questions and answers set forth in our numbered paragraphs 1 to 8 inclusive, with the exception of those declared to be proper during the consideration of respondent's propositions C and D. Upon the score of the district attorney's misconduct, it is pointed out by respondent that counsel for appellant at the trial did not make to the court a request to admonish the jury to disregard the improper questions and answers. This point bears merely upon the effect to be ascribed to the misconduct and not upon the question whether it was committed, and is not now of moment, for the reason that we have already determined that a reversal must be ordered because of the error committed by the court upon the point we have first considered. The effect of the misconduct of the prosecutor is of no interest for another reason. The court erred in exactly the same matters to which the misconduct related, and the effect of the error was not dissipated by a failure to ask that the misconduct be cured by admonition.

[12] Appellant's counsel at the trial addressed the following questions to a witness who had seen appellant and Brady together: "Q. What was their attitude toward each other? Did you observe that? * * * Q. Did they seem friendly? * * * Q. Was their attitude friendly?" Our discussion above as to the right of the prosecution to offer similar evidence shows the rulings sustaining objections to these questions were error.

Other points are made by appellant, but we think they are not likely to arise upon a second trial of the cause.

Judgment reversed, and cause remanded for a new trial.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

208 Cal. 376

DUKE et ux. v. LEVY et al. (S. F. 12652.)★

Supreme Court of California. Oct. 15, 1929.

Rehearing Denied Nov. 14, 1929.

1. Usury ⚷137—Debtor held not entitled to difference between amount of loan and note trebled, where no payment had been made (Usury Act).

In debtor's action for treble amount of usurious charge, where debtor had borrowed $2,000 and had given note for $2,500, no part of which had been paid, and debtor claimed to be entitled, under Usury Act (St. 1919, p. lxxxiii), to have difference between sum of $2,000 and $2,500 trebled and deducted from amount of their indebtedness, *held* debtor was liable for $2,000 and not entitled to such deduction, as recovery can be had only where payment has been made.

2. Usury ⚷140—Where maker of note given as security for loan to borrower paid usurious interest to borrower, who transmitted money to holder, held borrower was not entitled to benefits of Usury Act (St. 1919, p. lxxxiii).

Where borrower caused third party to execute note as security for sum borrowed, and maker thereafter gave usurious interest money to borrower to be transmitted by borrower to holder of note, and borrower did so transmit, *held* borrower was not entitled, under Usury Act (St. 1919, p. lxxxiii), to have amount of interest payment trebled and deducted from indebtedness, as borrower had not made such payment.

3. Usury ⚷102(1)—If transaction was usurious, borrower could not recover amount of usurious charge, where no money had been paid on such account.

Borrower could not recover amount of charge even though transaction was usurious, where no money had been paid on such account.

★Rehearing denied.

4. Execution 🔑158(1)—Where order staying execution was improperly granted, court's order setting aside such prior order held proper (Code Civ. Proc. § 945).

In borrower's action for treble amount of usurious charge, where court held that legal portion of obligation and deed of trust were enforceable, trial court did not err in setting aside its prior order staying execution on judgment, as under Code Civ. Proc. § 945, such order staying execution was improperly granted.

In Bank.

Appeals from Superior Court, Alameda County; J. D. Murphey, Judge.

Three actions by George E. Duke and wife against Irving S. Levy and others, consolidated by stipulation for purposes of trial and appeal. From judgments for defendants and orders after judgment vacating the prior order staying proceedings on the judgments, plaintiffs appeal. Affirmed.

Superseding opinion 274 P. 1031.

Robert E. Hatch, of San Francisco, and G. E. Duke, of Oakland, for appellants.

Owen D. Richardson, of San Jose, for respondents.

RICHARDS, J. There are in the record herein six separate appeals in three cases wherein the parties are substantially the same and the facts are similar. The first three of these appeals are, respectively, from the judgment in each of said actions. These three actions were consolidated by stipulation of the parties for the purposes of trial and appeal, and are presented upon a single transcript and the same briefs. The other three appeals are from an order made in each case after final judgment vacating a prior order of the trial court staying proceedings upon the judgment in each case pending appeal. In the three main appeals the facts are as stated in the findings of the trial court and are practically undisputed. The sole question of law upon each of said appeals is as to whether the judgment in each is supported by the findings. Each of said actions was instituted by the plaintiffs and appellants herein for the purpose of having certain transactions between the parties declared to be usurious and to have it adjudged that certain notes and trust deeds made and executed in the course of these transactions were void for usury.

The facts in the first of these cases, as found by the trial court, are briefly as follows: On or about March 14, 1925, the plaintiffs borrowed from the defendant Meyerfield the sum of $2,000, and thereupon made, executed, and delivered to him their promissory note for $2,500, payable one year after date, and bearing interest at the rate of 1 per cent. per month; and, as security therefor, made, executed, and delivered to him a deed of trust in the usual form upon certain real property in Alameda county, by the terms of which the defendant San Jose Abstract & Title Company was designated as trustee and was authorized and empowered to sell said real property at trustee's sale in the event of the failure of the makers of the promissory note to make payment thereof and of the interest thereon in accordance with its terms. By mesne assignments the promissory note and trust deed were transferred successively to the defendants Irving S. Levy, Federal Finance, and J. D. Shaw, the latter of whom is now the owner and holder thereof. The court found that said assignments were not for value but merely for collection, and further found that no part of said sum of $2,500, the face value of said promissory note, or of the sum of $2,000, the amount of money actually borrowed by the plaintiffs, or of the interest thereon, had been paid. As conclusions of law from the foregoing findings of fact, the court found that said promissory note and deed of trust securing the same were and each was valid and enforceable for the principal sum of $2,000 and no more, and that the trustee in said deed of trust was entitled to sell the real property described therein to satisfy said indebtedness of $2,000 and no more, as provided in the deed of trust. The judgment of the trial court followed said findings of fact and conclusions of law, and upon the entry thereof the plaintiffs have prosecuted this appeal.

In the second of said causes the parties are substantially the same, except that the wife of the plaintiff Duke is omitted, and the added defendants E. E. Pitman, Mary Alice Pitman, and August M. Saleneek were never served with process and did not appear therein. The facts in this case as found by the trial court are briefly as follows: On March 9, 1925, the plaintiff George E. Duke borrowed from said defendant Meyerfield the sum of $10,000, and as security therefor caused to be made, executed, and delivered to Meyerfield a certain promissory note of said defendants E. E. Pitman and Mary Alice Pitman, his wife, for said principal sum, payable one year after date, with interest thereon at 7 per cent. per annum; and thereupon also, and as security for said last-named instrument, caused to be made, executed, and delivered to the defendant Meyerfield another certain promissory note of defendant Saleneek for the principal sum of $8,500, payable one year after date, with interest thereon at the rate of 7 per cent. per annum. As security for the payment of the promissory note executed by Pitman and his wife, the plaintiff caused to be made, executed, and delivered to the defendant Meyerfield by the defendants Pitman and wife a certain deed of trust covering certain real property in the county of Merced, wherein Meyerfield was named as beneficiary and defendant San Jose Abstract & Title Company as trustee, with authority to sell said real property in the event that said principal sum of $10,000 and the interest thereon were not paid in accordance with the terms of said promissory note; and, as further and additional security for said note, caused to be made, executed, and delivered to Meyerfield by one August M. Saleneek, also a defendant herein, a deed of trust of certain real property in the city of Oakland, of which trust deed also the defendant San Jose Abstract & Title Company was designated as trustee with the usual powers. The trial court further found that by mesne assignments said promissory notes and deeds of trust had been assigned successively to Irving S. Levy, Federal Finance, and J. D. Shaw, and that the latter was now the owner and holder of said notes and deeds of trust, but that said assignments were and each of them was made for collection only. The court further found that the plaintiff at the time of the commencement of this second action was and still is the owner of the real property described in the deed of trust executed by said Saleneek as aforesaid; and further found that the plaintiff had paid upon account of interest upon the principal sum of $10,000 due and owing from himself to said defendant the sum of $49.50, which sum the trial court found to have been a usurious payment and that the plaintiff was entitled to have a recovery of treble the amount of said interest so paid. In addition to said sum of $49.50 paid by the plaintiff as interest on the Saleneek note it appears from the brief transcript herein that the defendant Pitnam delivered to the plaintiff Duke the sum of $358.25 which the plaintiff was to transmit to the holder of the Pitman note as interest thereon and which the plaintiff Duke did so transmit. The trial court apparently treated said payment as one made by the Pitmans to the owner and holder of their said promissory note through their intermediary, the plaintiff Duke, and that as to said plaintiff, being a mere intermediary, he was entitled to neither credit nor deduction on account of said payment, and hence that transaction is omitted from the findings of the trial court. As conclusions of law from the foregoing findings of fact, the trial court found that the total sum due and owing from plaintiff to the defendant Shaw was the principal sum of $9,851.20 and no more, which sum was arrived at by deducting from the principal sum of $10,000 the trebled interest paid by the plaintiff as aforesaid, and that, as to the remaining sum of $9,851.20, the said promissory notes and deeds of trust were valid and enforceable, and that the trustee named in each thereof was entitled to sell successively the real property described in said deeds of trust and to apply the proceeds derived from such successive sales to the payment of the aforesaid principal sum of $9,851.20 and no more. In his complaint in said second cause the plaintiff undertook to allege upon his information and belief that as to the Saleneek transaction there was an agreement between the plaintiff and said Levy to the effect that the sum of $8,500 represented in said transaction was to be divided between the plaintiff and Levy and that the amount to be thus received by Levy was to constitute a bonus to be received by him for negotiating said loan of $10,000 from Meyerfield to the plaintiff. These averments in the plaintiff's amended complaint were, however, fully denied by the defendants both in their pleadings and in their proofs offered at the trial of the cause. The trial court apparently gave no credence to the plaintiff's pleadings and proof in that regard, but found the transaction, in so far as the Saleneek note was concerned to be that which upon its face it appeared to be, that is to say, security for the Pitman note, and which was to be resorted to by the trustee only in the event that the Pitman deed of trust was found insufficient to satisfy the original loan of $10,000 from Meyerfield to the plaintiff Duke, and that as to said transaction the plaintiff was entitled to no deduction or recovery based upon the ground that said agreement for a bonus had been in fact made, or, if made, had ever been carried into effect. The trial court accordingly made its decree in effect denying to the plaintiff any relief based upon the payment of the sum of $358.25 made by the Pitmans, or by reason of the alleged agreement for a bonus to the extent of one-half of the Saleneek note, which the trial court, inferentially at least, found to have never been made. From the decree thus made and entered, the plaintiff has prosecuted his second appeal.

In the third of said actions the parties thereto are the same as those named in the first of said actions, and the facts thereof, as found by the trial court, are briefly as follows: On or about March 23, 1925, the plaintiffs borrowed from the defendant Meyerfield the sum of $3,500, and no more, and thereupon made, executed, and delivered to him their promissory note for $5,000, payable one year after date, with interest at the rate of 7 per cent. per annum, and, as security for the payment thereof, made, executed, and delivered to Meyerfield a deed of trust of certain real estate in the county of Alameda, of which deed of trust Meyerfield was designated as the beneficiary and San Jose Abstract & Title Company the trustee, with the usual powers, and which promissory note and deed of trust descended by mesne conveyances through the said defendants Irving S. Levy and Federal Finance to J. D. Shaw, who was and is the owner and holder thereof, but which assignments the court found were not for value, but for collection only. The court further found that no part of the principal or interest of said note had been paid and that the plaintiffs had only received upon the principal sum thereof the sum of $3,500, which sum remained unpaid. The trial court also found that said promissory note and deed of trust were valid and enforceable for the principal sum of $3,500, and no more, and that the trustee was entitled to sell said real property under the terms of said deed of trust for the payment of said indebtedness of $3,500, and no more. A decree was entered accordingly, from which the plaintiffs have taken their third appeal.

Upon the taking of their respective appeals, the plaintiffs caused to be prepared and certified a brief transcript, under the provisions of section 953a of the Code of Civil Procedure, which the parties hereto have stipulated to be a full, true, and correct transcript of the record upon the trial of said actions, and which is chiefly devoted to a statement of the evidence pro and con as to the alleged agreement for a bonus to be derived by one or other of the said defendants from the transaction involved in the Saleneek note, and which was apparently discredited by the trial court.

[1] The appellants insisted before the trial court and urge upon this appeal that as to the first of the above causes they were entitled under the Usury Act (St. 1919, p. lxxxiii) to have the difference between the sum of $2,000, which they actually received upon the loan in question, and the sum of $2,500, for which they gave their note and trust deed to the defendant Meyerfield, trebled and deducted pro tanto from the amount of their debt; and in the third of said actions they insisted, and here urge, that they were entitled to have the sum of $1,500, representing the difference between the amount which they received and the $5,000 for which they gave their note and trust deed in that transaction, also trebled and deducted from that indebtedness. The trial court, however, upon the authority of our recent decision in the case of Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725, held that the plaintiffs were not entitled to said deduction, for the reason, as stated in that decision, that the transaction as to the legal and illegal portions thereof was severable, and that it was not the legislative intent, as expressed in said act, to declare the whole contract void, but only such portion thereof as came within the inhibition of the statute. We fully approve our former decision and the application which the trial court made thereof to the first and third causes of action, with relation to which the plaintiffs have prosecuted their present appeal.

[2] As to the second of said causes of action, the trial court found and decided that as to the sum of $49.50 actually paid by the plaintiff as interest he was entitled to have the same trebled and deducted from the total sum of $10,000 borrowed by him from the defendant Meyerfield. The respondents do not quarrel with this conclusion, and we therefore see no reason to further comment upon it. As to the payment, however, of the sum of $358.25 paid as interest upon the Pitman note and mortgage, the trial court apparently treated said sum as having been paid thereon by the Pitmans, who merely used the plaintiff as the intermediary to transmit said sum to the then holder of their obligation. The testimony of the plaintiff Duke himself fully supports this finding, and hence also supports the conclusion of law which the trial court based thereon, to the effect that the plaintiff, not having actually paid any other sum than said $49.50 as usurious interest, he was not, upon the authority of Haines v. Commercial Mortgage Co., supra, entitled either to recover any other than the said amount or to have the amount thereof trebled and deducted from his indebtedness. As to this conclusion also there can be no doubt of its correctness upon the authority of the Haines Case.

[3] This leaves for consideration upon this particular appeal only the appellant's contention that there existed an agreement between himself and the defendant Levy by which they were to divide between themselves the sum of $8,500, which was represented by the Saleneek transaction. But, as we have already seen, the evidence upon that subject was conflicting, and the trial court found, inferentially at least, against the plaintiff's contention. But, even if it were to be conceded that the pleadings and evidence in the case were such as to have justified the trial court in coming to the conclusion for which the plaintiff contends, he would still be entitled to no relief in the present action, for the reason that no sum of money has ever been paid or collected on account of the Saleneek transaction, and hence, upon the authority of the Haines Case, no state of facts has arisen to which the usury laws can be given application.

It follows that, as to the three main appeals, the judgment of the trial court must be and is hereby affirmed.

[4] With regard to the three other appeals from the order of the trial court after final judgment, which had the effect of vacating and setting aside a prior order which had been made by the trial court staying execution of the judgment upon each of said main appeals, the facts were these: The plaintiffs commenced and prosecuted each of said actions for the purpose of having such sums in each as were claimed to come within the interdiction of the usury law trebled to the reduction of their admitted indebtedness to one or the other of the defendants in each of said cases, and which but for such claimed reductions would remain wholly due, payable, and unpaid, and would be subject as to the collection thereof to the provisions of the respective deeds of trust which had been given to secure each of said respective obligations. The trial court by its decree in said cases adjudged that, as to the legal portion of the obligation in each of said transactions,

the promissory note and deed of trust were enforceable under the terms and in the manner provided in the deed of trust executed by the plaintiffs. Such was the full force and effect of the decree of the trial court in each of said causes, and, this being so, it would seem to be apparent upon the taking of the appeal in each instance the plaintiffs would not be entitled to give a stay bond under the provisions of section 945 of the Code of Civil Procedure, since there was nothing in either or any of said decrees to which the provisions of that section of the Code could be given application. It follows that, when the trial court by its order made ex parte undertook to fix the amount of a stay bond and to approve the undertaking to stay the execution of said decrees, it was acting beyond its jurisdiction, and its orders made ex parte in that behalf were subject to be set aside upon proper application. Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617. It is no doubt true that the trial court possessed the power to incorporate in its judgment in each of said causes a provision suspending its operation and effect pending appeal, but the plaintiffs sought no such suspensory order prior to the perfection of their appeal to the District Court of Appeal and have made no application for that form of relief either to that or to this tribunal, but contented themselves with an appeal from the orders made by the trial court respectively, vacating its prior invalid order staying execution under a section of the Code which did not have application to the situation presented upon each of said appeals.

It follows that the plaintiffs' three later appeals were ineffectual, and that the orders of the trial court from which they were respectively taken must also be, and they are hereby, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

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208 Cal. 371

S. W. TOWLE LUMBER CO. v. ANDERSON et al. (S. F. 13255.)★

Supreme Court of California. Oct. 15, 1929.

Rehearing Denied Nov. 14, 1929.

1. Corporations ⚿514(1)—Denial of allegation of incorporation on information and belief held insufficient.

Where complaint alleged that plaintiff was corporation duly organized and existing under and by virtue of laws of state, denial of such allegation on information and belief *held* insufficient.

2. Abatement and revival ⚿80—Failure to object in answer to plaintiff corporation's capacity to sue waived such objection (Code Civ. Proc. §§ 433, 434).

Defense that plaintiff corporation had no capacity to sue *held* waived by failure to plead such objection, under express provisions of Code Civ. Proc. §§ 433, 434.

3. Pleading ⚿236(3)—Refusing amendment offered during trial denying allegation of plaintiff's incorporation held not abuse of court's discretion (Code Civ. Proc. § 473).

Where original answer denied incorporation of plaintiff corporation on information and belief, denying motion offered during trial to amend answer so as to deny directly such incorporation *held* not abuse of court's discretion, as granting of permission to amend under Code Civ. Proc. § 473, is within discretion of court to be exercised in furtherance of justice.

4. Corporations ⚿515—Failure to plead defense that plaintiff corporation had no capacity to make contract sued on waived such defense.

Defense that plaintiff corporation had no capacity to make contract sued on was waived by failure to plead such defense.

5. Mechanics' liens ⚿315—Materialman had privilege to apply contractor's payment to oldest obligation, although contractor received money from obligation on which there was surety (Civ. Code, § 1479).

Where defendant as surety for contractor contended that application of payments to materialman out of money which contractor received from owner for erection of building on contract for erection of which defendant was surety should have been made on obligation for which defendant was surety, and that application of such payments on prior obligation of contractor released defendant, *held* that, as payments were made without request that they be applied to any particular obligation, materialman had privilege under Civ. Code, § 1479, to apply such payment to oldest indebtedness.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the S. W. Towle Lumber Company against the Maryland Casualty Company and others. From a judgment for plaintiff, named defendant appeals. Affirmed.

John Ralph Wilson and C. S. Morbio, both of San Francisco (Everette C. McKeage, of San Francisco, of counsel), for appellant.

Maurice Carey, Walter E. Drobisch, Esmond Schapiro, and Jones & Dall, all of San Francisco, for respondent.

LANGDON, J. This appeal is by the defendant Maryland Casualty Company, surety on a contractor's bond, from a judgment rendered against it in favor of plaintiff, who had furnished materials used in the erection of a building in the city and county of San Francisco.

The complaint was in the usual form for the foreclosure of a mechanic's lien, and joined, as defendants, the owner of the building, the contractor, and the surety. The action was dismissed before trial as to the own-

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★Rehearing denied.

er, the contractor defaulted, and the case was tried against the surety alone, the appellant here. The surety denied the corporate existence of plaintiff, upon information and belief, which was the manner in which all the denials of the answer were made.

[1] The complaint having alleged that the plaintiff was at all of the times referred to therein a corporation duly organized and existing under and by virtue of the laws of the state of California, the denial of this allegation upon information and belief was insufficient to raise an issue. Art Metal Construction Co. v. A. F. Anderson Co., 182 Cal. 29, 186 P. 776.

[2, 3] During the course of the trial, the defendant made a motion asking that it be permitted to amend its answer so as to deny, directly, the allegations of the complaint with reference to incorporation. The court denied the motion, in the exercise of its discretion, stating in effect that, if any defect in the corporate organization existed, it did not go to the merits of the claim, and since it had been waived by the failure to deny the allegations of the complaint with reference thereto, the plaintiff would not be put to its proof on that issue. This ruling is one of the assignments of error upon the appeal, and we think appellant's objection thereto is without merit. Defendant waived objection to plaintiff's capacity to sue because it was not made in the answer. Sections 433 and 434, Code Civ. Proc. In the case of Kehrlein-Swinerton Construction Co. v. Rapken, 30 Cal. App. 11, 156 P. 972, 973, it was said: "* * * It has been held in a long line of well-considered cases bearing upon the rights of partnerships or of corporations to commence or maintain actions until they have complied with certain requirements of the legislature restricting such right, that the plea and proof that such partnerships and corporations may not maintain actions while under the disabilities provided in such statutes are matters of affirmative defense, and are in the nature of dilatory pleas, which are waived by the failure on the part of the defendant to make the required averments and proof; and that in the absence of such plea and proof a partnership or a corporation, although subject to such disabilities, may still maintain an action and recover and enforce a judgment therein in its own name. [Citing cases.]"

The granting of permission to amend the answer, at the time the privilege was sought, was a matter within the sound discretion of the trial court, which discretion is to be exercised "in furtherance of justice." Section 473, Code Civ. Proc. We cannot say that there was an abuse of discretion in this case.

[4] The defense that the plaintiff had no capacity to make the contract sued upon was also waived by the failure to plead it. No evidence upon this question was before the court and could not properly have been introduced, because not directed to any issue in the case. The statement of counsel for plaintiff made to the trial judge, in response to his question, was expressly stated to be no part of the record; it was so understood by the trial judge, who ordered it stricken from the record. Under the circumstances, its inclusion here in the briefs, as the basis of an argument on the lack of capacity of the corporation to make the contract, is improper.

[5] The only other question involved upon the appeal is the contention of defendant that it had a right to insist that the payments made by the contractor out of the money which he received from the owner for the erection of the building should be applied upon the obligation for which the defendant was surety and not upon a prior obligation of the contractor, and that since these payments were applied to an obligation of the contractor for which defendant was not surety, defendant is released from its obligation as surety. It appears that the contractor was indebted to the plaintiff for lumber furnished to do other work; that the contractor paid plaintiff several sums of money which he had received upon the building involved in the present controversy, without any request, however, that they be applied in any particular way. The plaintiff thereupon exercised his privilege of applying this money to the oldest indebtedness. This procedure is sanctioned by section 1479, Civil Code, in so far as the contractor is concerned, and it is assumed in the case of Ray v. Borgfeldt, 169 Cal. 253, 146 P. 679, that the surety would be amenable to the same rule as the principal debtor. In 30 Cyc. 1251, it is said: "Third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of the debts, cannot control the application of a payment by either the debtor or the creditor, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons." In Standard Oil Co. v. Day, 161 Minn. 281, 41 A. L. R. 1291, 201 N. W. 410, 412, the Supreme Court of Minnesota considers this precise legal situation and says: "The position of appellant assumes that a surety has a right that the earnings of the contractor under his contract shall be applied upon the labor and material going into the structure when no such agreement is stated in the bond or provided by statute. Our public contractor's bond contemplates that the contractor will receive and disburse his money as suits his convenience. The original contractor in this instance could have protected itself by requiring a bond from the subcontractor. It may have done so. Where the bond is furnished the surety must recognize the possible occurrence of what here did occur as one of the perils of its business. In other words one who becomes surety takes the risk that honest payment of unsecured debts may leave a deficiency which the surety must make good." To the same effect are Salt Lake City v. O'Connor, 68 Utah, 233, 249 P. 810, 49

A. L. R. 941; People v. Powers, 108 Mich. 339, 66 N. W. 215; and many others cited by respondent.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

208 Cal. 415

O'HARE et al. v. DUSENBERRY et al.

(S. F. 13250.)

Supreme Court of California. Oct. 23, 1929.

Appeal and error ⚷1011(1)—Finding on conflicting evidence that judgment debtor was owner of properties involved at time of levy of execution would not be disturbed.

Finding, in action to enjoin sale of real property under execution, that judgment debtor was owner of properties involved at time of levy of execution, would not be disturbed, where evidence was conflicting and abundantly supported finding.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action to enjoin sale of property under execution by Con O'Hare and others against Joseph Dusenberry and others, in which defendants filed a cross-complaint against S. W. George, William Jones, Sr., William Jones, Jr., and others. From a judgment in favor of defendants and cross-complainants, cross-defendants named and their attorney, George F. Sharp, appeal. Affirmed.

George F. Sharp, of Oakland, for appellants.

Crozier C. Culp and Lynn W. Culp, both of Oakland, for respondents.

LANGDON, J. Plaintiffs filed a complaint asking for an injunction against defendants to prevent them from selling at execution sale certain real property alleged to be owned by plaintiffs, under an execution issued on a judgment against William Jones, Sr., which judgment grew out of an award made by the industrial accident commission in favor of defendant Joseph Dusenberry.

Defendants obtained an order granting them leave to file a cross-complaint and to bring in additional parties, and an answer and cross-complaint was filed against the plaintiffs in the original action and against William Jones, Sr., and William Jones, Jr., which cross-complaint alleged, in effect, that a conspiracy existed to defeat the satisfaction of the judgment in favor of Dusenberry; that William Jones, Sr., was the equitable owner of the real property sought to be sold and any transfers which had been made thereof were made as a part of the conspiracy to defraud Dusenberry. After the cross-defendants had answered the cross-complaint, putting in issue its material allegations, the cross-complainants disclaimed any right or interest in the real property standing of record in the name of Con and Louisa O'Hare, and the matter went to trial upon the question of whether or not the defendants and cross-complainants were entitled to levy execution upon certain real property alleged to be owned by plaintiff and cross-defendant S. W. George. The court found the facts in favor of defendants and cross-complainants, and an appeal has been taken by cross-defendants S. W. George, William Jones, Sr., and William Jones, Jr., and their attorney, George F. Sharp.

The appeal presents a single question of fact: Whether W. Jones, Sr., was, in fact, the owner of the properties involved herein at the time of the levy of execution on said properties on November 5, 1927. Though the title must be traced through a tortuous maze of transfers, sales, redemptions, etc., which gives the effect in the record of most complicated and intricate problems, a careful and patient examination of the transcript on appeal leads to the conclusion reached by the trial court, that throughout the changes in the record title of the property, the beneficial interest, or at least a beneficial interest, remained in the cross-defendant William Jones, Sr., and was and is subject to execution upon a judgment against him. Upon this question the trial court found: That on or about the 26th day of March, 1922, defendant and cross-complainant Joseph Dusenberry was by the industrial accident commission awarded a judgment against W. Jones, cross-defendant; that said judgment, as of the 31st day of October, 1927, amounted in the aggregate, inclusive of interest thereon, to the sum of $5,780; that on the 31st day of October, 1927, the real properties now claimed by cross-defendant George were sold by the sheriff of the county of Alameda under a writ of execution issued upon the aforesaid judgment; that by said execution sale of said properties said judgment was satisfied in part, leaving a deficiency judgment in the sum of $4,659.14 still due to Joseph Dusenberry, which deficiency judgment was duly and regularly entered on the 3d day of November, 1927, and thereafter, on November 5, 1927, a writ of execution, duly issued upon said deficiency judgment, was levied upon said real properties. At all times mentioned in the complaint for injunction, W. Jones, also known as William Jones and as W. Jones, Sr., the judgment debtor, was, ever since has been, and is now the owner of the real properties involved herein, and plaintiff and cross-defendant S. W. George did not at any of the times mentioned in said complaint have, nor has he now, any right, title, or interest in said properties.

We shall not attempt to recite the evidence produced at the trial; it is voluminous, involved, direct and indirect, often conflicting, and some of the witnesses are self-contradictory. Suffice it to say that the record abundantly supports the findings made.

There are no other matters involved in the appeal which are worthy of consideration. The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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101 Cal. App. 170

BARNES v. COCKE. (Civ. 6557.)

District Court of Appeal, Second District, Division 2, California. Oct. 9, 1929.

Appeal and error 🔑766—Appellant's brief held sufficient, as against motion to dismiss appeal on ground brief failed to present any point separately (Rule 8 of District Court of Appeal).

Appellant's brief *held* sufficient, on motion to dismiss appeal from judgment on ground that brief did not comply with rule 8 of District Court of Appeal, in that it failed to present any point separately under appropriate heading showing nature of question presented, and that it contained but one heading, to wit, "Statement of Case."

Appeal from Superior Court, Los Angeles County; Arthur P. Will, Referee.

Action by Peter Barnes against R. V. Cocke, in which defendant filed a cross-complaint. On motion to dismiss plaintiff's appeal from the judgment. Motion denied.

M. W. Conkling, of San Diego, for appellant.

William A. Alderson, of Los Angeles, for respondent.

IRA F. THOMPSON, J. This is a motion to dismiss the appeal, on the ground that appellant's opening brief is not in the form required by the rules of the Supreme Court and of the District Courts of Appeal.

A motion was formerly made on the same ground, and this court, in disposing of it, ordered appellant's opening brief stricken from the files, and granted him leave to file another in lieu thereof. Barnes v. Cocke (Cal. App.) 279 P. 190. Appellant filed his opening brief pursuant thereto, which is the subject of the attack on this second motion to dismiss.

Respondent, in his notice of motion to dismiss the appeal, uses the following language: "That said second and further opening brief does not comply with Rule VIII of this court, in that it fails to present 'any point separately, under an appropriate heading, showing the nature of the question to be presented'; that the appellant's opening brief last filed contains but one and a single heading, to wit, 'Statement of Case.'" A careful examination of appellant's opening brief discloses that the opposite of this statement is true; i. e., appellant's brief contains a "statement of the case," with its appropriate heading in black type; thereafter follows appellant's argument, presenting the point that the judgment is contrary to the findings; this point is properly set apart from the other portions of the brief, and it is preceded by an appropriate heading in black type, "showing the nature of the question to be presented." It is true that but one point is raised in the brief, but this is immaterial, in view of the fact that it is properly set forth.

The other contentions made by respondent deal with the merits of the case, which fact precludes us from any discussion thereof.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 172

MESSNER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 7140.) ★

District Court of Appeal, First District, Division 1, California. Oct. 14, 1929.

Rehearing Denied Nov. 13, 1929. Hearing Denied by Supreme Court Dec. 9, 1929.

Time 🔑5—Where verdict was rendered on February 28, 1929, order granting new trial made on April 29 held within two months' statutory period (Code Civ. Proc. § 17, subd. 4, and § 660).

Where verdict was rendered on February 28, 1929, and order granting new trial was entered on April 29, 1929, such order *held* within two months' period provided by Code Civ. Proc. § 660, providing that power of court to pass on motion for new trial shall expire within two months after verdict, as word "month" as used by Code is, under the direct provisions of section 17, subd. 4, interpreted to mean calendar month, unless otherwise expressed.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Month.]

Application by Frank G. Messner for writ of mandate to be directed to the Superior Court of the State of California in and for the City and County of San Francisco, and Hon. J. J. Trabucco, Judge thereof, and another, to compel issuance of execution. Writ denied.

Hearing denied by Supreme Court; SEAWELL and CURTIS, JJ., voting for a transfer.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for petitioner.

Sloss & Ackerman, of San Francisco, for respondents.

KNIGHT, J. Petitioner obtained a judgment for damages after verdict by a jury in an action for malicious prosecution, and

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

subsequently the trial court granted a new trial. Petitioner now seeks, by this proceeding in mandamus, to compel the issuance of an execution, claiming that the order granting the new trial was not made within the period of time allowed therefor by section 660 of the Code of Civil Procedure, and for that reason is void.

The verdict was rendered on February 28, 1929, and on April 29, 1929, the court made an order to the effect that if petitioner remitted forthwith in writing $10,000 of the damages awarded by the jury the motion for a new trial would be denied; otherwise it would be granted. Petitioner refused to comply with the condition thus imposed, and consequently the order granting the new trial became effective. At the time these proceedings took place the concluding paragraph of said section 660 read as follows: "The power of the court to pass on motion for new trial shall expire within *two months* after the verdict of the jury or service on the moving party of notice of the entry of the judgment. If such motion is not determined within said *two months*, the effect shall be a denial of the motion without further order of the court." (Italics ours.) As will be observed, the verdict was rendered on the last day of February, and respondent contends therefore that since the statute allowed "two months" thereafter within which to pass on the motion for a new trial, the second succeeding month after the verdict was rendered did not expire until April 30. Petitioner contends that, regardless of the fact that said verdict was rendered on the last day of February, that day was the 28th day of the month, and that consequently the two months' limitation fixed by the statute expired on the 28th day of the second succeeding month, or on April 28th.

We are of the opinion that the case of Church Mfg. Co. v. Superior Court, 79 Cal. App. 637, 250 P. 705, is decisive of the question here presented. There notice of the judgment was served on December 31, 1925, which, as will be noted, was the last day of that month, and in construing the meaning of the words "two months" as used in that portion of section 660 above quoted the court said: "Respondent had the judicial days of the two calendar months of January and February within which to rule on the motion for a new trial. * * *" Here, as stated, the verdict was rendered on the last day of February, and the word "month" is interpreted by the Code to mean a calendar month, unless otherwise expressed (Code Civ. Proc. § 17, subd. 4); therefore, under the decision in the case cited, the respondent court was given the full period of the two succeeding calendar months of March and April, or until and including April 30th, within which to rule upon the motion for a new trial.

Aside from the controlling effect of the decision in the case cited, respondents have urged a number of other grounds upon which we think the writ may be properly denied. Some of them relate to the legal insufficiency of the petition and are raised by demurrer, and others go to support the foregoing construction placed upon the words "two months" as used in said section 660. But since there have been no convincing reasons advanced to justify a departure from the construction placed upon said Code section by the case cited, we deem it unnecessary to discuss the other grounds urged.

The demurrers to the petition are and each of them is sustained, and the writ is denied.

We concur: TYLER, P. J.; CASHIN, J.

100 Cal. App. 746

COHN v. COHN et al. (Civ. 7055.) ★

District Court of Appeal, First District, Division 2, California. Sept. 25, 1929.

As Modified on Denial of Rehearing, Oct. 3, 1929.

Hearing Denied by Supreme Court
Nov. 25, 1929.

1. **Mortgages 🔑608½—In action to declare deed a mortgage, it was not necessary to prove filing of claim with grantee's executors.**

In action to declare a deed to decedent a mortgage, it was not necessary to allege or prove filing of claim with executors of grantee.

2. **Witnesses 🔑135—In action to declare a deed a mortgage, plaintiff was competent witness (Code Civ. Proc. § 1880, subd. 3).**

In an action to declare a deed a mortgage, plaintiff was a competent witness under Code Civ. Proc. § 1880, subd. 3.

3. **Mortgages 🔑608½—Action to declare deed a mortgage held not barred by laches, where there was no proof grantee denied mortgage character of deed before his death.**

Action to declare deed a mortgage, commenced 10 years after execution of deed, *held* not barred by laches, where there was no proof grantee denied mortgage character of deed before his death shortly before action was commenced.

4. **Limitation of actions 🔑103(2)—Where there was no evidence grantee denied mortgage character of deed before his death, grantor was not required to commence action to declare deed a mortgage before grantee's death.**

Where there was no evidence of repudiation of mortgage character of deed by grantee before his death, and nothing appeared in complaint or in evidence indicating full payment of indebtedness for which conveyance was made, grantor was not required to commence action to declare deed a mortgage at any time prior to grantee's death.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

★Rehearing denied. Hearing denied by Supreme Court.

Action to declare a deed a mortgage by Irene Cohn against Levi Cohn and another, executors of the last will and testament of Charles Cohn, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

F. E. Borton and James Petrini, both of Bakersfield, and Joseph A. Brown, of San Francisco, for appellants.

Harry I. Stafford, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff executed to Charles Cohn, deceased, during his lifetime, a deed conveying to him certain real property, with improvements thereon, in the city and county of San Francisco. This action is brought against the executors of said Charles Cohn, deceased, for the purpose of having said deed, which is absolute in form, declared to be a mortgage. The complaint alleged that pursuant to agreement, the said decedent took possession of said property immediately after said conveyance, and thereafter collected all the rents therefrom, applying them to the indebtedness, and that the rents so collected, at the time suit was commenced, exceeded the amount of plaintiff's indebtedness to said decedent. The complaint prayed for an accounting and for a reconveyance of the property. At the trial the plaintiff waived her prayer for a money judgment against the estate of said decedent for any amount of rent which might have been collected in excess of her indebtedness to the decedent. An interlocutory judgment was given in favor of plaintiff for an accounting. The defendants appeal.

[1, 2] The points urged on the trial by the defendants were: First, that plaintiff could not maintain the action because she had not filed a claim with the executors of the estate before commencing the action; second, that her action was upon a claim against the estate, and that she was therefore incompetent to testify as a witness on account of the provisions of subdivision 3 of the Code of Civil Procedure, section 1880. These two points have been directly passed upon by the Supreme Court and appellate courts of this state. It has been held that in an action to recover specific real property as owner thereof, it is not necessary to allege or prove the filing of a claim with the executors. Newport v. Hatton, 195 Cal. 132, 231 P. 987; Maguire v. Cunningham, 64 Cal. App. 536, at page 548, 222 P. 838. It has likewise been held that the plaintiff is a competent witness in an action of this kind. Wadleigh v. Phelps, 149 Cal. 627, 640, 87 P. 93; Maguire v. Cunningham, supra.

[3, 4] On this appeal appellants also urge that the plaintiff's action is barred by laches. The deed was made in 1917, the decedent died in June, 1926, and this action was commenced January, 1927.

We find that the record fails to show laches, either in the pleading or in the evidence. The fact that ten years elapsed from the date of the execution of the deed until the time suit was commenced does not show that plaintiff waited ten years to assert her rights. The day after she executed the deed she had no cause of action, and under the allegations of the complaint this condition continued until such time as her indebtedness had been paid, which fact would entitle her to a reconveyance, or until such time as Charles Cohn denied and repudiated the plaintiff's claim that the property was held by him solely for security for her indebtedness, which fact would entitle her to sue for a decree fixing the rights of the parties in and to the property. Neither the complaint nor the evidence shows at what particular time, if at all, the rents collected by Charles Cohn liquidated the indebtedness. There is no competent testimony that Charles Cohn ever repudiated the arrangement testified to and alleged by plaintiff. A copy of a letter, dated October 31, 1921, was found among the papers of the decedent after his death. It purported to be a copy of a letter written by him to Mr. Stafford, who was then acting as attorney for the plaintiff. The substance of the letter was such that, had it been mailed to Mr. Stafford, it would have constituted such a repudiation as would have given plaintiff cause to commence an action at that time for an accounting and for a decree declaring the deed to be a mortgage. This element of fact, however, does not enter into the case, for the reason that there was no proof offered that the original letter, of which the said paper was a copy, had ever been communicated or transmitted to Mr. Stafford or to the plaintiff. There was considerable discussion at the trial concerning the admissibility of this paper, but so far as the record discloses, the argument related to whether or not the declarations of the decedent contained in it were hearsay and self-serving. It does not appear that the paper was considered by defendants' counsel as competent evidence of the fact of a communicated repudiation of the mortgage arrangement. It seemed to have been the position of defendants' counsel that even though not communicated to the plaintiff or her agent, it was admissible merely as a declaration of the decedent upon the issue of whether such an arrangement had originally been made by him. The paper was actually received in evidence, but it only proved that decedent had written his ideas on a piece of paper, and it did not prove that he had communicated a denial of the mortgage character of the deed in 1921.

There being no evidence of a repudiation by Charles Cohn and nothing appearing in the complaint or in the evidence indicating the full payment of the indebtedness for which the conveyance was made, the plaintiff was never required to commence this action at any time prior to the death of Charles Cohn.

For the foregoing reasons the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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101 Cal. App. 209

DUNN v. FARROW et al. (two cases). (Civ. 3906, 3907.)

District Court of Appeal, Third District, California. Oct. 15, 1929.

1. Vendor and purchaser 🔑224—Quitclaim deed given for valuable consideration was good as against unrecorded grant, bargain, and sale deed (Civ. Code, § 1214).

Under Civ. Code, § 1214, relative to recording of instruments of conveyance, a quitclaim deed given for valuable consideration was good as against an unrecorded grant, bargain, and sale deed.

2. Adverse possession 🔑114(1)—Evidence held to establish title by adverse possession.

Evidence in action to quiet title *held* sufficient to establish title by adverse possession.

Appeals from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Two separate actions by James T. Dunn against William J. Farrow and others, the actions being tried together. Judgments for plaintiff, and defendant named appeals. Affirmed.

Charles H. Adkins and J. Everett Brown, both of Los Angeles, for appellant.

Wm. T. Kendrick, Victor H. Kendrick, Wilson & Snow, and Hawkins & Hawkins, all of Los Angeles, for respondent.

PLUMMER, J. Two actions and two appeals, numbered respectively in this court 3906 and 3907, are involved herein. The two actions were tried together in the court below, are presented here upon one transcript, and will be decided as though only one action were involved. Both actions were brought to quiet title, one to quiet title to lots 5 and 6 in block E, and the other to quiet title to lot 7, in block E, townsite of Howard (formerly Rosecrans), in the county of Los Angeles. The plaintiff had judgments quieting his title as to the lots involved, one judgment quieting title as to lots 5 and 6, and the other judgment quieting title as to lot 7. The testimony set out in the transcript and the arguments of counsel relate to all of the lots alike. We shall henceforth speak of the two actions as one.

The plaintiff's judgments rest upon two grounds—record title and title by adverse possession. Prior to the 20th day of June, 1892, one Emil R. d'Artois was the record owner of the lots involved upon this appeal, and on that day executed a deed of conveyance whereby he granted, bargained, and sold to Mrs. James Carroll lots 5, 6, and 7 in block E of the townsite of Rosecrans, being the lots hereinbefore referred to. This deed was recorded on June 20, 1894. On the 13th day of August, 1892, Emil R. d'Artois, by deed of conveyance, granted and sold a large number of lots situate in the town of Rosecrans to one W. E. de Groot, not including lots 5, 6, and 7 in block E. This deed was recorded September 23, 1892. Thereafter, and on the 17th day of September, 1892, Adelaide d'Artois (a single woman), remised, released, and forever quitclaimed to William E. de Groot all the right, title, and interest of the party of the first part in and to all the lots in the townsite of Rosecrans. This deed was recorded on the 17th day of September, 1892. On the 3d day of November, 1892, W. E. de Groot remised, released, and forever quitclaimed unto James T. Dunn, the plaintiff in this action, a number of lots, included in the townsite of Rosecrans, including lots 5, 6, and 7 in block E. On the 8th day of June, 1892, Adelaide d'Artois bargained and sold all of her interest in certain property in the townsite of Rosecrans, the property being described as lots lying in south half of section 12, township 3 S., range 14 W., S. B. M., north half townsite of Rosecrans. On the 6th day of July, 1892, Emil R. d'Artois reconveyed the same property to Adelaide d'Artois. The appellant William J. Farrow claims, through the conveyance made to Mrs. James Carroll heretofore mentioned, we need not set forth this chain of title, for the reasons hereinafter stated. The right of the plaintiff to succeed in this action depends upon the effect of the conveyance of Emil R. d'Artois to Adelaide d'Artois of all his right, title, and interest in and to the townsite of Rosecrans, and the deed by Adelaide d'Artois conveying all her right, title, and interest in and to the townsite of Rosecrans to William E. de Groot, and the subsequent conveyance of William E. de Groot, to the plaintiff, of lots 5, 6, and 7 in block E of the townsite of Rosecrans. All these instruments were recorded long prior to the recording of the conveyance under which the appellant claims. The conveyance to the plaintiff was made on the 3d day of November, 1892, and was recorded on the 12th day of November, 1892. The conveyance under which the appellant claims purports to have been executed on the 20th day of June, 1892, but was not recorded until the 20th day of June, 1894. Other conveyances affecting the plaintiff's title were recorded some months prior to November 12, 1892.

[1] The appellant contends that the quitclaim deeds or instruments of conveyance under which the plaintiff claims were and are insufficient, though executed and recorded prior to the recordation of the deed under which the appellant claims. In this particu-

lar it may be stated that the record shows the plaintiff paid for the lots purchased the sum of $2,400 and there is no contention made or anything in the record indicating that the sum paid by the plaintiff was not an adequate consideration or the full value of the premises purchased. A large number of eastern cases are cited by appellant which, if the rules of law therein stated were applicable here, judgment of reversal would necessarily follow. These decisions, however, are rendered inapplicable by reason of the provisions of section 1214 of the Civil Code relative to the recording of instruments of conveyance, by which it is provided that an unrecorded instrument is not good as against a subsequent one where the subsequent purchase has been made in good faith and for a valuable consideration. The only suggestion of lack of good faith on the part of the purchase of the lots in question by the plaintiff is that he acquired title by quitclaim deeds. We may here state that the assertion by the appellant on page 63 of his brief, that "When Dunn took his deed from de Groot he took it with notice that de Groot had no title to these lots," has absolutely no support in the record and appears to have been made upon the theory that the instruments referred to conveyed no title. That a quitclaim deed such as we have referred to herein is good as against an unrecorded grant, bargain, and sale deed, has been the decided law of this state for a great many years. In the case of Graff v. Middleton, 43 Cal. 341, it is held: "A quitclaim deed, received in good faith, and for a valuable consideration, and which is recorded before a prior deed of bargain and sale, will prevail over such prior deed." In that case the grantee, just as in this case, took his deed without notice, actual or constructive, of any prior deed. In that case, just as in this case, upon taking the deed to the premises the plaintiff entered into the possession of the lots conveyed. To the same effect is the case of Frey v. Clifford, 44 Cal. 335. There, the quitclaim deed was identical in its terms with the instruments attacked in this case. The quitclaim deed in the Frey Case read as follows: "All my right, title, and interest in Sacramento City, Upper California, consisting of town lots and buildings thereupon." In the case of Flores v. De Flores, 55 Cal. App. 595, 204 P. 54, 56, we find the following: "'A deed conveying all the lands of the grantor is not void for uncertainty of description, and passes the title to all lands in which he has an interest.' * * * A deed describing property as 'all my right, title, and interest in Sacramento City, Upper California, consisting of town lots and buildings thereupon,' was held a sufficient description to convey title. * * * A similar holding was made as to a descriptive clause in a deed reading: 'All lands and real estate belonging to said party of the first part, wherever the same may be situated.'" Cases are cited supporting these statements in the opinion of Flores v. De Flores, supra, on page 598 of 55 Cal. App., 204 P. 56. In Packard v. Moss, 68 Cal. 123, 8 P. 818, it is held that a quitclaim deed gives color of title. In Allison v. Thomas, 72 Cal. 562, 14 P. 309, 1 Am. St. Rep. 89, it is held that a quitclaim deed is good as against a prior unrecorded deed, where taken in good faith and for a valuable consideration. That such a deed is sufficient to give color of title and lay the basis upon which to found title by adverse possession is supported by the rule stated in 1 California Jurisprudence, pp. 571 and 572. That such a deed is sufficient to convey title is supported by the text found in section 90, 9 California Jurisprudence, p. 204. See, also, Brusseau v. Hill, 201 Cal. 225, 256 P. 419, 55 A. L. R. 157.

[2] The record shows, and the court found, that the plaintiff went into possession of the premises involved immediately after the execution of the conveyance referred to, in 1892, and has since remained in possession of the premises, claiming to own the same; that his possession was open, notorious, and adverse to all the world; and that he paid taxes thereon for more than twenty years, to wit, from the time of taking possession thereof up to and including all taxes levied against said property prior to the year 1924. The court held that the title was taken in good faith, and for a valuable consideration; that the plaintiff had no knowledge, either actual or constructive, that any person claimed to have any right, title, or interest in the premises; that the consideration paid by the plaintiff was fair and reasonable.

Whatever the law may be in other states, under the circumstances which we have detailed and the cases cited, it is not apparent how any other judgment could be rendered in this case than was rendered quieting the plaintiff's title to the lots in controversy.

It follows that the judgments appealed from must be, and they are, affirmed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

101 Cal. App. 213

PEOPLE v. GARCIA. (Cr. 1093.)★

District Court of Appeal, Third District, California. Oct. 15, 1929.

Rehearing Denied Oct. 15, 1929.

1. Criminal law ⚿736(2)—In prosecution for manslaughter, whether accused was able to understand and speak English clearly enough to bind him by his admissions held for jury.

In prosecution for manslaughter, where accused was charged with negligently driving automobile, whether accused was able to understand and speak English clearly enough to bind him by his admissions that he was driving automobile which struck deceased *held* question for jury.

2. Criminal law ⚿1159(3)—Conflict in evidence as to whether accused was able to understand and speak English must be resolved in favor of judgment.

Where evidence as to whether accused was able to understand and speak English conflicted, such conflict must be resolved in favor of judgment.

3. Criminal law ⚿409—In prosecution for manslaughter, admission of accused that he was driving automobile which hit deceased held admissible (Pen. Code, § 192).

In prosecution for manslaughter, where killing of deceased as result of collision with automobile while it was being negligently driven was established independent of defendant's admissions that he was driving such automobile, *held*, such admission was competent to prove that defendant drove automobile, as under circumstances identity of individual was no part of corpus delicti of manslaughter, as defined by Pen. Code, § 192.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

E. Garcia was convicted of manslaughter, and he appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendant was convicted of manslaughter, for the negligent driving of an automobile which resulted in a collision and the death of John Browning.

At dusk on the evening of May 31, 1929, the defendant, who is a Filipino, was driving a large Chrysler sedan car containing four other countrymen at a high rate of speed along the Thornton road in San Joaquin county. At the same time the deceased with two other companions was driving a Pontiac coach from Stockton to Lodi along the Turner highway. Upon reaching the intersection of these highways, the speed of the Pontiac machine was diminished to a rate of about 15 miles an hour. When it reached a point past the center of these roads, it was struck midway along its side by the Chrysler machine, running, as two witnesses who observed the collision testified, at 50 miles an hour. The Pontiac car was hit with such force that, as Mr. Alderson testified, "the Pontiac flew up in the air and turned over about three times." It was hurled from the highway and landed in the ditch 25 or 30 steps from the point of collision. The course of the Chrysler was diverted by the impact, and it landed at a considerable distance from the point of collision out in a vineyard by the roadside, cutting off vines and breaking down a pole which was 6 inches in diameter. Both cars were demolished. As a result of the accident, John Browning was instantly killed, one of the occupants of the Chrysler car subsequently died, and all of the other occupants of both cars who were more or less injured were immediately taken to the Buchanan hospital. Dr. Buchanan, who rendered medical aid to the injured persons, testified that the defendant was cut on the arm, and that he had a scalp or face injury which he sewed up, and that he was bleeding profusely, but added that his condition was not bad, and that his mental capacity was not affected by the injuries; that he could answer questions. "Q. Did you hear him answer the questions? A. I did, yes." That same evening about 10 p. m. the defendant and his companions were interviewed at the hospital by Carroll, a deputy coroner, and J. E. Hopkins, police judge of Lodi, and subsequently by one Whitman, all of whom testified to conversations with the defendant, who spoke poor English, but seemed to understand and responded intelligently to the interrogations. To each of these witnesses the defendant admitted that he was driving the Chrysler car at the time of the accident.

The testimony regarding the defendant's admissions to the effect that he was driving the Chrysler car at the time of the accident was received over defendant's objections upon the ground that these statements were incompetent and inadmissible for the purpose of establishing the corpus delicti. There is no evidence other than defendant's admission, which tends to establish the identity of the driver of the Chrysler car.

[1, 2] There is no merit in the contention that the record fails to show that the defendant was able to understand and speak English. There is a conflict of evidence regarding this subject, which must be resolved in favor of the judgment. This was a question for the jury to determine, and this court is bound by its implied finding that he could understand and speak English clearly enough to bind him by his admissions.

[3] The appellant assumes that the mere admission of the defendant that he drove the car at the time of the accident was a necessary element of the corpus delicti, and that it was therefore inadmissible under the rule announced in the cases of People v. Quarez, 196 Cal. 404, 238 P. 363; People v. Bedoy, 80

★Rehearing denied.

Cal. App. 783, 252 P. 1061, 1062; People v. Frey, 165 Cal. 140, 131 P. 127; People v. La Rue, 62 Cal. App. 276, 216 P. 627; People v. Jones, 31 Cal. 566; and other similar cases. In most of these cases, however, the challenged admissions or confessions were essential to establish the corpus delicti, without which that important element of the crime would have no support in the record. In the Jones Case, supra, a conviction of the defendant was reversed for lack of competent evidence of the corpus delicti. The court said: "Without some evidence * * * tending in some degree to show that Ah Po [*was*] *robbed*, the question as to who robbed him cannot well arise. * * * Extra-judicial confessions of a prisoner, without other proof of the fact *that a felony has been committed*, are insufficient to justify a conviction." In the Bedoy Case, supra, a statement was made which is equally applicable to the Quarez Case, above cited, as the nature of the offenses was the same. The court said: "The foreign nativity, of the defendant [in a charge of the possession of a firearm by a foreign-born unnaturalized citizen], being an essential element of the corpus delicti, should be established by evidence independent of his extra-judicial statements."

In the present case, however, the killing of John Browning as the result of a collision with the Chrysler car while it was being driven at a high rate of speed in a reckless manner, without due caution or circumspection, was established independent of any admissions of the defendant, and furnished ample proof of the corpus delicti as that crime is defined in section 192 of the Penal Code. The identity of the individual who committed the crime under such circumstances is no part of the corpus delicti. In the case of People v. Domenighini, 81 Cal. App. 484, 254 P. 292, it is said the essential elements of the corpus delicti are: "(1) Certain facts forming its basis; and (2) the existence of criminal agency as the cause of them."

In the La Rue Case, above cited, in which the defendant was convicted of syndicalism, it was contended that evidence of extra-judicial admissions of membership in the objectionable organization constituted reversible error on the theory that such acknowledgments of membership were a necessary part of the corpus delicti. The court said: "It seems clear that the criminal organization constitutes the corpus delicti. Proof of membership therein serves only to connect the defendant with the crime. Proof of the killing of a human being by a criminal agency establishes the corpus delicti in homicide, without any evidence tending to show who committed the act. After such proof has been made, the fact that the defendant struck the fatal blow may be shown by his extra-judicial admissions alone. * * * Such admissions [of membership in the organization] * * * did not tend in any degree to show the criminal character of the organization."

"Likewise, in the present case, the admission on the part of the defendant that he drove the Chrysler machine at the time of the accident was not an admission that he was driving it in an unlawful or reckless manner without due caution or circumspection. This admission was therefore no part of the corpus delicti, and the objection to this evidence was properly overruled.

In the case of United States v. Jones (C. C.) 10 F. 469, 470, an objection to the evidence of an admission by the defendant that he was the sender of a letter through the mail in violation of law, on the ground that the identity of the sender was a part of the corpus delicti, was similarly disposed of as follows: "We are, therefore, of the opinion that the offense charged was proved by the evidence. Another point taken is that there was no evidence of the corpus delicti except the defendant's admission. But the gist of the offense consists in the abuse of the mail. The corpus delicti was the mailing of the letter in the execution of the unlawful scheme. There was direct evidence of the mailing of the letter by some one, and the letter itself showed its unlawful character. This much being shown, it was certainly competent to prove that the defendant was the sender of the letter by his admission to that effect."

So in the present case there was ample direct evidence of the unlawful speed and the reckless manner in which some one operated the Chrysler machine resulting in the death of a human being. It was certainly competent to prove by his own admission that the accused was the individual who drove the machine.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J

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101 Cal. App. 204

WESTBERG v. WHITTIKEN et al.

(Civ. 3891.)

District Court of Appeal, Third District, California. Oct. 14, 1929.

1. Pleading 🔑129(2)—Where allegation of agency in petition was not denied, such allegation stood admitted.

In materialman's action against owner of building where allegation that purchaser was agent of owner was not denied, such allegation stood admitted, and it was unnecessary to introduce proof thereon.

2. Payment 🔑18—Materialman's acceptance of trade acceptances issued by agent of builder did not constitute payment of account for building materials.

Where materialman accepted trade acceptances of agent of builder for price of materials furnished and indorsed account rendered, *held*, such acceptance did not constitute payment for account of building materials, where there was no agreement that they should be so accepted.

3. Principal and agent ⚷133—Where builder acted as agent of owner, owner was liable for all materials used in construction of building, although materialman had entered account against agent.

Where builder acted as agent of owner of property on which building was being erected, owner was personally liable for all materials furnished by materialman and used in construction of such building, and also for cost and expense of labor performed in and on such building, although materialman had entered on his books an account against agent.

4. Principal and agent ⚷160½—Indorsement of word "paid" on agent's account, and payment by principal to agent, did not estop materialman from collecting from principal (Civ. Code, § 3543).

Indorsement by materialman of word "paid" on agent's account did not estop materialman from collecting from principal price of materials furnished to agent and used in building principal's building, although principal had paid agent, as principal cannot plead estoppel based on failure of agent to make proper application of money intrusted to his care; Civ. Code, § 3543, providing that where one of two innocent persons must suffer he by whose negligence it happened must suffer, being inapplicable.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Ed Westberg against R. E. Whittiken and others, doing business as the De Luxe Building Company. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Glen Behymer, of Los Angeles, for appellants.

John F. Poole, of Los Angeles, for respondent.

PLUMMER, J. The plaintiff had judgment against R. E. Whittiken and Mayme B. Whittiken, his wife, for the sum of $985.75, and also for the foreclosure of a mechanic's lien on certain property described in the complaint. From this judgment said defendants appeal.

The action was originally begun for the collection of $1,750 and the enforcement of a lien to secure the payment thereof, on account of work and labor performed by the plaintiff in furnishing plastering material and plastering a certain residence constructed by R. E. Whittiken and Mayme B. Whittiken, his wife. After the beginning of the action, the sum of $729.25 was paid on said account. The record shows that the defendants Whittiken constructed a certain residence by days' labor; that no contract for the erection of the building was ever entered into by the defendants with any one. The record further shows that at about the time of the beginning of the erection of the building referred to, the defendants Whittiken employed A. B. Maescher and V. E. Maescher, doing business as De Luxe Building Company, as their agents, to take charge of the construction, and manage the construction of the building referred to. The complaint alleges that after entering upon the construction of the building, A. B. Maescher and V. E. Maescher, doing business as De Luxe Building Company, as agents of the owner of the described premises, entered into an agreement with plaintiff whereby the plaintiff was to furnish certain materials and labor necessary to do the interior and exterior plastering required for the construction of the building, etc. This allegation of agency is not denied in the answer, and therefore stands admitted. The evidence, however, is in accordance with the allegations of the complaint. The court found that the De Luxe Building Company was acting as agent of the owners of the property, and was acting as the superintendent of the construction of the building; that the building was being constructed by days' labor, and no contract was entered into between the owner and the De Luxe Building Company for the construction of the building. In other words, there was no contractor, but the De Luxe Building Company was acting as the agent and superintendent of the owners of the property. Upon the completion of the work by the plaintiff, the plaintiff made out and delivered to the De Luxe Building Company a statement thereof, showing the amount due in the sum of $1,750. The De Luxe Building Company thereupon executed and delivered to the plaintiff certain trade acceptances for the amount thereof, and at the same time the plaintiff indorsed on the account the word "paid." The account is in the following words:

"Los Angeles, Cal. Aug. 4, 1923.
"Sold to DeLuxe Bldg. Co.,
"Union League Bldg.
"Job Address: Whittiken, 619 Friend, Whittier.
"To plastering as per contract, $1715.00
"[Rubber stamp]: Entered A.B.M.
"Paid Aug. 8/23 Ed Westberg.
"[Rubber Stamp]: Checked.O.K.
"Acct: Whittiken."

The trade acceptances not being honored, the plaintiff filed a lien as provided by the Codes, and brought this action for foreclosure. The De Luxe Building Company went into insolvency, and only the sum of $729.25 was ever paid on account of the trade acceptances.

[1] The first point urged by the appellants is that "the evidence is insufficient to sustain the findings contained in the third and fourth lines of the third paragraph of the complaint, to the effect that the De Luxe Building Company, as the agent of the owner, entered into

the agreement with the plaintiff. The evidence clearly showed that the contract was made between the plaintiff and the De Luxe Building Company, the credit being extended by the plaintiff to the De Luxe Building Company and not to the defendant owner." This statement entirely ignores the fact that the complaint alleges the agency, and that the agency was not denied by the answer of the defendants. All that the answer does deny is that the De Luxe Building Company entered into an agreement with the plaintiff for the furnishing of the materials and performance of the work as alleged by the plaintiff. There being no denial of the agency, it was unnecessary to introduce any proof, though there is some testimony in the record supporting the allegation of agency and the fact that the De Luxe Building Company was simply acting as agent. Furthermore, the record shows that a stipulation was entered into during the course of the trial showing that the building was constructed by days' labor; that the owner, about the 22d day of May, 1923, began, by day labor, the erection and construction of the building involved in this action.

[2, 3] The next contention of the appellants is to the effect that the taking of the trade acceptances issued by the De Luxe Building Company constituted a payment. All there is in the record upon which this argument can be based is the simple indorsement of the word "paid" appearing upon the account rendered for the materials furnished and labor performed. There does not appear to have been any agreement or understanding that the trade acceptances in and of themselves should constitute payment. Under such circumstances the general rule relating to payments as set forth in 48 C. J. p. 610 prevails. The rule is there stated as follows: "The rule obtaining in most jurisdictions is that, in the absence of agreement or consent to receive it, as such, a draft or bill of exchange, although accepted by the drawee, or a promissory note of the debtor, or his acceptance of a draft or bill of exchange drawn upon him does not, in itself, constitute payment or amount to a discharge of the debt, although it may postpone the right of action thereon until the maturity of the paper, but if such paper, delivered to a creditor, is thereafter honored or paid, the debt is discharged pro tanto as of the date of such collection or payment, and accordingly a bill or note is often designated prima facie or conditional payment." The authorities supporting this statement of the law cited in Corpus Juris, supra, are simply legion. The rule is stated in different language, but to the same effect, in 20 California Jurisprudence, p. 920: "The giving of a note or check of a debtor or a third party for the amount of a debt does not constitute payment unless there is an agreement between the parties that it shall be so accepted. The rule is based upon the obvious ground that nothing is to be considered as payment in fact but that which is in truth such unless something else is expressly agreed to be received in its place." It is further there stated that if the note or check is not paid, action may be had upon the original debt. And as further stated in the same volume, pages 925 and 926, the marking of the account as paid does not prevent the court inquiring into and ascertaining the true facts, and if the checks or notes or bills of exchange are dishonored, the indorsement of the word "paid" on the original statement of account is immaterial. The following cases show that the rule announced in Corpus Juris and California Jurisprudence is followed in the state of California: Ellison v. Henion, 183 Cal. 171, 190 P. 793, 11 A. L. R. 444; South S. F. Packing, etc., Co. v. Jacobsen, 183 Cal. 131, 190 P. 628. Other cases might be cited, but the two California cases just referred to take up and consider very fully the law as to what does and does not constitute payment. The fact that the De Luxe Building Company was acting as the agent or superintendent of the owner of the property rendered the owner liable personally for all the materials furnished by the plaintiff and used in the construction of the building belonging to the owner, and also the costs and expenses of the labor performed in and upon the building. The fact that the plaintiff entered upon his books an account against the De Luxe Building Company on the Whittiken job does not relieve the owner from liability to pay for the materials furnished and work and labor performed by the plaintiff.

[4] The appellants further rely upon the provisions of section 3543 of the Civil Code, which provides that where one of two innocent persons must suffer by the act of the third, he by whose negligence it happened must be the sufferer. The claim here is made that the owners gave the De Luxe Building Company sufficient money to pay the plaintiff's account in full. Had the De Luxe Building Company been an independent contractor instead of the agent of the owner, it might be urged that the indorsing of the account "paid" by the plaintiff misled the owner and would constitute an estoppel. We do not very well see how a principal can plead any estoppel based upon the failure of his agent to make proper application of the money entrusted to his care.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; ROLFE, L.; THOMPSON, J.

101 Cal. App. 106

McLACHLAN v. McLACHLAN. (Civ. 6223.)

District Court of Appeal, Second District, Division 1, California. Oct. 4, 1929.

1. Divorce 🔑150(2)—In divorce actions, question of desertion is ultimate fact to be found by court on establishment of probative facts.

In divorce actions, question of desertion is an ultimate fact to be found by the court on the establishment of several probative facts.

2. Jury 🔑18—Refusing defendant in divorce action jury trial after jury impaneled had disagreed held not error.

Refusing defendant wife, in action for divorce, right of jury trial, when demand was made after jury impaneled disagreed and was discharged, *held* not error, since any verdict rendered would not have been binding on judge, if he saw fit to disregard it; verdict of jury in such cases being only advisory.

3. Divorce 🔑133(3)—Evidence held to support findings that wife sued for divorce willfully deserted husband for year before action, that wife's return was not in good faith, and that wife refused to live and cohabit with husband without just cause.

Evidence, in action by husband against wife for divorce, *held* sufficient to support findings that wife deserted husband for period of year prior to filing of action, that wife willfully deserted husband, that wife's return was not in good faith, and that wife refused to live and cohabit with husband without just cause.

4. Divorce 🔑184(10)—Findings of court on conflicting evidence in divorce action will not be disturbed on appeal.

Where evidence was conflicting in action by husband for divorce, findings made by trial court who had parties before him and had opportunity to question them will not be disturbed on appeal.

Appeal from Superior Court, Imperial County; William Hazlett, Judge.

Action for divorce by Argyle McLachlan against Pauline Viola McLachlan. From an interlocutory judgment of divorce for plaintiff and from an order denying defendant's motion for a new trial, she appeals. Judgment affirmed, and the appeal from the order denying the motion for new trial dismissed.

Superseding former opinion, 278 P. 873.

M. C. Atchison, of Calexico, for appellant.
Ault & MacKinnon, of Calexico, for respondent.

YORK, J. This appeal is from an interlocutory decree of divorce granted to plaintiff, and from an order denying the defendant's motion for a new trial based upon the ground that the decision is contrary to the evidence.

There was evidence introduced proving or tending to prove the following facts: The plaintiff and defendant intermarried on the 20th day of December, 1910, at Victoria, Tex. In the spring of 1912 they came to El Centro, which is situated in the Imperial Valley in California, where they lived for about two months, after which defendant returned to Victoria. However, she made another trip to El Centro the following winter, and in the spring of 1913 again returned to Victoria because of her ill health, and has since then lived in Victoria with her mother, separate and apart from her husband, except for visits made each year by the plaintiff to Victoria. His last visit was made at Christmas time in 1924. Meantime the plaintiff was employed at El Centro earning a salary of $533 per month, and in addition operated a 160-acre cotton ranch, which he owned. At various times during the years the plaintiff requested the defendant to come to California and make her home with him at El Centro, but she refused on the ground that her health would not permit her to live in that climate. The plaintiff in 1920 offered to procure a home for the defendant and their son (who was born in 1915) in San Diego, Cal., in order that he might be near enough to see them, but defendant refused the offer, giving as her reason therefor the fact that plaintiff could not afford it. Just before leaving California for his annual visit to defendant in December, 1924, plaintiff arranged to rent a comfortable house in Calexico, with the view of making it a home for himself and family, but, when he broached the subject to defendant, she informed him that she would never come to Imperial Valley, whereupon he investigated business opportunities at Victoria, but was unable to find anything attractive or which gave indication that he could make a living there.

Plaintiff left Victoria early in January, 1925, and early in the fall of that year he wrote defendant that he had decided to plan the future for himself alone. After a delay of some months, the defendant, in company with their son, made a trip to California, but remained only five days, and in February, 1926, plaintiff filed action for divorce on the ground of desertion. The cause came on for trial before a jury, which failed to agree, whereupon the court discharged them and determined the issues without their aid, granting to the plaintiff an interlocutory decree of divorce from defendant on the ground of willful desertion.

The appellant's first contention is that the court should have granted her motion for a new trial, for the reason that the judgment of the court is contrary to the evidence.

Appellant next contends that the court should have granted her motion for a nonsuit, for the reason that plaintiff failed to establish that defendant deserted him, and for the further reason that there was no testimony to corroborate the plaintiff as to the desertion.

[1] In divorce actions the question of desertion is an ultimate fact to be found by the court on the establishment of several probative facts. Section 130, Civil Code, only requires that there shall be some corroborating evidence in an action for divorce, the purpose being to prevent collusion, and upon an examination of the record we are convinced that plaintiff was sufficiently corroborated by the testimony of his two sisters and by the letters introduced into evidence by the defendant. Appellant further contends that the court erred in refusing the defendant the right of a jury trial, when demand was made after the jury impaneled had disagreed and had been discharged.

[2] In the instant case the jury disagreed after six hours' deliberation, and it was proper for the court to discharge them and decide the case himself, especially when any verdict rendered would not have been binding upon him, if he saw fit to disregard it. 9 California Jurisprudence, p. 718, § 81: "As the Constitution secures the right only in those cases in which it existed at common law, and as the right of trial by jury did not exist in divorce cases at common law, it follows that a trial by jury in a divorce action cannot be demanded as a matter of right under the Constitution. * * * However, it is optional with the judge to submit special issues to the jury. * * * The verdict in such cases is only advisory. * * *"

"In actions of this character, a party is not entitled to a jury as a matter of right, and, if a jury be called in, it simply acts in an advisory capacity, the court being compelled to make findings of its own, and, in so doing, it is free to adopt or reject the findings of the jury as it deems proper." De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059, 1061.

The appellant maintains that the several findings of the court, to wit: (1) That defendant deserted plaintiff for a period of one year prior to filing of action for divorce; (2) that defendant wilfully deserted plaintiff; (3) that defendant's return was not in good faith; (4) that defendant refused to come to Imperial Valley and live and cohabit with plaintiff, without just cause—are contrary to the evidence, and that there is no evidence that the defendant had any intent to desert plaintiff or that plaintiff had chosen a reasonable place of abode for defendant.

The record shows that the parties had lived apart for the entire period from their marriage, except for a few months, the husband visiting the wife once each year for a period of several weeks, and that the wife, although repeatedly requested to do so by the husband, refused to live with him in Imperial Valley, assigning her ill health as her reason for such refusal. The court's finding in regard to her health is as follows: "But the Court finds that it is not true that at Plaintiff's request, Defendant, and/or their son, remained in Victoria, Texas, on account of the ill health of the Defendant, and/or by reason of their son being frail, and/or because both, or either of them, could have the advantage of the services of their family physician, or for any other reason whatsoever. That it is not true that Plaintiff discouraged Defendant each, or any, time Defendant desired to return to California for the purpose of again establishing a home with the Plaintiff, or for any other reason, but the Court finds on the contrary, that Defendant never did desire, or offer to, return to California, at any time, but did on many occasions fail, and refuse, to return to California, or to go any other place than to Victoria, Texas, to establish a home with Plaintiff, although Plaintiff did, on many occasions, ask that she do so."

When the husband finally told her he intended to go his way alone, she came to California, but remained only a few days. The court's finding as to this trip is as follows: "The Court finds that it is true that on the 23rd day of December, 1925, Defendant and their son came to Calexico, and did offer to again live there with the Plaintiff, but the Court finds that such visit and offer was not made in good faith, and that Plaintiff believed that such visit and offer was not made in good faith, and that in fact such visit and offer were made only for the purpose of preventing Plaintiff from filing an action for divorce."

[3, 4] We are of the opinion that there was sufficient evidence to support each and every finding made. As is usual in cases of this character, the evidence is conflicting, and the findings made by the trial court, who had the parties before him and the opportunity to question them, will not be disturbed upon appeal.

The interlocutory judgment of divorce is affirmed. The appeal from the order denying motion for a new trial is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

101 Cal. App. 186

EASOM v. GENERAL MORTGAGE CO.
(Civ. 6944.)

District Court of Appeal, First District, Division 2, California. Oct. 14, 1929.

1. Continuance 🔑10—In action for balance due on purchase price of notes, continuance on ground defendant was foreclosing trust deed securing note held properly denied.

In action to recover balance due upon purchase price of promissory notes, motion for continuance on ground that defendant was foreclosing deed of trust securing one of notes purchased *held* properly denied, since defendant's action in that respect had no bearing upon issues involved.

2. Pleading 🔑129(2)—Where complaint alleged that title to promissory notes sold was cleared, performance of that condition was admitted by failure to deny.

In action to recover purchase price of promissory notes sold, where complaint alleged that title to promissory notes was cleared as required by contract, performance of that condition was admitted by failure to deny.

3. Pleading 🔑35—Where complaint in action for price of notes sold stated complete cause of action otherwise, paragraph that plaintiff had performed all conditions could be considered as surplusage.

In action to recover purchase price of notes sold, where complaint stated complete cause of action without paragraph alleging that plaintiff had performed all of conditions in contract, such paragraph could be considered as surplusage or as immaterial allegation which it was not necessary to deny.

4. Pleading 🔑126—Where complaint alleged plaintiff had performed all conditions of contract, denial, in form a negative pregnant, admitted substantial compliance.

Where complaint alleged that plaintiff had performed all of conditions in contract, denial reading, "Denies allegations in paragraph IV of said complaint, and in this respect denies that said H. or plaintiff had performed all of the conditions in said contract to be performed by the said H.," being in form a negative pregnant, was insufficient, and was admission that substantially all of conditions had been complied with.

5. Trial 🔑163—Motion for nonsuit on ground plaintiff failed to prove performance held properly refused, where counsel did not direct court's attention to particulars in which proof failed.

Motion for nonsuit *held* properly denied, where only ground assigned was failure to prove performance on part of plaintiff, and counsel failed to direct court's attention to any particulars in which proof failed.

6. Appeal and error 🔑241—Appellate court will not review trial court's ruling denying motion for nonsuit on ground not specifically stated in motion.

An appellate court will not review ruling of trial court denying motion for nonsuit upon any ground not precisely and specifically stated in motion.

7. Contracts 🔑221(3)—Under contract requiring payment on completion of contractual outlets and not later than 60 days from first payment, completion of contractual outlets was not condition precedent to second payment.

Under contract requiring payment of $10,400 upon completion of contractual outlets and not later than 60 days from date of first payment, completion of contractual outlets was not condition precedent to payment of $10,400.

8. Trial 🔑419—Order denying motion for nonsuit will not be disturbed, where evidence subsequently admitted fully supports judgment.

Order denying motion for nonsuit will not be disturbed on appeal, where evidence subsequently admitted fully supports judgment.

9. Appeal and error 🔑1011(1)—Truth of conflicting testimony was for trial court.

Where testimony with reference to offsets was conflicting, trial court was at liberty to accept as true testimony of plaintiff's witnesses in reference thereto.

10. Bills and notes 🔑539—Findings that plaintiff's assignor represented to purchaser of notes that $4,000 interest was paid in advance and that $2,000 fire insurance premiums were paid and that representations were not false, and finding that interest payable on certain date was not paid, held not contradictory.

In action to recover purchase price of promissory notes sold, finding that plaintiff's assignor had represented to purchaser that $4,000 had been paid as interest in advance and that $2,000 had been paid as premiums on fire insurance policies and that such representations were not false, and finding that interest on deeds of trust was not paid when due on July 2, 1926, *held* not contradictory.

11. Bills and notes 🔑516—In action for purchase price of notes, defense of misrepresentation was affirmative defense to be proven by defendant by preponderance of evidence.

In action to recover purchase price of notes sold, defense of fraud and misrepresentation on part of plaintiff's assignor was an affirmative defense to be proven by defendant by preponderance of evidence.

12. Appeal and error 🔑1033(7)—Defendant could not complain that finding in its favor was unsupported by evidence.

Defendant could not complain on appeal that finding in its favor was not supported by evidence.

13. New trial 🔑99—Evidence justifying new trial must be newly discovered, must not be cumulative merely, must be such that different result is probable, and must have been undiscoverable with reasonable diligence.

To entitle one to new trial on ground of newly discovered evidence, it must appear, first, that evidence, and not merely its materiality, be newly discovered; second, that evidence be not cumulative merely; third, that it be such as to render different result probable on retrial of cause; fourth, that party could not with reasonable diligence have discovered and produced it at trial; and, fifth, that these facts be shown by evidence of which case admits.

14. Appeal and error ⟹981—Court's action denying new trial for newly discovered evidence will not be disturbed except for abuse of discretion.

Action of trial court in denying motion for new trial on ground of newly discovered evidence will not be disturbed except for an abuse of discretion; presumption being that discretion was properly exercised.

15. New trial ⟹108(1)—New trial held properly refused where newly discovered evidence would not have rendered different result probable.

New trial on ground of newly discovered evidence *held* properly denied where affidavit was based largely on hearsay, and evidence was not such as to render different result probable on retrial.

16. New trial ⟹1—New trial for purpose of setting up new offset arising out of deficiency judgment recovered against plaintiff's assignor subsequent to trial held properly refused.

New trial for purpose of setting up offset arising out of deficiency judgment recovered subsequent to trial against plaintiff's assignor on foreclosure of deed of trust securing one of notes involved in action *held* properly refused.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Harry Easom against the General Mortgage Company, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals. Affirmed.

Alden Ames and Rudolph J. Scholz, both of San Francisco (Donald Scott, of San Francisco, of counsel), for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

LUCAS, Justice pro tem. This action was brought by plaintiff (respondent herein), as the assignee of one James H. Hardy, to secure a balance due upon the purchase price of certain promissory notes which the General Mortgage Company, defendant below and appellant herein, had purchased under contract from the said Hardy. The answer of the mortgage company purported to deny the performance of conditions precedent, and, as a separate defense, set up certain small counterclaims. There was also included in the answer a cross-complaint alleging fraud and praying for a rescission of the original contract. Issues were framed thereon, and the case proceeded to trial. Thereupon plaintiff and respondent rested on the pleadings, and defendant and appellant moved for a nonsuit. The motion was denied. Appellant then introduced evidence in support of the allegations contained in its answer and cross-complaint, and, after the case was submitted to the court, judgment was given plaintiff and respondent for the full amount sued for.

[1] After a motion for a new trial had been made and denied, the mortgage company appealed, assigning as error the court's action in denying the motions for a nonsuit and for a new trial, in disallowing a certain offset or counterclaim, and in making allegedly contrary and inconsistent findings and findings not supported by the evidence. The court is also said to have committed error in denying a motion for a continuance of the trial. This latter motion was made on the ground that the mortgage company was foreclosing a deed of trust securing one of the notes purchased under the contract involved in the case at bar. As appellant's action in that respect could have no possible bearing upon the issues involved herein, the motion was properly denied.

To pass upon the propriety of the trial court's action in denying the motion for a nonsuit, it will be necessary to briefly examine the pleadings. The complaint, after alleging defendant's corporate existence, alleges that on August 5, 1926, James H. Hardy entered into a written contract with said defendant (appellant herein) whereby the said Hardy conveyed to it a promissory note of Anna M. and Charles A. Clark in the principal sum of $18,457.71, a promissory note of James Michael and Margaret Sinnott in the principal sum of $1,800, and a promissory note of Robert Burns and Estelle Boardman Jensen in the principal sum of $1,500; each of said promissory notes being secured by a separate second deed of trust. In consideration therefor, the mortgage company agreed to pay the said Hardy $10,500 "when the title to said promissory notes had been cleared in accordance with the recommendations of the preliminary title search submitted by the East Bay Title Company, which said search was to show clear title to date of assignment to General Mortgage Company," and $10,400 "not later than sixty (60) days from the date of said first payment." It is then alleged that on August 5, 1926, the said Hardy transferred his interest in said contract to plaintiff, that the General Mortgage Company was notified of said assignment, and that on the same date the title to said promissory notes was cleared in accordance with the recommendations of the preliminary title search referred to in said contract; the search showing clear title to the date of assignment. It is further alleged that of the payments due under said contract only the sum of $14,000 had been paid, and that there was still due, owing, and unpaid from the mortgage company to plaintiff (respondent herein) the sum of $6,900, together with interest. None of these allegations was denied by the answer. In addition to the foregoing, however, the complaint contained the following allegation:

"IV. That said Hardy and said plaintiff had performed all of the conditions in said contract on the part of said Hardy contained."

The answer attempted to deny this paragraph in the following words: "Denies the allegations in paragraph IV of said complaint, and in this respect denies that said Hardy or plaintiff had performed all of the conditions in said contract to be performed by the said Hardy."

[2] This denial, according to appellant, placed in issue the allegations of performance of all conditions to be performed by Hardy, and therefore made it incumbent upon respondent to prove performance. We do not agree with appellant. The only condition mentioned in the complaint as a condition precedent to payment was that concerning the clearing of title to the promissory notes, and the performance of that condition was admitted by failure to deny.

[3] There are several reasons why appellant cannot be heard to complain of the court's ruling on the motion for a nonsuit. In the first place, the complaint stated a complete cause of action without paragraph IV, and, the contract being pleaded in terms and not being set forth in full, paragraph IV may be considered as surplusage, or at least an immaterial allegation which it is not necessary to deny. 21 Cal. Jur. 143.

[4] Secondly, if the allegations contained in paragraph IV may be considered material, the denial thereof being in form a negative pregnant was insufficient. It had the effect of admitting that all the conditions precedent except the least material thereof had been performed. In law this has been held to amount to an admission that substantially all of the terms and conditions of the contract had been complied with. Jones & Laughlin Steel Co. v. Abner Doble Co., 162 Cal. 497, 500, 123 P. 290.

[5, 6] Again, the motion did not sufficiently state the grounds relied upon. The only ground assigned was failure to prove performance on the part of respondent. Counsel failed, however, to direct the court's attention to any particulars in which the proof failed. It has been many times held that an appellate court will not review the ruling of a trial court denying a motion for a nonsuit upon any ground not precisely and specifically stated in the motion; the reason being that the court and opposing counsel are entitled to have their attention directed particularly to the supposed defects in plaintiff's case. Millar v. Millar, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184. It develops from a reading of the transcript of the evidence taken at the trial that moving counsel was in no position to direct the court's attention to particulars in which the proof failed, for the simple reason that there were no other conditions to be performed by respondent or his predecessor.

[7] It is true that, in the written contract introduced in evidence as Plaintiff's Exhibit A, where reference is made to the payment of $10,400 the following language appears: "10,400 upon completion of contractual outlets and not later than sixty (60) days from the date of the first payment made above." Neither from the contract nor from the evidence can it be ascertained what was meant by the words "contractual outlets," nor whose duty it was to complete them; but, since in any event the $10,400 payment was to have been made not later than 60 days from the date of the first payment (i. e., from August 5, 1926), the completion of contractual outlets—whatever they may be—was certainly not a condition precedent to payment.

[8] Finally, even if it could be said that the court erred in denying the motion for a nonsuit, such error could not be taken advantage of herein because the evidence subsequently admitted fully supports the judgment. In such a case the order denying the motion for a nonsuit will not be disturbed. Lowe v. San Francisco, etc., Ry. Co., 154 Cal. 573, 98 P. 678; Mayr v. Goldschmidt, 63 Cal. App. 381, 218 P. 621.

[9] The point attempted to be made concerning the alleged error of the court in disallowing certain offsets is entirely without merit, as the testimony in reference to offsets was conflicting, and the court was at liberty to accept as true the testimony of respondent's witnesses in reference thereto.

[10] The claim of conflicting and insufficient findings we find also to be without merit. As a so-called third and separate defense and by way of cross-complaint appellant alleged that respondent's predecessor, Hardy, represented at the time of transfer of one of the notes and second deeds of trust that there had been paid on a certain first deed of trust the sum of $4,000 as interest in advance, and that there had also been paid the sum of $2,000 as premiums on fire insurance policies covering the incumbered property. It is then alleged that these representations were false; the facts being that the interest on said first deed of trust payable July 2, 1926, had not been paid, that default had occurred prior to August 5, 1926, in the payments due under said first deed of trust, and that no interest thereon whatsoever had been paid in advance, and that said property on August 5, 1926, was not covered by fire insurance on which payments had been made in the sum of $2,000, or any other sum. The court found in reference to these allegations:

"8. That it is true that said James H. Hardy represented to the cross-complainant and defendant that there had been paid on said first deed of trust * * * the sum of Four

Thousand Dollars ($4,000), as interest in advance, and also that there had been paid the sum of Two Thousand Dollars ($2,000) as premiums on fire insurance policies covering the said property, but it is not true that said representations, or either of them, were false or fraudulent; that it is true that the interest on said first deed of trust which was payable on the 2nd day of July, A. D. 1926, had not been paid, and that default had occurred prior to August 5, 1926, in the payments due under said first deed of trust; but it is not true that no interest thereon whatsoever had been paid in advance; but, on the contrary, it was true that the said sum of Four Thousand Dollars had been paid as interest thereon in advance; that it is true that said property on said 5th day of August, 1926, was covered by fire insurance on which premiums had been paid in the sum of Two Thousand Dollars ($2,000)."

These findings are not contradictory. It is found to be true that the sum of $4,000 had been paid in advance as interest upon the first deed of trust. It is also found to be true that default had occurred in the payment of interest due July 2, 1926; but there is no finding, nor in the evidence is there any justification for a finding, or even an assumption, that the interest found to be paid in advance was interest falling due July 2, 1926.

[11] Appellant further attacks the above findings on the ground that that portion thereof finding it untrue that the representation in regard to the interest payment of $4,000 was neither false nor fraudulent is not supported by the evidence. The attack is unmerited. The defense of fraud and misrepresentation was an affirmative defense to be proven by appellant by a preponderance of the evidence. Appellant failed in this proof, and therefore the court properly found against the averments of fraud and misrepresentation.

[12] As a matter of fact, the only erroneous finding of the court shown by the record is the finding that Hardy represented that a $4,000 advance interest payment had been made. In regard thereto, appellant's employee, to whom the representation was said to have been made, testified positively:

"Q. You handled that transaction, did you? A. Yes, sir.

"Q. Now, at the time that this agreement was entered into did Mr. Hardy mention to you anything about the payment of interest on the first deed of trust on property on Broadway Street? A. I don't remember any statement of that kind.

"Q. Did he at any time ever tell you that the interest on that property was in arrears or had been paid? A. No."

While this finding was clearly unsupported by the evidence, being in its favor, appellant cannot complain. On the other hand, since in point of fact no such representation was made, it could neither be fraudulent nor relied upon as a matter of inducement.

The motion for a new trial which appellant insists should have been granted was made upon several statutory grounds, but the only one relied upon by appellant was that of newly discovered evidence.

[13, 14] "In People v. Sutton, 73 Cal. 243, 15 P. 86, 88, it is said: 'To entitle a party to a new trial, on the ground of newly discovered evidence, it must appear—"(1) that the evidence, and not merely its materiality, be newly discovered; (2) that the evidence be not cumulative merely; (3) that it be such as to render a different result probable on a retrial of the cause; (4) that the party could not with reasonable diligence have discovered and produced it at the trial; and (5) that these facts be shown by the best evidence of which the case admits." 1 Hayne on New Trial and Appeal, § 88. "Applications on this ground are addressed to the discretion of the court below, and the action of the court below will not be disturbed except for an abuse of discretion, the presumption being that the discretion was properly exercised." (1 Hayne on New Trial and Appeal, § 87.)'" People v. Urquidas, 96 Cal. 239, 241, 31 P. 52.

[15, 16] In this case the affidavit in support of appellant's motion was based largely on hearsay. Many of the alleged facts contained therein were immaterial and entirely insufficient, either of themselves or in connection with the other testimony in the case, to establish any defense to the action and were not such as to render a different result probable on a retrial of the cause. The affidavit also contained averments attempting to set up a new offset arising out of a deficiency judgment recovered subsequent to the trial against respondent's assignor on foreclosure of a deed of trust securing one of the notes involved in this action. Permission was asked to present such evidence at a new trial and to file an amended answer and cross-complaint setting up such offset. There would be no end to litigation if such procedure were generally allowed. We are unable to see, therefore, any abuse of discretion on the part of the trial court in denying appellant's motion.

The judgment appealed from is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

101 Cal. App. 373

WITHERS et al. v. SOUTHERN PAC. CO. (Civ. 6243.)

District Court of Appeal, Second District, Division 2, California. Oct. 21, 1929.

Appeal and error ⇨635(1)—Where there is failure to print parts of transcript justifying reversal of judgment, judgment will be affirmed (District Court of Appeal and Supreme Court Rule VIII).

It is incumbent on appellants to print such parts of transcript as will justify reversal of judgment, and, where there is failure to do so, judgment will be affirmed, especially where nonobservance of requirements of Rule VIII of rules governing practice in District Court of Appeal and Supreme Court was brought to appellants' attention by respondent's brief.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by F. M. Withers and others, copartners as Withers Bros. & Co., against the Southern Pacific Company. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

I. Henry Harris, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

IRA F. THOMPSON, J. The plaintiffs have appealed from a judgment of nonsuit rendered against them in the court below. Their opening brief is all contained under one heading, to wit, "Statement." Some of the pleadings are set forth, and then appellants tell us in the most general way about some testimony which was excluded, whether erroneously we cannot judge because sufficient to enable us to say is not printed either in the brief or an appendix thereto. Neither the questions nor objections are set forth. Whether they were sufficient in form or substance cannot be determined from any printed matter. In truth the only way left open for us to determine the merits of the appeal, if we are to undertake the task, is to make a complete examination of the typewritten transcript. This we are not called upon to do. It is incumbent upon the appellants to print such parts of the transcript as will justify a reversal of the judgment, and, where there is a failure in this regard, the judgment will be affirmed. Filmer v. Davis (Cal. App.) 266 P. 985, and Keele v. Clouser (Cal. App.) 268 P. 682. Particularly should this be the rule where, as here, the dereliction of counsel in this particular, as well as his nonobservance of the requirements of rule VIII of the rules governing the practice in this and the Supreme Court, was brought to his attention by the brief of respondent.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 20

LICHTENBERG v. BURDELL. (Civ. 6548.) ★

District Court of Appeal, First District, Division 1, California. Sept. 30, 1929.

Rehearing Denied Oct. 29, 1929. Hearing Denied by Supreme Court Nov. 29, 1929.

1. Evidence ⇨82—It is presumed that official duty was performed in appraisement of estate, and that probate proceedings were regularly conducted.

Probate proceedings will be presumed in the absence of evidence to have been regularly conducted, and appraisement made in due performance of official duty.

2. Evidence ⇨601(4)—In action to declare involuntary trust by reason of executor's fraud, evidence held not to sustain court's finding as to value of corporate stock in excess of appraisement.

In an action to declare an involuntary trust in favor of plaintiff by reason of executor's fraud and concealment, finding that certain corporate stock was worth $50,000 *held* unwarranted in view of original appraisement at $1,000 and entire lack of evidence to show value of corporate assets indicating greater value at time of appraisement.

3. Trial ⇨395(3)—General findings of fraud, concealment, domination, and trust, unsupported by evidence of specific facts, are insufficient to sustain judgment declaring trust for executor's wrongdoing.

General findings of fraud, and concealment and domination and trust, unsupported by evidence of specific facts, indicative of fraud or wrongdoing, will not support judgment declaring involuntary trust for executor's fraud and concealment.

4. Descent and distribution ⇨74—Wills ⇨721—Estate vests in devisees, legatees, or heirs immediately on death of decedent.

An estate of a decedent vests in his heirs or devisees and legatees immediately on his death.

5. Wills ⇨723—Legatee derives title to specific legacy, not from decree of distribution, but from will, which takes effect on testator's death.

Legatee of specific legacy does not derive title from the decree of distribution, but from the will, which takes effect immediately upon testator's death.

6. Fraud ⇨25—Fraud without damage creates no cause of action.

Fraud without damages gives rise to no cause of action.

7. Trusts ⇨105—Executor who was also specific legatee cannot be charged as trustee for fraud by reason of concealment of partnership interest with purchaser of specific legacy, estates in no wise suffering loss.

Executor, who was also legatee of specific legacy, cannot be charged as involuntary trustee because of his sale of corporate stock belonging to estate including his specific legacy and concealment of partnership interest with purchaser in subject-matter of such specific leg-

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★Rehearing denied. Hearing denied by Supreme Court.

acy, no contention being made as to the existence of fraud with respect to other corporate property, and the estate in no wise suffering injury or loss, by reason of his conduct with respect to his own specific legacy.

8. Wills ⇨717—Renunciation of specific legacy of corporate stock held not established by testimony of legatee that stock was owned by estate.

Renunciation of specific legacy of corporate stock cannot be found as a fact from legatee's testimony on witness stand that stock was part of testatrix's estate and that estate owned stock, such testimony not being inconsistent with legatee's claim under legacy, and in any event being a mere conclusion in no way affecting status of legacy.

9. Trusts ⇨110—Evidence held insufficient to charge executor as involuntary trustee for wrongdoing in acquiring interest in corporate stock sold by him as executor.

Evidence that plaintiff under mother's will bequeathing to her son and executor certain shares of corporate stock and to her daughter, plaintiff, portion of ranch equal in value to the value of such stock, entered into agreement with her father and brother whereby he released his claim to the corporate stock, and she released her claim to any portion of the ranch, on consideration of the father paying to each of them during his life the sum of $100 per month, and thereafter the executor sold the corporate stock, and evidence that he acquired a partnership interest in stock appraised at $1,000, and thereafter acquired sole ownership of business represented by such stock, *held* insufficient on which to charge him with an involuntary trust as wrongdoer.

10. Fraud ⇨50—Fraud must be proved, and is not presumed.

Fraud must always be proved and is never presumed, where the evidence and proven facts are equally susceptible of the inference of fair dealing.

11. Equity ⇨88—Limitation of actions ⇨15—In action to declare executor involuntary trustee, stipulation that plaintiff's suspicions were aroused shortly before commencement of action held not waiver of defense of limitations and laches.

In action to declare executor involuntary trustee for fraud and wrongdoing, stipulation by defendant's counsel admitting that plaintiff's suspicions were first aroused shortly before commencement of action *held* not waiver of defense of limitations and laches.

12. Limitation of actions ⇨1—Statutes of limitation are statutes of repose.

Statutes of limitation are statutes of repose and designed to bring about peace and harmony.

13. Equity ⇨67—Defense of laches rests on public policy disfavoring stale demands, and doctrine is relaxed only where fraud or injustice will result.

The doctrine of laches is founded, not on particular concern for individual rights, but as matter of public policy, and the defense of laches will be available in all cases to bar stale demands, except where fraud or injustice will result.

14. Trusts ⇨365(3)—Delay of 24 years in bringing suit to declare involuntary trust held laches barring relief, in view of plaintiff's knowledge and opportunities to know facts.

Delay of heir for 24 years in questioning transaction upon which she now predicates suit to declare executor involuntary trustee, for fraud and concealment, *held* laches precluding relief, in view of evidence of her knowledge and opportunities for knowledge of facts.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Mabel Burdell Lichtenberg against James B. Burdell. Judgment for plaintiff, and defendant appeals, and plaintiff cross-appeals. Judgment reversed on defendant's appeal.

Brittain & Weise and Brobeck, Phleger & Harrison, all of San Francisco (Maurice T. Dooling, of Hollister, of counsel), for appellant.

R. P. Henshall, Robert R. Moody, and Nat Schmulowitz, all of San Francisco, for cross-appellant.

PARKER, Justice pro tem. This action was commenced to declare a trust in favor of plaintiff and to enforce an accounting thereof.

In the court below plaintiff prevailed, and after accounting had, it was found that a large sum of money was due to the plaintiff and judgment entered accordingly. The defendant appeals from said judgment and urges that under the facts as shown no judgment at all should have been rendered against him. Plaintiff appeals and contends that under the facts found by the trial court, as a matter of law, the judgment should be for a much greater amount.

The basis of the action and the theory upon which it was tried embraces fraud and concealment on the part of an executor with reference to the funds of the estate of his testator. It therefore becomes necessary that we review, in some detail, the facts of the controversy.

Plaintiff and defendant are brother and sister, and, as far as the record discloses, are the only children of Mary A. Burdell, deceased. In order to avoid a possible confusion of names, we will refer to Mary A. Burdell hereafter as the mother. The mother died some time in the year 1900, and at the time of her death she was survived by her husband, Galen Burdell, and the children named. The plaintiff at that time was the wife of one John Coleman, and there was one child of their union, a daughter, Kathlynne, at that time a minor. Prior to her death, the mother had made a last will and testament and also a codicil thereto. After her death and after proceedings regularly had, the will and codicil were admitted to probate in the superior court of the state of California in and for the county of Marin and the persons designated by her as executors were duly appointed as such and thereafter qualified. These executors were the surviving husband, Galen Burdell, James B. Burdell, defendant, and John Coleman, husband of the plaintiff. Here it might be noted that at or about this time, in any event, during the times in question here, plaintiff and the said John Coleman had discontinued their marital relations and a decree of divorce had been entered. Likewise it might be noted that notwithstanding this, the said John Coleman was and remained the guardian of the estate of the minor Kathlynne. The estate of the decedent was of a value in excess of $400,000, and with the exception of a few minor personal bequests the entire estate was devised to the parties hereinbefore named by specific bequests to each.

The general thought prevailing throughout the instrument was that eventually, after a life estate in a portion to the husband, the entire estate, with little exception, should go in equal shares to the son James Burdell in fee and the daughter Mabel Coleman, the plaintiff here, for life with remainder over to her issue. The instrument was dated November 7, 1899.

There are two provisions of this will which demand specific attention, namely paragraphs 9 and 10 thereof. Paragraph 9 is as follows: "I give and bequeath unto my son James B. Burdell all the shares owned by me at the time of my death in the corporation known and designated as The Western Refrigerating Company."

Paragraph 10 reads: "I give and bequeath to my daughter Mabel such portion of the Nicasio Ranch as shall be equal in value as appraised in the inventory of my Estate, to the value of the shares in the Western Refrigerating Company devised to my son James. To have and to hold the same for her use and benefit during the period of her natural life; and upon her death I give and bequeath the same unto her children living at the time of said event in equal shares."

The codicil to the will was dated January 16, 1900. Little change is made in the previous terms of the will, but there are two paragraphs in this codicil that are worthy of note, namely, paragraphs 2 and 5. Paragraph 2 reads: "After that portion shall have been taken from the Nicasio Ranch to make up the equivalent of the shares in the Western Refrigerating Company now known as the Electric Light Power Company, which is bequeathed to my daughter Mabel for life in paragraph Tenth of my will, I give and bequeath the remainder of the said Nicasio Ranch to my husband Galen Burdell to have, hold and enjoy the same during the term of his natural life * * *" Then follows disposition of remainder.

Paragraph 5 reads: "The portion of the Nicasio Ranch bequeathed to my daughter Mabel, etc., as the equivalent of the shares in the Western Refrigerating Company now the Electric Light and Power Company is to include the dwelling house and such portion of the lands adjoining or surrounding the same as may be selected by her of the value directed."

The mother died on January 23, 1900, and the will was admitted to probate on March 5, 1900, at which time the executors were appointed.

In the regular course of probate appraisers were appointed, and on October 11, 1900, the inventory and appraisement of the estate was filed. This inventory, as far as it is before us in the present record, contains the following:

"1,396 shares in Petaluma Gas & Electric Company, appraised at $40,000.

"146 shares in Western Refrigerating Co., $1,000."

In the early part of 1901, Mr. John Martin comes into the field as an organizer and promoter of power and light corporations. At that time this class of corporation was somewhat in disorder; there being many small companies, each covering a limited field. Martin had already secured numerous little companies throughout the state and being, as he modestly admitted, a man of vision, his purpose was to group many of these corporations and form a larger controlling company. At this period he was operating a corporation known as and called California Central Gas & Electric Company. The record discloses that this corporation was, to a great extent, if not wholly, the mere instrumentality of Martin, who owned a large majority of the stock.

In the spring of 1901 Martin began negotiations with defendant James B. Burdell, looking toward the purchase of the properties called Petaluma Gas & Electric Company. This was the same company whose stock was inventoried in the estate of Mary A. Burdell. It will assist in outlining the case to dwell further on the condition of this Petaluma Gas & Electric Company, briefly, for the present. Mrs. Burdell, the mother, as her estate indicates, was a person of wealth. Her interests had been mostly in farming lands and live stock. Her favored interest was the development of the dairy industry and the installation of modern methods and refrigeration. She had visited fairs and agricultural expositions in many places and was interested in starting something in the section where her properties were located. Some time in 1897 or thereabouts there was for sale an old electric light plant in Petaluma, and it was her idea that a refrigerating plant could be operated with the same overhead and crew of help. Accordingly she purchased this plant and business known as the Petaluma Light & Power Corporation. This was the beginning of her ventures along the line of distribution and sale of electric light and energy and the supplying of gas. Subsequently she purchased other machinery and equipment to the point where she organized the corporation whose stock is referred to in the inventory. Her power and light business was conducted on a small scale, compared with present methods, and she remained the sole owner of all of the stock in the corporation formed. The business of refrigeration was conducted under the same roof as the power business, the rooms being divided into various departments wherein there was an ice plant, a creamery and butter business, and the vegetable and produce business.

As may be more or less frequent where several corporations are organized and controlled by the same persons, there were, from time to time, dealings between the corporate entities whereby properties were exchanged and agreements made. As is likewise usual, these transactions really, by a person with himself, leave much indefinite and uncertain as to the exact status of either the person or his or her corporations. It will suffice to say that both the refrigerating plant and the power plant, while each a separate corporation, were entirely owned by the mother and operated, in a great measure, together. The means of gas distribution were antiquated; the power plant was equipped with even then old machinery, and the refrigeration and icing plant was put together with mixed new and second-hand machinery. This was the situation when John Martin entered the Petaluma field.

The trial of the present action in the court below was commenced in June, 1926, and John Martin was called as a witness for plaintiff. An analysis of his testimony disclosed that he had some general knowledge, that in 1901 he had purchased an electric plant or the stock of an electric plant in the city of Petaluma and in the purchase had negotiated with James B. Burdell. He did remember the price paid and that is about the extent of his testimony. His story of the transaction was not relied upon by plaintiff nor did the court find the facts as Martin recalled them. This is in no way intended as a criticism of the witness. He stated throughout his testimony, as was the fact, that he was in 1901 engaged in many big projects, of which this Petaluma matter was a comparatively small venture. He testified further that the details of the transfer and the questions of legal formalities were in the hands of his attorneys exclusively. And, further, his memory had not retained the events of 25 years back. There is testimony, however, that the negotiations covered a period of several months. There was a difference in the price offered and the price asked; inspection was made of the premises, and title examinations were entered into. Negotiations ended in an agreement to sell to Martin the electric light plant and the refrigerating plant with its allied creamery and produce business. This last statement, in so far as it includes the refrigerating plant, is the subject of dispute, but found by the court and practically agreed upon by all sides, though denied equivocally by Martin.

We now go back to the record of the court in probate. On August 30, 1901, there was filed in said court a petition for order of sale of personal property. This petition was signed by the three executors and after preliminary recitals showing indebtedness of estate and need of funds, set forth the property desired to be sold. This property embraced 1,396 shares of Petaluma Gas & Electric Company, 146 shares of the Western Refrigerating Company, and 5 shares in the Dairyman's Union of California. The last-named shares have no connection with this case in any way and there will be no further mention thereof. The petition then recites: That the heirs of the deceased to whom the said 1,396 shares would be distributed if not needed for the payment of the debts of the estate are Galen Burdell, husband, James B. Burdell, a son, and Mabel Smith, formerly Mabel Coleman, a daughter, all of whom are desirous that the said personal property should be sold and applied to the payment of the indebtedness. The petition then further recites: That the shares of the Western Refrigerating Company, although devised to James B. Burdell, are so connected with the gas and electric plant represented by the shares of the Petaluma Gas & Electric Company that it is necessary to sell the said shares with the others to secure a favorable sale of the same and it is absolutely necessary that all of the shares should be sold together. The petition prays for an order authorizing the sale of the said stocks. Pursuant to the law as it then read, the court set a date for hearing said petition and ordered notice thereof given by posting. Thereafter on September 10, 1901, the court made its order authorizing and directing the sale of the said stocks at private sale. This order recited that the 146 shares of Western Refrigerating Company were so connected with the Petaluma Gas & Electric Company that it was necessary and advisable for a sale of the same to be made jointly with the shares of stock of the gas and electric company in order to obtain a full and adequate price for the said shares of both companies, and the order directed and authorized that the sale of the stock in these two companies might be sold jointly in one parcel.

On September 20, 1901, a return of sale was made and filed, which said return was executed by the three executors. It recited the proceedings had under the order of sale and that at the said sale there was received the bid of John Martin offering the sum of $65,000 for the stocks mentioned. The return prayed the confirmation of the court. This return was verified by each and all of the executors. After proceedings regularly had, the court on September 26, 1901, confirmed the sale to John Martin and directed the necessary transfers.

On March 31, 1902, there was filed in said court the second annual account of the executors. This account was executed by James B. Burdell and John Coleman, two of the executors, but the names of the three appear thereon; the name of Galen Burdell being signed by James B. Burdell. In this account the proceeds of the sale were accounted for as follows:

> "Received for 1400 shares Pet. Gas & Electric Co. $64,000.00.
>
> "Received for 146 shares Western Refrig. Co. $1,000.00."

On April 14, 1902, an order was made by the court decreeing the account, in all respects as rendered, approved, allowed, and settled.

On January 30, 1902, there was filed in the said court a petition for leave to borrow certain moneys and as security for the repayment thereof to execute a mortgage on certain real estate belonging to the estate of the decedent. The petition recited the execution and admission to probate of the will and detailed certain legacies thereunder. Further, it showed other debts which were due, amounting in all to some $130,000. The petition then recites: That in addition to the said legacies mentioned, a devise was made by will of the deceased to James B. Burdell, her son, one of the petitioners, "of all the shares owned by her at the time of her death in the corporation known and designated as the Western Refrigerating Company, which shares are referred to in a codicil of the will as now known as the Electric Light and Power Co.," and there was devised to the daughter of the deceased such portion of the Nicasio ranch as should be equivalent in value as appraised in the inventory of the estate to the value of the shares devised to said James B. Burdell. The petition then recites that at the time of the death of Mary A. Burdell, the mother, there were three corporations answering, or in some way answering to the one mentioned in the will and named these as the Western Refrigerating Company, the Petaluma Electric Light & Power Company, and the Petaluma Gas & Electric Company. Further the petition recites that it is claimed by James B. Burdell that it was the intent of the testatrix to devise to him the 1396 shares in the Petaluma Gas & Electric Company and that the same are devised by the will but were misnamed and incorrectly described. The said James B. Burdell therefore claims the equivalent in cash to the appraised value of the said shares. The petition is signed and verified by James B. Burdell and Galen Burdell, executors. It is not signed by the remaining executor, Coleman, and the reason appears in the petition itself as follows: "The belief and claim of James B. Burdell is not acquiesced in by John M. Coleman, one of the executors, and also the Guardian of Kathlynne Coleman, a minor interested in the estate, and he therefore has not joined in this petition."

Thereafter all of the parties came together, namely, Galen Burdell, James B. Burdell, John Coleman, executors, the latter being also guardian of Kathlynne Coleman, and the plaintiff Mabel Smith, formerly Mabel Coleman. The last-named Mabel Smith was represented in these negotiations by Leonard Stone, her attorney. As a result of this conference an agreement was entered into between the parties to the effect stated as follows: "In consideration of James B. Burdell releasing and abandoning any claim under the will of any interest in and to any shares in the Petaluma Gas and Electric Company or in the Western Refrigerating Company or the Electric Light and Power Company, and the said Mabel Smith releasing and abandoning any claim under the will to an interest in the Nicasio Ranch equivalent to the value of such shares as shown by the inventory or otherwise, Galen Burdell agrees to pay to James B. Burdell and to Mabel Smith from the date of the Decree of Distribution, during the term of his, Galen Burdell's natural life, the sum of one hundred dollars per month each."

This agreement, as far as the record indicates, was fully complied with by all of the parties thereto. Nothing further appears of interest in the probate proceedings down to the decree of final distribution, which decree was preceded, as a matter of course, and record, by the final account, which was duly approved. The decree of final distribution was entered on September 2, 1902, and distributes the property remaining as per the terms of the will. No mention is made in this decree of any of the stocks herein discussed nor is mention made of the life estate of Mabel Smith in the Nicasio ranch.

After distribution of the specific legacies the decree contains the general wording of distribution of any residuum to the named heirs, the surviving husband and two children, as follows: "There is distributed to Galen Burdell, James B. Burdell and Mabel Smith all and singular any property not now known or discovered or not included in any inventory on file which may belong to the estate of Mary A. Burdell, or in which the estate may have any right, title or interest." And thus, as far as the record of probate discloses, the matter of the estate of Mary A. Burdell, deceased, closed.

The present action was commenced in July of 1925. In the complaint many of the matters hereinbefore detailed are recited and alleged. It is the gravamen of the complaint that there was irregularity in the proceedings involving the sale of the stock and assets of the Western Refrigerating Company. The complaint sets forth and alleges: That the sale of the stock of the Western Refrigerating Company was in fact no sale. That no stock of the Western Refrigerating Company was involved in the sale to John Martin. That the defendant James B. Burdell, as the controlling executor, had dominated the remaining executors and made them believe that a sale of the Refrigerating Company's stock had taken place, when, in fact, all that John Martin purchased was the stock in the Petaluma Gas & Electric Company. Further, the complaint alleges the value of the stock of the Western Refrigerating Company to have been worth more than $50,000. Many other allegations are contained, such as the trust and confidence placed by plaintiff in defendant, his representations to her and her absolute faith in him; likewise, her unfamiliarity with business, and in general all of the so-called classical allegations of a complaint in equity, seeking the creation of a trust in favor of one who has been fraudulently deprived of the benefits of his inheritance.

We pass thus over the allegations of the complaint for the reason that on the trial the plaintiff conceded that her understanding of the facts surrounding the sale were purely on information and belief and beyond her knowledge. The facts as developed, of which hereinafter, came through the testimony of defendant and the court records, and on this testimony and records the court made its findings in favor of plaintiff. The plaintiff also pleaded the reason for her long delay in bringing the action, which reasons will be discussed when we come to the claim of defendant on the point of laches. After the evidence was in the court found the fraud alleged and declared that defendant had by this fraud unlawfully and inequitably come into the possession of assets of the estate of which he was executor, and ordered an accounting. Upon the account being taken, it was found by the court that the plaintiff was entitled to recover from the defendant the sum of $58,672.02 in cash and to have delivered to her by him certain corporation stocks of the par value of $34,900.

The findings of fact are detailed and lengthy and in some instances apparently in conflict and in other instances wholly unsupported by the record and without even the foundation of legitimate inference.

It was argued in the court below as the position of the plaintiff that she would stand on the story of defendant concerning what actually was the transaction between him and Martin, and inasmuch as the trial court adopted in its findings this testimony we will detail the same. As suggested hereinbefore the testimony of Martin was unsatisfactory and indefinite. He testified that he did not know that he was dealing with an executor or, that the property involved was in any wise connected with a probate proceeding or subject to the supervision of a court. He testified further that his chief part in the transaction and in all similar transactions was to give personal attention to the securing of the certificates representing the stock with particular note of the legality and sufficiency of the indorsements. It was shown that the certificates he received were indorsed by the executors as such, thus bringing directly to his attention the character of the transfer. Likewise, he testified that the regularity of the legal steps was intrusted to his counsel and the counsel named were stipulated to be and the fact is they were outstanding members of the California bar at that time. All conceded that they were men of such standing in the profession that they and each of them had and would have a complete familiarity with the details of probate and the statutory requirements accompanying any sale of the assets of a decedent, whose estate was in course of probate. Without further analysis of the testimony of this witness, whose recollection was dimmed by the intervening years, we will, as did the trial court and plaintiff's counsel, adopt, at least as far as was done in the court below, the version given by defendant.

[1, 2] It might be noted here that no claim of any sort is made or involved concerning the shares of stock or the assets of the Petaluma Gas & Electric Company. As far as this record goes, it is conceded that plaintiff makes no claim by reason of any irregularity in this. Therefore the question is confined to the Western Refrigerating Company. It is alleged that the stock and assets of the Western Refrigerating Company were worth the sum of $50,000. The trial court makes no finding on the value. We must presume that official duty was performed and our presumption likewise extends to the regularity of probate proceedings or other ordinary transactions. With this in mind, we have the appraisement return of the stock of the said corporation as $1,000. There was no evidence on values nor is there anything in the record that impeaches the fairness of the appraisement. Indeed, the entire record and the attendant circumstances seem to support it. The executors who turned over the inventory for appraisement were those persons who had been closest to the affairs of Mrs. Burdell in her lifetime and had a close familiarity with her estate. The appraisers, at least one of them, had been theretofore associated in the conduct of the general refrigerating and power business of Mrs. Burdell; Coleman, one of the executors, had a personal interest, as the guardian of his daughter, in having a full and fair valuation placed upon these shares. This by reason of the fact that the life interest in the Nicasio ranch, equivalent in value to the value of these shares, carried

a remainder over to the ward, as issue of the daughter Mabel. Also the record develops that the Western Refrigerating Company really owned practically no assets by reason of an extent but not completely executed agreement whereby everything owned by the said corporation was transferred to the electric company. In fact, it is conceded and found that the most valuable part of the refrigerating company was its good will and this finding is made 25 years after, when the business had shown that the then good will must have had some value.

The plant of the refrigerating company was an assembled plant, mostly secondhand, and there is nothing to indicate the volume of business, if any, that was being done. Everything would indicate that the entire business was merely an experiment of an enterprising woman, keen on development of the dairy industry and with refrigeration yet in its infancy.

When John Martin came into the field, it was then generally known and was a fact that he was seeking control of the power and light industry throughout that entire region and was in a position to either buy or ruin. He came seeking to buy, rather than being sought after by the executors. His first contact was with James B. Burdell, with whom he had many discussions, mostly bargaining as to the price to be paid. His first offer was $60,000 and it was not until much negotiation that the price was finally agreed upon as $65,000. James B. Burdell took him through the various plants and properties and was continuously insisting that the refrigeration plant was such an integral part of the operating system that a sale of both was advisable and necessary. Martin explained that he had no interest in such a plant nor in the business of eggs, butter, or kindred products, Finally, Martin stated that if conceded the necessity of one entire purchase it would mean a total loss to him, inasmuch as he could not run the refrigerating company business and could not devote any time or attention thereto. Thereupon Burdell suggested that it might not be a difficult matter to interest someone who would take it over for Martin. In any event, after some bargaining, it was agreed between Martin and James B. Burdell that the purchase by Martin should include both the electric company and the refrigerating company and that Burdell would manage and operate the refrigerating company, and that as to the refrigerating company, Martin and James B. Burdell would be equal partners. Thereafter followed all of the probate proceedings, returns of sale, accounts, etc., as hereinbefore detailed. When the sale to John Martin was confirmed, the stock of the gas company was forthwith turned over to Martin. The stock of the Western Refrigerating Company was indorsed by the executors, as far as the stock of the mother was concerned, the remaining shares being indorsed by the parties in whose name they stood, though Mary A. Burdell was the acknowledged owner, and were in possession of James B. Burdell. Nothing was done with this or these stock certificates in the way of delivery. The assets of the gas and electric company followed the stock of that company, and John Martin, acting through his corporation, took immediate possession. For a short time the refrigerating business went on as usual under the management of James B. Burdell, defendant, but within a very short time he caused to be opened in his books, or in the books of the company, a partnership account between himself and John Martin. This was pursuant to the agreement or understanding prior to the sale. This partnership paid rent to the California Central Gas & Electric Company, then owner of the premises wherein the refrigerating plant was situate. The partnership continued on for approximately a year and one-half, or thereabouts, when Burdell purchased the interest of Martin. However, it is here to be noted that upon the opening of the partnership books, James Burdell placed into the business under the account of capital investment the sum of $1,000, being credited capital of $500 for each partner. After Burdell had purchased the interest of Martin in the concern for the sum of $3,000, he (Burdell) resurrected the old stock certificates of the Western Refrigerating Company and the corporation went through a process of what might be termed reorganization. The stock books were reopened and transfers made of the entire stock to James Burdell with sufficient qualifying shares for a directorate. He carried on the business up to approximately 1917, when the same was sold; though portions thereof had been sold at an earlier period.

[3] It was on this state of facts that the trial court determined that a fraud had been accomplished as against the estate of the decedent and against the plaintiff, and ordered the accounting. The court found that the relationship between John Martin and James B. Burdell was knowingly and willfully fraudulent and in violation of the duty of an executor and that the stock and assets of the Western Refrigerating Company, having been fraudulently obtained from the estate, a constructive trust had arisen in favor of the plaintiff as beneficiary, with the duty of accounting. Incidentally, as defendant phrases it, the findings were fully embroidered and adorned with general findings of fraud and concealment and domination and trust, many of which general findings have not the slightest support in the record. It seems that after fraud was found in the main transaction, that it was taken for granted that all of the stigmata were present. For example, it was found that James B. Burdell was the con-

trolling and active factor and "he controlled and dominated the other executors in and about all things found in the premises." Not a word of evidence appears in support of this finding and any inference that might be drawn from the conduct of the remaining executors would negative this finding. To take up each finding and analyze the same would cover hundreds of pages, but throughout 50 pages of findings we find general unsupported conclusions and in nearly all of the specifications of insufficiency of evidence to support the findings, the complaining defendant has sustained his burden. Each attacked finding is so drawn that to point out its weakness would necessitate taking it phrase by phrase, for the reason that a little scrap of fact is taken and polished up with epithets and then builded upon by the addition of the general concomitants of a fraud, whether founded in fact or otherwise. It was found by the court that the transaction with Martin, as a matter of fact, was really a sale of the assets of Western Refrigerating Company, which passed with a partnership reservation in the defendant executor. Further, it was found that there was no sale of the stock of the said corporation and that the most valuable of the assets, namely, the good will and business, remained inherent in the stock. While upon analysis this construction might work out, yet on its face and from the state of the record, it seems rather too finely spun. The corporation remained dormant and ceased to function until revived after the termination of the partnership. Whatever business it was capable of doing must have been through its equipment, which was a part of the assets transferred. If it will be assumed, in support of the finding, that the business was done in the name of Western Refrigerating Company, then it might logically follow that it being the name that attracted the business, the success of the venture was attributable to the good will incident to that name. However, no evidence supports this construction.

[4-7] The court's finding that the transfer of the assets was with a partnership reservation supported the further finding that the transaction was a fraud upon the estate. Likewise, the finding that there was actually no transfer of the stock would have the necessary effect of leaving the stock still undistributed. Let us therefore analyze the situation in view of the admitted facts. The stock of the Western Refrigerating Company represented only $\frac{1}{400}$ part of the entire inventoried value of the estate. Under the terms of the will this stock was a specific legacy to defendant, James B. Burdell. The estate was admittedly solvent and to a healthy degree. The testatrix had been dead for more than one year and her estate had been in probate for over one year. Under these conditions the legatee was entitled to the stock bequeathed him. That the estate of a decedent vests in his heirs or devisees and legatees immediately upon his death cannot be disputed. The legatee does not derive title from the decree of distribution but from the will, which takes effect immediately upon the death of the testator (Western Pacific Ry. Co. v. Godfrey, 166 Cal. 349, 136 P. 284, Ann. Cas. 1915B, 825), citing many cases supporting the holding.

Let us suppose in the instant case that upon the petition to sell the stock of Petaluma Gas & Electric Company, the defendant James B. Burdell had set forth to the court fully the facts now found; that he had shown the court his ownership and right to the stock as a specific legatee thereof, the solvency of the estate, and its then admitted condition with reference to all of the things now disclosed. Undoubtedly the court would have had the power to sanction the arrangement. Had the court, however, upon closer scrutiny, determined that it would not be the proper thing to do, then what result would have followed? The court, upon the unquestioned showing made, would have approved the sale of the stock of the Petaluma Gas & Electric Company and refused its approval of the sale of the stock or assets of the Western Refrigerating Company. The situation then would have been exactly the same as though no proceedings or negotiations had taken place with reference to this latter stock. Then let us suppose that Burdell went to Martin and they then had the arrangement here complained of and that Burdell made an assignment to Martin of his stock with the agreement that they would be partners in the business. What possible fraud could be attached to the arrangement? If Burdell had title to this specific legacy, and no claim is made that he did not, he surely could anticipate its full delivery and either sell, assign, or give away the stock or any portion thereof that he chose. Disregarding any of these suppositions, respondents contend that the fact is Burdell did nothing of the sort and it is with the fact alone that we must deal. The gravamen of his offense and the essence of his fraud is that irrespective of the quality of his act the method he chose to bring about the result obtained was fraudulent. We may even concede this, and then immediately arises the pertinent query as to the manner in which the estate or its assets was depleted or in any way affected by this fraud or the manner in or through which this complaining plaintiff was damaged. The law seems well settled that fraud without damage gives rise to no cause of action. Holton v. Noble, 83 Cal. 9, 23 P. 58; Hunter v. McKenzie, 197 Cal. 176, 239 P. 1090.

[8] In the early case of Patterson v. Donner, 48 Cal. at page 378, it is said: "No man can complain in equity of the fraudulent practices of another, unless he has been in-

jured by such practices." In the more recent case of Gaffney v. Graf, 73 Cal. App. at page 626, 238 P. 1054, 1055, it is said: "It is axiomatic that deceit or misrepresentation without damage does not give a cause of action; that the essential element of an action of deceit or fraud is the concurrence of both fraud and damage. It has been put in another way, that neither fraud without damage nor damage without fraud is sufficient to support an action." See also 12 Ruling Case Law, p. 239, et seq. With the application of these principles, we repeat, the damage to any one is not apparent. If it is true that a fraud was committed, the net result was of benefit to the estate in that the funds purporting to be derived from the sale were actually turned into the estate; if, on the other hand all of the funds received were to be credited to the Petaluma Gas & Electric stock, then all the estate apparently lost was the stock of the refrigeration company, which it held to be distributed to the defendant. Respondent, however, has anticipated this conclusion and as far as it goes might concur. But, she argues, there are two reasons why the argument or the citations have no application. First, she contends, the legacy was renounced. On this there is no finding nor was there any issue made at the trial of a renunciation of the legacy. Respondent bases this contention upon two excerpts from the testimony of defendant. One was the statement of defendant, in reply to a query as to who owned the stock of Western Refrigeration Company at the time of the Martin negotiations, that the estate owned the stock. Another was a statement of defendant that at the time of the death of Mary A. Burdell this stock was a part of her estate. Respondent submits these without comment or argument. Surely, it could not be contended that these two statements evidenced any renunciation. As a strict matter of fact, disregarding any legal construction, it might be truly said that every legacy, specific or otherwise, is a part of the estate and owned by the estate. In any event, it would be a mere conclusion of ownership and could in no way control or determine the status of the legacy, or, of itself, establish a renunciation.

[9] The second argument of respondent in this connection is based upon the stipulation entered into between Mabel Smith, James B. Burdell, and Galen Burdell wherein and whereby both of the children waived certain claims against the estate and Galen Burdell agreed to pay to each the sum of $100 per month during his lifetime. Here it might be noted that the reason and purpose of the defendants found fraudulent conduct was determined and found by the court to be for the purpose of defrauding Mabel Smith out of her life interest in the Nicasio ranch. This necessitates somewhat of a review of what has gone before. Under the terms of the will as hereinbefore noted, it was stated that the testatrix gave to James B. Burdell "all of the shares owned by me at the time of my death in the corporation known and designated as The Western Refrigerating Company." In the very next clause it is provided: "I give and bequeath to my daughter Mabel such portion of the Nacasio ranch as shall be *equal in value as appraised in the inventory of my estate* to the value of the shares in the Western Refrigerating Company devised to my son James." It is then argued that the yardstick by which the estate of Mabel was to be measured was the amount that James received from the estate through the stock devised; that if James received nothing from the estate, or if he waived his inheritance, then the inheritance of Mabel fell in toto. It is impossible to see by what forced construction this conclusion is arrived at. The testatrix very carefully avoided the possibility of such a contingency. She herself, familiar as it seems she must have been with the fact that an inventory would be returned in her estate, provided that the means provided by law for determining value should be adopted in determining the values of the respective legacies. The reference to values could in no sense be controlling. If she had provided and named three persons to make the evaluation, the result would have been the same. Or, if she had herself appraised the value of the shares or fixed a valuation thereon there would have been little difference. If instead of either, she had made a direct bequest of $10,000 to James and then provided that there should be cut out of the Nicasio ranch a portion sufficient to equal in value the legacy to James, we know of no rule of law and none is cited to us which even indirectly holds that a waiver of one specific legacy operates to cancel and nullify another legacy to a different person. No claim was made by him to any proceeds from Western Refrigerating Company stock or proceeds thereof. If he prevailed in his claim, it would naturally follow that the values obtained by him would have been the value of the life estate going to the daughter Mabel.

There is not the slightest suggestion of evidence of any representations, misrepresentations or other contact, direct or indirect, made by defendant to plaintiff or to any one else on the subject. As far as the record indicates he stood upon that claim opposed by his coexecutor Coleman, and the plaintiff, being represented by counsel in the negotiations.

Galen Burdell, the father, entered into an agreement for the avowed purpose of preventing the threatened litigation and avoiding the possible delay or other troublesome results thereof, whereby he would pay to each child the sum of $100 per month, if James would release and abandon any claim under the will of any interest in and to any share in the Petaluma Gas & Electric Company or Western Refrigerating Company, or Electric Light & Power Company, and if Mabel would likewise release and abandon any claim under the will to an interest in the Nicasio ranch equivalent to the value of said shares. This agreement was executed and carried out. The plaintiff, or rather in plaintiff's behalf, it is contended that she would not have executed this agreement if she had known that her brother was then interested as a partner with Martin in the stock or assets of the Western Refrigerating Company, valued at $1,000. The agreement recites that both James and Mabel were in accord with James' claim as to the proceeds of the Petaluma Gas & Electric Company, belonging to James under the will. This brought directly to the mind of plaintiff the claim of James, at least to the extent of the value of the gas and electric shares, namely, in excess of $40,000 and possibly to the full $64,000 or $65,000 of the Martin sale. As a matter of record, there is no evidence from which it could even be inferred that defendant Burdell, directly or indirectly or at all, represented or misrepresented to plaintiff that he had received nothing from the Western Refrigerating Company or that he had received anything.

It is apparent from the terms of the codicil that the testatrix intended that the gift to James should include something more than the shares of stock in the Western Refrigerating Company, inasmuch as the said codicil referred to this company as now being the Electric Light & Power Company. Twice in her codicil, she thus refers to the Western Refrigerating Company, and her idea is more evident when in the legacy to the daughter she made provision that the portion of the Nicasio ranch that should be the equivalent of the stock, should embrace a dwelling house and appurtenances. Even then not much of a dwelling house could be included in a one thousand dollar bequest. Therefore, James B. Burdell, under at least some claim of right, as frequently recognized by decisions of courts in the construction of wills wherein there is a misdescription of property devised or persons to whom devised, set up his claim to the proceeds of the sale of the Petaluma Gas & Electric stock as coming within the terms of the bequest. His claim thus presented, if allowed, would have greatly increased the value of the life estate to the plaintiff in the Nicasio ranch rather than depleting her legacy.

It is interesting to here note the only concrete evidence of the domination and control over the executors alleged to have been exercised by James B. Burdell. The executor Coleman refused to join in this claim and threatened litigation. The only claim of James Burdell was to the proceeds or at least the inventoried value of the stock of Petaluma Gas & Electric Company. It is evident that the estate was not depleted in any way by or through the agreement. The estate, if anything, was enriched to the extent of the withdrawn claim for the proceeds of the sale of the stock. There is not a scrap of testimony that would indicate the value of the Nicasio ranch or the value, if estimated, of plaintiff's life estate therein, save and except the valuation placed thereon by the appraisers, as indicated in the will, namely, $1,000. Therefore, the most that could be made of the complaint of plaintiff would be that by reason of the fact that James concealed the fact that he had indirectly, or even directly received a small portion of the claim, she consented to an agreement wherein and whereby she gave up an estate valued at $1,000 for a consideration of her receiving $1,200 annually during the life of her father, she being, at the same time, the owner of a remainder over for life after her father's death. The agreement was one binding upon Galen Burdell for the payment of money to each of the children. There is no evidence, one way or the other, that Mabel, the daughter, would or would not have entered into the agreement but for the concealment of the facts by her brother. There is no evidence that she knew anything about the Western Refrigerating Company's stock or its value. There is no evidence that she relied upon any representation or misrepresentation. In fact, there is no evidence at all forthcoming from the plaintiff Mabel. She was not called as a witness nor was her deposition offered. No account was made for her absence, and in view of the entire case there can be nothing but the remotest inferences concerning what she knew or believed at the time.

This concludes our view of the first part of the case. It is our opinion that it is not a case where the allegations of actionable fraud have been sustained in any particular. It may be that testing the transactions by all of the rigid rules governing, there was an irregularity of procedure and that the defendant secured what actually belonged to him in a manner that might have been better had he waited the distribution of the estate. But the claim of plaintiff is predicated wholly as an heir to funds of the estate held in trust by the defendant. We hold this claim not supported by the record.

[10] In Ryder v. Bamberger, 172 Cal. at pages 799 and 800, 158 P. 753, 756, it is said: "If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing. [Citing cases.] For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury * * * to find in favor of innocence and uprightness. This does not, of course, mean that the fraud must be proved by direct evidence. This is not always, nor even often, possible; but it does mean that the indirect evidence and the inference to be drawn from the proved facts must be so convincing as to satisfy trial court or trial jury that fraud was designed and accomplished."

We are mindful, too, of the disfavor with which a court of equity looks upon anything savoring of fraud. The prevention of fraud and the integrity of trust relationship have been subjects of many learned opinions in chancery. Down through the ages have come the scathing denunciations of the learned chancellors against those who by fraud and deceit overcome the trust and confidence of their cestui que trust. Epics have been written on the power of equity to relieve those distressed through violation of confidential relations. But in no instance has equity ever wavered in its holding that fraud would not be presumed in the absence of evidence. Equity itself has its foundation in man's honesty of purpose, and for its continuance it must rely upon the presumption that this continues. For if ever it were a presumption to be indulged that all men were dishonest, not only courts of equity but all law would fail.

The next important point is the question of laches, raised by the appellant at every stage of the proceedings and found against him on each occasion by the court.

[11] Preliminary to a discussion of this phase of the case, we take up the respondent's claim that all questions of laches and limitation were stipulated out of the case. As much stress is placed upon this stipulation and the facts surrounding the same, and as there was a finding by the court that the stipulation did take the question of laches out of the case, which said finding embraces a one-page sentence, it becomes necessary to detail the circumstances and the stipulation. It was claimed on behalf of plaintiff that she first was put upon suspicion by an event that happened in 1924, in the course of the settlement of her father's estate. There was an item in the father's estate referred to as the Howard note. Defendant, James B. Burdell, was the executor of the estate of Galen Burdell. It was claimed that when the account of the executor came on for settlement, it was represented that the Howard note was an asset of no value. This representation was made in the account of the executor and his account charged with a small sum of ten dollars on account of the said note. It was claimed by the attorneys representing plaintiff in the estate matter that the face value of the note, namely, $1,200, had in fact actually been received by a dummy to whom the note had been assigned. The controversy coming on to be heard in open court, before the hearing or at the hearing, the defendant, who was executor of the estate of Galen Burdell, made admission of the amount due the estate and paid in the $1,200. When, in the instant trial, this subject was opened up, a colloquy between court and the respective counsel ensued:

"Mr. Henshall (counsel for plaintiff): Of course, I do not know the peculiar form in which the admission is made. I should not be misled or trouble these witnesses again by ordering them back. I do not know by this admission, and I so claim it, and will now claim it so it may be denied that after Mr. Meyer had settled the Howard note, which theretofore had not been known to the plaintiff, that for the first time her suspicions were aroused and as a result of investigation for the first time she became aware of the alleged cause of action set up. This is my understanding of the admission.

"Mr. Brittain (counsel for defendant): We are perfectly willing to stand on that, reserving the right to argue the facts in regard to matters antecedent to that time relating to matters in issue in this case. We will not contest anything about the Howard note because it is entirely immaterial and will be settled according to the statement of counsel. We will not question as to whether there was a foundation for Mrs. Lichtenberg's suspicions by reason of the Howard note. It does not make any difference what aroused her suspicions, as your Honor has well said, if she had suspicions, and if she thereafter made a discovery and brings herself within the rule of law putting the burden upon her of making discovery promptly of frauds, we will not make any question about that, we will not raise any questions as to the suspicions which she alleged she had. I do not know if I can go any further in an admission. It seems perfectly clear.

"The Court: I think with those admissions before us it will not be necessary to go into the details of the settlement of this account of 1924.

"Mr. Henshall: I do not think we should go into any of these matters at all. If it is admitted her suspicions were aroused in 1924, why trouble ourselves."

A fair reading of this so-called stipulation will readily convince one that all that was involved was the question of whether or not the plaintiff's suspicions were aroused by this transaction surrounding the Howard note. The very last statement of counsel for plaintiff indicates that he so understood it. The careful statement of the counsel for appellant does not indicate any waiver of the questions of limitation and laches. It is a most appropriate place for the application of the old maxim that he who sticks on words, sticks in the bark. The language used must be stretched and distorted out of all proportion to get from it the meaning given by respondent. Granting that it was admitted that the plaintiff's suspicions were aroused at this time does not remove from her the duty of diligence and watchfulness, nor does it impose upon the courts any additional duty to disregard the wholesome laws and rules enacted to prevent the inquiry into stale claims and demands.

[12, 13] We conclude that the point of limitations and laches was not taken from the case but still remains, and as will be disclosed hereinafter, bars the plaintiff's action.

The transactions around which the action centers occurred some 24 years before action brought. During all of this time the plaintiff was of the age of majority and not under any legal disability. As the evidence discloses, for many years she was the active manager of a ranch of some 4,000 or 5,000 acres in close proximity, territorially, to the place wherein the defendant was conducting the business of the Western Refrigerating Company. The books of the company at the very outset showed the existence of the partnership and at all times the defendant was in the actual management and control thereof. The record further shows that in the conduct of the said business the defendant purchased cream and dairy products from plaintiff and was friendly with her. The record further shows: That the father of both plaintiff and defendant was on the usual terms of family intimacy with each of the children and that social visits were exchanged between all of the families. That defendant was held out in the city of Petaluma as the active owner of the refrigerating company and its allied activities. That the father knew of the partnership, at least after it was formed, speaking of the original partnership between Martin and the defendant. This appears from the undisputed testimony that the father advanced to defendant the money, or a part thereof, with which defendant purchased the interest of Martin. The plaintiff for more than 20 years was a close personal friend of John Martin, and Martin was often a visitor at the home of plaintiff and her husband. That plaintiff had, at all of the times mentioned, independent advice and counsel, inasmuch as throughout the original proceedings she was represented by counsel. The record further shows without dispute that the business was conducted in a small city and within the knowledge of any one who cared to become interested to ascertain any of the facts connected therewith. The record discloses no act, representation, or misrepresentation of defendant, other than the solitary fact that he did not directly in so many words or at all give to plaintiff any of the facts surrounding the transaction in the original estate matter. Further than this, it is undisputed that all of the principals who could throw any light upon the subject have died. Galen Burdell, the father, died in 1906; Leonard Stone, attorney for Mrs. Lichtenberg, plaintiff, is dead; the attorneys who represented Martin and who made fullest investigation of the affairs attending the transfer of the stock, and to whom was entrusted exclusively this matter, are all dead. And chiefly to be noted is the fact that the plaintiff herself was not a witness nor did she present any testimony on her own behalf as to what her knowledge might have been or what facts she knew. All that is presented to overthrow the claim of laches is that 25 years after the fraud alleged was perpetrated, the plaintiff felt that she had been defrauded in a transaction then occurring, and thereby her suspicions were aroused and she made investigation. No record appears as to what this investigation was or what facts were discovered thereby or why, if at all, these facts could not have been discovered before. The final and ultimate test of what was operating in the plaintiff's mind and indisputably the best evidence on that subject, and evidence that was easily available to plaintiff, was her own statement on the subject. The only finding that would support her case is that she believed from what she had heard, presumably from the record of the court proceedings, as no evidence of any representations by defendant or others on his behalf appears, that there had been a sale and she took it for granted that this was the case. If the doctrine of laches has not its fullest application here, it is difficult to determine what the doctrine means or when, if ever, it can be applied. It is to be noted also that the defendant does not rely entirely if at all upon the strictly equitable definition of laches. He asserts, and has asserted at every stage of the proceedings, the bar of the statutes of limitation. Statutes of limitation are statutes of repose and designed to bring about peace and harmony.

The doctrine of laches is founded, not on a concern particularly as to individual rights, but as a matter of public policy. At a very early period in the history of the law, statutes were enacted to prevent the pursuit of stale demands and to bar recovery thereon. Only where it is apparent that a fraud will result and injustice follow have the courts of equity relaxed. And this does not appear here. It is doubtful if the reports will disclose any case wherein a plaintiff has been able to invoke the aid of a court of equity after a delay of 25 years upon no greater showing than that he did not have occasion to mistrust defendant until after a lapse of such great time and without the plaintiff offering any testimony concerning his knowledge or lack of knowledge prior to the time of the arousal of these suspicions. If the doctrine of laches is founded on public policy and the preservation of the general good, it may be wondered just how far consistent with the general good it might be to hold that the doctrine did not apply in a case where the facts are as hereinbefore detailed.

[14] In the instant case, with no showing of diligence, with ample opportunity to know and almost positive knowledge that the defendant was operating the business involved, and dealing with him herself in this business, all that the plaintiff offers to justify a delay of almost 25 years is the fact that after she became convinced in 1924 that the defendant was unfaithful to his trust in another family matter it dawned on her that perhaps all was not well some 25 years back. It may be reasonably asked just why did she pick out for investigation this particular transaction of the Western Refrigerating Company stock. The obvious answer, in the absence of further testimony forthcoming from her, is that all of the time she knew that he had operated and carried on this business as his own, without account to her or to any one else on her behalf or on behalf of the estate of the mother. The only reason for her suspicion lighting upon this particular transaction must have been a prior knowledge or at least reasonable grounds of doubt on the integrity of that particular transaction. How would she, or any one else, without knowledge or facts, out of an estate of some $400,000 immediately light upon this obscure item, out of a clear sky? More than seven periods of limitation had elapsed. The right of action was given to plaintiff within a period of three years after the discovery of the fraud. It was not incumbent on the defendant to prove that plaintiff had not discovered the fraud or that she had not discovered facts sufficient to compel her investigation. The right accorded plaintiff was an exceptional one and upon her devolved the duty and burden of bringing herself within the exception as an essential part of her cause of action. Defenses based upon statutes of limitation are meritorious defenses and the defense of laches is a favorable defense in equity. As we have held hereinbefore, the fraud alleged was more of an irregularity than a positive fraud; it involved a small portion of a large estate and involved a portion which of right belonged to the defendant. The irregularity, or fraud, if it might be so termed, was acquiesced in by the other member of the family, the father, with full knowledge. If the judgment of the lower court can be upheld, it would mean chaos in the courts and in society at large. Every heir or legatee, after 25 years or 50 years, could come forward with a complaint to the effect that but recently he had cause to suspect something wrong, not about the original probate, but concerning the honesty of the executor or a coheir and without the necessity of making any showing as to what his own knowledge had been through the intervening years, seize upon something that perhaps he had been carefully nursing for many years and demand relief. Business would become necessarily unsettled and affairs generally in a state of havoc.

In the case of Kleinclaus v. Dutard, 147 Cal. 251, 81 P. 516, 517, it is said, quoting from Story's Equity: "Where time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust." An all-sufficient reason for the application of the doctrine, as announced in the case just cited, was the impossibility of doing complete justice between the parties. Such a condition is present here. The business had been discontinued since 1917 and a large part thereof discontinued since 1912. Books of account were missing and the evidence of income or expenditures almost wholly conjectural. All in all, there is no appeal to a court of equity in a demand for more than $100,000 arising out of a technical trust alleged to have been involuntarily created some 25 years ago, involving a sum of $500, and particularly where the actual state of mind or knowledge on the part of the plaintiff is withheld.

In our opinion the judgment should be reversed, on the appeal of the defendant. This leaves nothing further to be done in respect to the appeal of the plaintiff. The judgment is not reversed on the plaintiff's appeal and obviously it cannot be affirmed on that appeal. In its entirety the judgment is reversed, and if express order is necessary, it is ordered that for all intents and purposes the judgment, being reversed, no longer serves as the basis for any claim on behalf of plaintiff.

We concur: TYLER, P. J.; KNIGHT, J.

101 Cal. App. 374

O'NEILL et al. v. HICKS et al. (Civ. 6246.)

District Court of Appeal, Second District, Division 2, California. Oct. 21, 1929.

Appeal and error 🔑78(3)—Judgment merely reciting that demurrer to complaint was sustained, without containing adjudication as to dismissal or costs, held not appealable.

Judgment which merely recited that demurrer of defendants to plaintiffs' complaint was sustained without leave to amend, without adjudication that plaintiffs take nothing, or that demurring parties recover costs, or that action be dismissed as to them, *held* not appealable.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by William J. O'Neill and others against Lee J. Hicks and others. Judgment for defendants, and plaintiffs appeal. Appeal dismissed.

Killian & Bentson, of Los Angeles, for appellants.

Willis O. Tyler, of Los Angeles, for respondents.

IRA F. THOMPSON, J. A complaint seeking to enjoin 20 named defendants and a large number sued by fictitious names from violating certain restrictions, alleged to have been imposed by agreement upon about 100 lots in Hopper & Sons Western Avenue tract in the city of Los Angeles, was filed in the court below. Eleven of the defendants interposed a general and special demurrer, which was sustained without leave to amend. Thereafter the judge signed a document, entitled "Judgment Sustaining Demurrer," which, after reciting preliminary matters, reads as follows: "The demurrer of defendants to complaint of plaintiffs is sustained without leave to amend." This is the purported judgment from which the plaintiffs appeal.

There is no adjudication that plaintiffs take nothing from the named defendants, or that the demurring parties recover their costs, or dismissing them from the action. In De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717, 719, we read: "An order sustaining a demurrer is not a judgment, and does not have the effect of finally and irrevocably dismissing the demurring party from the action. 'It may form the basis for rendering a judgment, but it is not itself a judgment' (Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571), is not appealable, and can be reviewed by an appellate court only on appeal from a final judgment subsequently given. Upon such an order being made without leave to amend, or where it is made with leave to amend, and no amendment is made, the party whose demurrer has been sustained may become entitled to a judgment, which may effectually bar further proceedings against him in the matter from which he has been dismissed. In the absence of such a judgment, however, the mere order constitutes no bar, and if, at any time prior to judgment, it is made to appear to the court that a complete determination of the controversy cannot be had without the presence of such party, we can conceive of no good reason why the court may not make such orders as will have the effect of bringing such party into the action again. He has never really been effectually dismissed from the action, and technically speaking is not a new party at all; but the order sustaining his demurrer has the effect of relieving him from the necessity of further defending, in the absence of subsequent action by the court." Or we may liken the order sustaining a demurrer to any other order made during the progress of the case, which may, if further light be shed upon the subject, be reversed or modified. People v. Lucas, 78 Cal. App. 421–425, 248 P. 691. We also make reference to the case of People v. Carillo, 66 Cal. App. 146, 225 P. 475, and cases there cited, as covering the same principles.

The appeal is dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 330

BARLOW v. SOUTHERN TRUST CO. (Civ. 3895.)

District Court of Appeal, Third District, California. Oct. 18, 1929.

1. Trusts 🔑117—Conveyances to trust company and trust agreement respecting property held to be considered as parts of single transaction.

Conveyances to trust company and trust agreement respecting property conveyed *held* to be considered as parts of single transaction, so that, if trust was void, whole transaction was void, where deed was dated April 25, acknowledged April 27, and recorded April 29, and trust agreement was dated April 29.

2. Trusts 🔑72—Resulting trust is presumed in favor of company paying consideration for transfer of property to trust company.

Where property was conveyed to trust company, resulting trust will be presumed in favor of company which paid entire consideration for transfer without regard to trust agreement.

3. Banks and banking 🔑95—Bank held not required to sell property held in trust, under statute protecting stockholders and creditors (Bank Act, § 54).

Under Bank Act, § 54 (St. 1917, p. 622), bank *held* not required to sell property which it holds in trust and in which it has no beneficial interest, since provisions of such statute were written for benefit and protection of stockholders and creditors of bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Charles Henry Barlow against the Southern Trust Company to compel sale of minerals and mineral rights reserved on sale of real property. Judgment for defendant, and plaintiff appeals. Affirmed.

James W. Bell, of Los Angeles, for appellant.

Newlin & Ashburn and W. C. Mathes, all of Los Angeles, for respondent.

FINCH, P. J. The complaint alleges that the defendant is engaged in the general banking business under the banking laws of this state; that in the year 1907 it became the owner of a tract of land described in the complaint; that in the year 1911 it conveyed the land to the plaintiff, reserving and excepting all minerals and mineral rights therein; that its title to and ownership of such minerals and mineral rights have continued for more than five years; that such property "is not necessary for carrying on its business, and is in contravention of section 54 of the Bank Act" (St. 1917, p. 622), and that the plaintiff desires to purchase the minerals and mineral rights reserved by the defendant. The prayer is for a judgment compelling the defendant to sell the property so reserved.

The answer, filed by the Security Trust & Savings Bank, alleges and the proof shows that the defendant, on December 3, 1921, became merged into the Security Trust & Savings Bank, to which all the assets and liabilities of the defendant have been transferred and that neither corporation at any time owned or claimed any interest in the property for its own benefit and that the "Security Trust & Savings Bank does not now own, hold or claim or assert any right, title or interest in or to the said property, or any part thereof, except as trustee for another."

The deed conveying the property to the defendant was dated April 25, 1907, acknowledged April 27, 1907, and recorded April 29, 1907. There was admitted in evidence a trust agreement, dated April 29, 1907, executed by the defendant's grantors as trustors, the defendant as trustee, and the Atlantic & Pacific Fibre Importing & Manufacturing Company as beneficiary, which agreement contained the following:

"The trustee has received and accepted two deeds, dated April 25, 1907, made and executed by the trustors, conveying to said trustee that certain real property (describing the lands in controversy and other lands). The interest of the said trustors by virtue of said deeds has passed to and is now vested in the said trustee. The entire purchase price and consideration paid the trustors for the said property was paid by the said beneficiary, and no part of said purchase price or consideration was paid by the trustee herein, and the said trustee therefore holds and will hold said property in trust for the said beneficiary for as long a time as the said beneficiary desires the said trustee to hold said title, and the said trustee will transfer, sell, lease, dedicate or otherwise dispose of the said property upon the written request of the said beneficiary."

The trust officer of the Security Trust & Savings Bank testified that such corporation "does not claim or assert any right to the real property described in the complaint other than under the provisions of the (trust) agreement."

Judgment was entered in favor of the Security Trust & Savings Bank for costs of suit, and the plaintiff has appealed.

[1, 2] Appellant contends that the trust agreement is void. It need not be determined whether or not that agreement is void. The conveyances to the defendant and the trust agreement must be considered as parts of a single transaction. Younger v. Moore, 155 Cal. 767, 771, 103 P. 221. If the trust is void, the whole transaction is void, and no title passed to the trustee. Ruddick v. Albertson, 154 Cal. 640, 98 P. 1045. Without regard to the trust agreement, a resulting trust is presumed in favor of the Atlantic & Pacific Fibre Importing & Manufacturing Company from the payment by it of the entire consideration for the transfer of the property to the defendant. Civ. Code, § 853.

[3] Section 54 of the Bank Act (St. 1917, p. 622) provides that all real estate "owned or held" by a bank, "which is not necessary for carrying on its business, must be sold or exchanged for other real estate by such bank within five years after title thereto shall have vested in it by purchase or otherwise; * * * Parcels of such real estate not sold or exchanged within said time may be purchased by any person wanting the same upon the conditions and proceedings following: The intending purchaser may file a petition in the superior court in and for the county wherein said real estate or any portion thereof is situated; upon the filing of such petition a citation shall be issued out of said court directed to the bank owning such real estate requiring such bank to show cause * * * why commissioners should not be appointed by said court for the purpose of appraising the value of the real estate described in the petition and of selling the same at public auction under the provisions of this section. * * * If it shall appear at the hearing of such petition that the real estate therein sought to be purchased is held by such bank in violation of the provisions of this section or of the constitution of this state, the court shall appoint three commissioners to appraise the value thereof and sell the same at public auction * * * In case of any sale made under the provisions of this section and of the refusal of any bank owning such real estate * * * to execute the conveyances

or releases necessary or proper to vest the title of such bank, * * * in the purchaser thereof the court shall have power in such proceedings to direct said commissioners to execute such deeds, conveyances or releases upon the payment to them of the purchase price therefor."

It has been said that "the provisions of the Bank Act were written for the benefit and protection of the stockholders and creditors of the bank." Patterson v. Southern Trust Co., 80 Cal. App. 411, 414, 251 P. 938, 939. That purpose would not be furthered by requiring a bank to sell property which it holds in trust and in which it has no beneficial interest. The language of section 54 indicates that its provisions were not intended to apply in a case such as this. Notice of the application is to be directed only to "the bank owning" the real estate. The commissioner is to execute a conveyance to the purchaser in the event of the refusal of the "bank owning such real estate" to make the conveyance. The conveyance is to be such as to vest "the title of such bank" in the purchaser. If a bank holds real estate in trust in violation of law, other remedies may be provided or invoked, but it seems clear that section 54 of the Bank Act was not intended to apply in such a case.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

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101 Cal. App. 195

DEACON v. DEACON et al. (Civ. 3653.)

District Court of Appeal, Third District, California. Oct. 14, 1929.

1. Appeal and error 🔑707(1)—Question of stipulated judgment, where record on appeal did not indicate any stipulated order or decree, held not presented for review.

Where there was nothing in record on defendant's appeal in action for an accounting and partition which indicated in any particular that single order or decree made by trial court was based on any kind of agreement or stipulation, no question of agreed or stipulated judgment was open for consideration.

2. Divorce 🔑322—Husband and wife 🔑272(4)—Husband and wife, after divorce decree not mentioning community, were tenants in common, and wife was entitled to maintain partition proceedings (Code Civ. Proc. § 752).

Where decree of divorce was granted, without any mention of community property of husband and wife, their relationship thereto immediately became that of tenants in common, entitling wife to institute and maintain partition proceedings, under Code Civ. Proc. § 752.

3. Husband and wife 🔑272(4)—Wife, after divorce decree not mentioning community, held entitled to maintain partition, irrespective of manner in which community was managed by husband under separation agreement (Code Civ. Proc. § 752).

Under Code Civ. Proc. § 752, entitling tenants in common to institute and maintain partition proceedings, wife, after decree of divorce was granted without any mention of community property, *held* entitled to institute and maintain partition proceedings as tenant in common, irrespective of manner in which community property was managed by husband under separation agreement.

4. Husband and wife 🔑272(4)—Satisfying mortgage on homestead set aside to wife under separation agreement out of proceeds of sale of community property held not improper.

Where separation agreement between husband and wife before divorce obligated husband to discharge mortgage on homestead set aside to wife, which husband failed to do, satisfying such mortgage out of proceeds of sale of part of community property, in action for partition and accounting, before dividing proceeds, *held* not improper.

5. Husband and wife 🔑272(4)—Attorney's fees in action for accounting and for partition held improperly allowed, so far as accounting proceedings were concerned.

In action for accounting and for partition of community property after separation agreement and divorce, attorney's fees, so far as accounting proceedings were concerned, *held* improperly allowed, since court had no jurisdiction to allow attorney's fees in action for accounting.

6. Husband and wife 🔑272(4)—Fact that community estate sought to be partitioned was bankrupt to large extent should be considered in allowing attorney's fees (Code Civ. Proc. § 796).

In action for partition of community estate, fact that referee's report shows bankruptcy of estate to extent of several thousand dollars should be considered in allowing attorney's fees under Code Civ. Proc. § 796, authorizing court on partition to include reasonable counsel fees expended by plaintiff or either of parties for community benefit.

7. Husband and wife 🔑272(4)—Husband's contention that decree in accounting and partition action took away possession of community vested in him by separation agreement held without merit.

Contention by husband that decree in action for accounting and for partition of community property, after separation agreement and divorce took away possession and control of community property vested in him by separation agreement, *held* without merit, where property agreement failed to mention subject of possession of property of which parties after decree of divorce became tenants in common, further than to provide that parties should cooperate in disposition thereof.

8. Appeal and error ⚷1172(2)—Contention that decree should be reversed, because part was void, held without merit, where void part could be stricken without affecting material rights.

Contention that decree in action for partition and accounting of community property should be reversed, because decree imposed limitation on sale price of part of property which was beyond jurisdiction of court, *held* without merit, where portion of decree complained of could be stricken therefrom without affecting material rights of any of parties.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Clara E. Deacon against Daniel A. Deacon and another, in which A. R. Roark filed cross-complaint and complaint in intervention. From the judgment rendered, defendant Deacon appeals. Affirmed in part, and reversed and remanded in part.

Glen H. Munkelt, of San Diego, for appellant.

Sloane & Sloane, of San Diego, for respondent.

PLUMMER, J. This is an action for an accounting and partition of certain property described in the plaintiff's complaint. The record shows that on and prior to the 14th day of July, 1923, the plaintiff, Clara E. Deacon, and the defendant, Daniel A. Deacon, were husband and wife; that on said date an agreement settling and adjusting their property rights was executed and acknowledged. This agreement recited that the parties had separated on the 13th day of March, 1923, were living apart, and that an action for divorce had been instituted, and for the purposes of settling and adjusting the property rights of the respective parties it was agreed, among other things, that the defendant, Daniel A. Deacon, should pay to the plaintiff certain sums of money for her support, and for the support of the children, the issue of said marriage. Said agreement also provided that there should be set apart, and said agreement purported to set apart and convey to the plaintiff, as her separate property, a certain dwelling house, the furniture therein, and the lot upon which it is situated, the lot in question being described as the south 50 feet of the north 100 feet of lots 1, 2, 3, and 4 in block No. 456 of Seaman's addition to the city of San Diego. The agreement further provided that the mortgage incumbrance on said property in the sum of $2,500 should be assumed and paid by the defendant, Daniel A. Deacon. The agreement then provided for the setting aside to the defendant, Deacon, of certain property known as the south 25 feet in block 59, Horton's addition to the city of San Diego, and the store situated thereon, and the stock of merchandise then in said store building. The agreement then described other real property belonging to the parties entering into the agreement, and described the same as the community property of Daniel A. Deacon and Clara E. Deacon. It was further provided that the community property should be disposed of and applied to the payment of the community debts, and the excess, if any, divided equally between the parties entering into the agreement.

The record shows that, within a short time after the execution of this agreement, a divorce was granted to the plaintiff, Clara E. Deacon, from the defendant, Daniel A. Deacon. It does not appear that any mention was made of the community property in the decree of divorce, nor does it appear that the property settlement to which we have referred was considered by the trial court, or adopted as a settlement of the property rights of the respective parties in the decree of divorce granted as aforesaid. The record shows that the community property referred to remained in the possession of the defendant, Daniel A. Deacon, for about two years, during which time he collected the rents and profits thereof, and, according to the findings of the court, did not render any account of the same to the plaintiff in this action. In this connection, however, it may be stated that the defendant, Daniel A. Deacon, during said two years, applied the sum of approximately $16,000 toward the payment of the community debts existing on the 14th day of July, 1923. Upon the hearing of the action the trial court determined that an accounting should be had, and appointed a referee to take such an accounting and report to the court the condition of the accounts between the parties and the status of the community property. This report shows that at the date of the execution of the agreement referred to the community debts aggregated the sum of $36,945.43; that at the same date the possible community assets were of the value of about $29,300; that during the two years intervening between the execution of the property agreement and the beginning of this action the defendant, Daniel A. Deacon, had advanced out of his own property toward the payment of community debts the sum of $16,355.43, which was a charge against the community property. The record thus shows that at the date of the execution of the property settlement the liabilities of the community exceeded the assets in the sum of $7,645.43.

In the agreement settling the property rights there was listed as community property the undivided half of the westerly half of lots 7 and 8, block 60, Middletown, city of San Diego, upon which there was situated an apartment house known as the "Ivy Apartments," including as well a like interest in the furniture and furnishings in said apartment house. After the beginning of the action herein, as just mentioned, the defendant and cross-complainant, A. T. Roark, filed a complaint in intervention, setting forth his interest in said property, by which it appears, and also, as found by the court, he owned a one-half interest, subject to the payment by him of a mortgage existing on said property in the sum of $6,500, which he had assumed and agreed to pay.

The court, in its decree, after finding the status of the property, among other things, directed that the property which we have mentioned, and known as the "Ivy Apartments," be sold; that from the one-half interest of the said A. T. Roark in and to said property and the proceeds there be deducted, first, the sum of $6,500 on account of the mortgage thereon which he had assumed and paid. It was further provided in the decree that said property should not be sold, unless there could be obtained therefor a price of at least $14,000 in excess of the existing mortgage of $6,500 thereon, and the discharge and cancellation, in addition thereto, of the mortgage existing thereon in the sum which we have mentioned. The decree further provided that, out of the proceeds of the sale of said Ivy Apartments, the mortgage existing upon the homestead setting aside to the plaintiff, in the sum of $2,500, should be paid and discharged, being the mortgage which the defendant, Daniel A. Deacon, had assumed and agreed to pay in the agreement adjusting the community rights of the parties entered into on the 14th day of July, 1923. The decree then provided that all of the community real and personal property, other than the Ivy Apartments, should be set over and awarded to the said Daniel A. Deacon, subject to the obligations and liens existing thereon, and that the plaintiff, Clara E. Deacon, should forthwith execute a good and sufficient quitclaim deed or deeds and bill of sale conveying and transferring to said Daniel A. Deacon. all of said community property, and that the acceptance by said Daniel A. Deacon should be an assumption by him of the community indebtedness referred to in the decree, and that he should thereafter save harmless the said Clara E. Deacon from all liability arising therefrom. The decree then provided for the appointment of a referee to sell the Ivy Apartments, and the proceeds of the sale of said premises apportioned as directed in the decree, and then further ordered "that there be allowed and adjudged and paid as attorney's fees to Sloane & Sloane, as attorneys for the plaintiff in this action, the sum of $1,500.00; to Wright & McKee, as attorneys for defendant Daniel A. Deacon and the defendant the First Trust & Savings Bank of San Diego, the sum of $1,500.00." Costs were allowed the referee in the sum of $490. Likewise there was allowed, and made a charge against the community property, the sum of $200 for an abstract of title obtained by the plaintiff. The record further shows that Sloane & Sloane, as attorneys for the plaintiff, had obtained the sum of $607.29 on account of attorney's fees, out of the community property, which should be charged against them.

[1] In the order of the questions raised upon this appeal, we will first consider the contention of the respondents that the decrees entered in this proceeding were consent decrees; that is, that the parties to the action stipulated to the entry of the various decrees and the making of the various orders of the trial court, and therefore are bound by the same upon this hearing. While certain papers in connection with the motion heretofore made in this cause for a dismissal of the appeal indicate to some extent that the attorneys for the parties did stipulate, at least as to the form of the orders and decrees to be made, and that were made by the trial court, and to some extent that the substance of the decrees were stipulated and agreed to by counsel for the respective parties, there is absolutely nothing in the record upon this appeal which we can consider indicating in any particular that a single order or decree made by the trial court in this proceeding was upon any kind of an agreement or stipulation. The affidavits submitted upon the motion heretofore presented to the Supreme Court and denied, as appears in the case of Deacon v. Deacon, reported in 201 Cal. 190, 255 P. 798, are no part of the transcript upon this appeal, and therefore no question of an agreed or stipulated judgment is open for our consideration.

[2] We do not need to determine whether the property settlement, as evidenced by the agreement to which we have referred, constituted the plaintiff, Clara E. Deacon, and the defendant, Daniel A. Deacon, tenants in common, because it is evident that, when the decree of divorce was granted without any mention of the community property of the defendants, their relationship thereto immediately became that of tenants in common. See Estate of Brix, 181 Cal. 667, and cases cited on page 676, 186 P. 135, 138. Under the provisions of section 752 of the Code of Civil Procedure, tenants in common are entitled to institute and maintain partition proceedings. This section of the Code answers the contention of the appellant that partition proceedings cannot be maintained in actions such as are presented upon this appeal.

[3, 4] We come next to that provision of the decree of partition which provides for the disposal or sale of the Ivy Apartments and the application of the proceeds. The appellant contends that the court had no authority to direct that out of the proceeds the mortgage on the homestead set aside to the plaintiff should be first discharged. This was an obligation resting upon the defendant, Daniel A. Deacon, and we do not very well see how he is in any wise prejudiced by this provision in the decree. True, there is no finding in the decree that the defendant, Deacon, had been remiss in any particular in his manage-

ment of the community property, or of the property in which he and the plaintiff were in law tenants in common; but under the provisions of section 752 of the Code of Civil Procedure the plaintiff had a right to institute and maintain partition proceedings, irrespective of the manner in which the business was being conducted by the defendant, Daniel A. Deacon, and the argument of the appellant in this particular need not be considered or further referred to in this opinion. The agreement obligated the defendant, Daniel A. Deacon, to discharge such mortgage, and therefore it was proper for the trial court, upon ordering the sale of the Ivy Apartments, to decree that out of the proceeds this mortgage should be paid, and the proceeds divided in the manner set forth in the decree, which followed the terms of the agreement, save and except that it provided for the payment of the referee's costs and the attorney's fees, which we have heretofore mentioned.

[5, 6] The appellant further contends that the court had no jurisdiction to allow the sum of $1,500 as attorney's fees to Sloane & Sloane as attorneys for the plaintiff in this action, nor to allow Wright & McKee, as attorneys for the defendant in this action, the sum of $1,500. Section 796 of the Code of Civil Procedure allows a court, upon partition, to include reasonable counsel fees expended by the plaintiff, or either of the parties, for the common benefit, fees of referees, and other disbursements. There is no finding to the effect that any attorney's fees have been expended or obligations for attorney's fees incurred by any of the parties, for the benefit of any of the parties. While the section to which we have referred does purport to allow attorney's fees in partition proceedings, there is no provision in the Codes allowing attorney's fees for an action seeking an accounting. The decree of the court does not purport to fix the attorney's fees for the partition part of the action.

The action is twofold in its nature, really an action for an accounting, and then an action for partition. So far as the accounting proceedings were concerned, the court had no jurisdiction to allow attorney's fees. The record in this case shows and establishes beyond doubt that practically all of the services rendered by counsel were connected with the accounting proceedings. The partition relates to only one piece of property, and while the court had jurisdiction to allow compensation for the services, in so far as it pertained to the partition of the particular property decreed to be partitioned, or rather sold, and the proceeds divided, it could not make an allowance of a lump sum covering the attorney's fees for the entire action. The record fails to show, as we have said, that the court made any finding as to the fact of any expenditures having been made or incurred for the common benefit of the plaintiff or either of the parties. The only possible benefit that the record shows rendered in this case for any of the parties is that portion of the decree providing that, "when the Ivy Apartments are sold, $2,500.00 of the proceeds shall be applied to the payment of the mortgage subsisting upon the homestead further set aside to the wife." The decree leaves the remainder of the property practically in the status where it was found, though it does show that the defendant advanced a considerable sum of money toward paying off the community obligations.

By reason of the order hereinafter to be made, we do not deem it necessary to discuss the contention of the appellant that the allowance of attorney's fees is excessive, but will content ourselves with the statement that in the allowance of attorney's fees for the services performed by the attorneys in this case, in so far as it related to the partition, or rather sale, of one piece of property, the court should consider the fact that the referee's report shows the bankruptcy of the estate to the extent of several thousand dollars.

[7, 8] Returning again to that portion of the decree relating to the execution of deeds and bills of sale by the plaintiff to the defendant, Daniel A. Deacon, it is evident that no injury can be suffered by him, for the simple reason that the decree does not make it obligatory upon him to accept the deed under the conditions there mentioned. The contention of the appellant that the decree takes from the possession of the defendant, Daniel A. Deacon, the management and control of the community property vested in him by the agreement entered into between him and the plaintiff, does not appear to be well taken. The property agreement fails to mention the subject of possession of the property of which the parties, after the decree of divorce, became tenants in common, further than to provide that both parties should co-operate in the disposition thereof. The limitation as to the sale price of the Ivy Apartments, though appearing to be beyond the jurisdiction of the court, as the court has full power to determine the adequacy of the price paid for the property upon return of the sale, appellant's contention that the judgment should be reversed for that reason is not tenable, as it may be stricken therefrom without affecting the material rights of any of the parties.

It follows, from what has been said, that the judgment of the trial court is affirmed, save and except as to that portion thereof providing for the payment of attorney's fees, and also that portion limiting the sale price, which is hereby stricken from the decree. As to that portion fixing the attorney's fees, the judgment is reversed and remanded to the lower court for further proceedings. The appellant will have and recover his costs on appeal, but such costs are hereby made a charge against the community property, payable out of the proceeds, if any there be, after the discharge of the community obligations found to be existing as of the date of July 14, 1923.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

208 Cal. 447

MONROE v. GROLIER SOCIETY OF LONDON. (L. A. 9989.)

Supreme Court of California. Oct. 28, 1929.

1. Master and servant 🔑70(2)—General agent of book company having charge of sales and collections held not entitled to commissions on collections after termination of employment, notwithstanding collections represented sales during employment.

Under contract of employment whereby plaintiff was engaged as general agent for defendant, having management and control of sale of books and collection of purchase price, and was to be paid commission on all net collections after deduction of discounts, *held* that plaintiff was not entitled to commissions on payments made after termination of contract on sales made during term of contract.

2. Contracts 🔑147(3)—Intention of parties must be gathered from contract construed as whole.

A contract must be construed as a whole, and intention of parties collected from entire instrument, not from detached portions.

3. Master and servant 🔑50—Business and duties of employee may be considered in construing contract, where writing relates only to compensation (Civ. Code, § 1647).

Where writing relates only to compensation of employee, his business and duties, so far as necessary to determination, may be considered in arriving at true construction of contract of employment, in view of Civ. Code, § 1647.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by H. R. Monroe against the Grolier Society of London, a corporation. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

For opinion of District Court of Appeal, see 277 P. 1105.

Brown & Bissell and Leet W. Bissell, all of Los Angeles, Wm. R. Crawford, Jr., of New York City (J. Fearon Brown, of New York City, of counsel), for appellant.

Erwin P. Werner, of Los Angeles, for respondent.

PER CURIAM. Petition for hearing after decision of the District Court of Appeal, Third Appellate District, Plummer, J., writing the opinion of the court. Upon a more thorough investigation of this case than we were able to give it on the petition for hearing, we have concluded that the decision of the District Court of Appeal fully and correctly decided the cause, and we therefore adopt its opinion as the decision of this court.

Plaintiff had judgment against the defendant in this action for the sum of $2,180.68 alleged to be due as commissions earned on a certain contract of employment hereinafter set forth. From this judgment the defendant appeals.

The plaintiff in his complaint asks for the sum of $3,099.78, against which the court allowed a counterclaim or offset in favor of the defendant in the sum of $919.10. The defendant, in its answer, set up a counterclaim against the plaintiff in the sum of $795. This counterclaim was allowed in the amount just stated, as an offset to plaintiff's demand.

The record shows that the defendant is a corporation engaged in the business of selling books; that during the time hereinafter mentioned the plaintiff was employed by the defendant as the general agent of the defendant, having the management and control of the sale of books and the collection of the purchase price thereof from the persons to whom books were sold. The method of conducting the business is not disclosed by the record, but there is sufficient to lead to the conclusion that books were sold upon the installment plan, and it was the duty of the plaintiff to supervise the sale and distribution of books and to look after the collection of the installments to be paid by purchasers to whom books were sold. In other words, the record shows that the plaintiff had at least two important duties to perform—first, to make sale of books; second, to attend to collection of the purchase price of the same. The extent of the agency is not disclosed by the record, further than that the evidence would indicate that the territory over which the plaintiff had supervision included the state of California and part of the state of Oregon, as the documents in the record refer to Los Angeles, San Francisco, and Portland. The record shows that considerable correspondence was had prior to reducing the terms of the employment to writing, and that finally the parties came to an agreement which was and is embodied in the following instrument:

"The Book of Knowledge
The Children's Encyclopedia
The Grolier Society
2 West 45th Street
New York

"Telephone: 0200 Vanderbilt June 23, 1922.

"Mr. H. R. Monroe. Dear Sir: Confirming our conversation we agree to pay you four per cent. (4%) on all net collections (after the discount has been deducted) on all business which was booked prior to October 1, 1921.

"On all business booked subsequent to October 1, 1921, we will pay you a commission of two per cent. (2%) on all net collections after the discounts have been deducted, with the exception of orders where the total collections have not exceeded fifteen per cent. (15%) of the contract price. In other words, on a $65.00 account, accompanied by a $4.00 payment, no commission would be due you on such collection until after the third payment of $4.00 has been made. The commission is then due you on these three payments the same as on subsequent payments—settlements to be as of October 1, 1922, and March 1, 1923.

"This agreement is retroactive to October 1, 1921, and terminates February 28, 1923.

"Yours very truly,
"The Grolier Society,
"A. E. Smith.

"Accepted by H. R. Monroe."

The record shows a stipulation to the effect that the plaintiff's employment was continued under the foregoing contract to and including the 30th day of September, 1923. The plaintiff, under this agreement, was employed as a resident manager of the San Francisco office which controls the western territory or what is known as the western territory.

[1-3] The subject of dispute in this action is the compensation to which the plaintiff is entitled on business booked subsequent to October 1, 1921. The trial court accepted the theory that the plaintiff was entitled to 2 per cent. on all net collections on business booked subsequent to October 1, 1921, irrespective of whether collections were or were not made during the period for which the plaintiff was employed; in other words, that the plaintiff was entitled to 2 per cent. of net collections, irrespective of whether collections were made by him or by some one else after his employment had terminated. The appellant contends that, as the plaintiff had the duty of making collections as well as the duty of making sales, his sales and collections during the period of his employment were concurrent duties, and that the plaintiff was an is entitled only to 2 per cent. on all net collections made by him on business booked subsequent to October 1, 1921, and prior to the 30th day of September, 1923, and in furtherance of this contention appellant calls attention to the fact that the first clause of the employment, to wit, that clause which specifies that the plaintiff should receive 4 per cent. on all net collections, less certain discounts, on all business which was booked prior to October 1, 1921, indicates and shows the intent of the parties in entering into the agreement that collections and commissions went together (that is, that the right to commissions was dependent upon collections); otherwise, the defendant, on old business, would be paying double commissions, to wit, 4 per cent. to the plaintiff and whatever per cent. had been agreed upon to the predecessor of the plaintiff. To understand the meaning of the terms used in the writing which we have set forth, it is necessary to bear in mind that the collections were just as important a branch of the business to be managed by the plaintiff as that of making sales. If the collections were not properly attended to, the sales would prove profitless. If sales were made to hazardous risks, or, in other words, to persons from whom collections could never be made, there would be no profit either to the defendant or to the plaintiff, and thus, the intention is enforced, by the very terms of the contract, that collections and commissions should go together, and that the contract, taken as a whole, means this, that "on all business booked subsequent to October 1, 1921, we will pay you a commission of 2 per cent. on all net collections made by you after the discounts have been deducted," etc., this, to insure efficient management on the part of the plaintiff. Any other construction would lead to this: That the plaintiff might devote his entire time and attention to the sales department of the undertaking, leaving the collections not attended to, and then, at the expiration of the term of his employment, retire and quietly await the collections made on the sales during his administration, and demand his 2 per cent. If it had been the duty of the plaintiff only to make sales, then this construction might be held permissible, but, in view of the fact that the plaintiff had a double duty to perform as manager of the company, we conclude that sales and collections were joint duties and obligations, and began and ended with the beginning and termination of the contract of employment. As said in 13 C. J. 625, § 486: "A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument, and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part, as well as the whole. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect." In construing the writing involved in this action, as we have said, it is necessary to look into the business to conduct which the plaintiff was being employed. The writing itself only relates to compensation. The business and the duties of the plaintiff, so far as necessary to a determination of this cause, are set forth in the record, and the plaintiff was required to attend to all the business as manager, and not to a part, and the intent of the instrument, as we have said, was to secure efficient management and encourage the plaintiff, not only in making sales, but in making collections. This is apparent from the correspondence set forth in the record.

A somewhat similar contract was involved in the case of Ortega v. Collins New Medical Institute, 127 App. Div. 293, 111 N. Y. S. 427, and it was there held that "one employed to carry on business correspondence in a foreign language under a contract giving him a certain sum per year and a special commission on all receipts in his department, settlements of his compensation to be made monthly, is not, after his discharge, entitled to commissions on moneys received on business procured by him during the employment." Likewise, in the case of Crum v. Murray (C. C. A.) 102 F. 92, where it was held that a contract for commissions for services read, "80 per cent. of the first month's dues collected, 5 per cent. of the succeeding months' dues collected, $7.50 per share flat for fully-paid stock," and "1 per cent. of all dues collected after the first" of the month, did not apply to, and did not give to the person employed any right to dues collected after the termination of the contract. While the contracts involved in those cases, as we have said, differ somewhat from their terms from the one under consideration, they are in substance the same in relation to the compensation to be paid for the services to be performed. Again, as provided by section 1647 of the Civil Code: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Thus, the matter to which the contract we have to consider relates to the performance of the duties which we have herein specified, and when read in the light of the duties to be performed, we conclude that there is no ambiguity in the instrument relating to the plaintiff's compensation, and that he was to be compensated for the duties performed by him, and not for the duties left unperformed; that is, his failure to make collections during the term of his employment. This is further evidenced, as we have hereinbefore said, by the fact that the plaintiff was employed to perform duties left unperformed by his predecessor, and paid a separate compensation therefor.

The record shows that the defendant's counterclaim for $769.10 was for overpayments made by the defendant to the plaintiff, on account of drafts drawn by the plaintiff in excess of the amount to which the plaintiff was entitled under the contract set forth herein, and that the court found said amount justly due the defendant, and that there were some other items considered by the court which increased the counterclaim allowed to the sum of $919.10. As to these items the record gives us no information, and, for the purposes of terminating this litigation without further trial, we will act upon the appellant's request and accept the figures set forth in the defendant's answer as a counterclaim, and direct judgment in its favor therefor.

It follows from what has been said that, the error of the trial court consisting only of a misconstruction of the contract, no further proceedings need be had.

The foregoing consideration of the cause impels a reversal of the judgment and a direction to the trial court to enter judgment in favor of the defendant for the amount of its counterclaim set forth in its answer, to wit, in the sum of $769.10, and costs.

It is so ordered.

PEOPLE v. REILLY. (Cr. 3245.)★

Supreme Court of California. Oct. 18, 1929.

Rehearing Denied Nov. 14, 1929.

1. Criminal law ⟹723(1)—Court properly limited scope of defendant's counsel's argument in murder trial to effect that neighbors would ask jurors about verdict.

In murder prosecution, court properly limited scope of defendant's counsel's argument to jury to effect that trend of time was away from death penalty, and that, after jury had sat upon case and returned verdict, their neighbors, friends, and acquaintances would ask them something about verdict.

2. Criminal law ⟹723(1)—In murder prosecution, court properly directed defendant's counsel to refrain from argument sketching word picture of execution scene.

In prosecution for murder, court did not abuse discretion in directing defendant's counsel to refrain from argument sketching for jury, in vivid and harrowing detail, a word picture of execution scene, for which they would be responsible if they permitted death penalty to be imposed upon defendant.

3. Criminal law ⟹730(7)—District attorney's argument that defendant was hardened criminal and "I know things that you don't know—" held not prejudicial, after objection sustained and jury cautioned.

In murder prosecution, district attorney's remarks in argument to jury that he had said that defendant was a hardened criminal and "I know things that you don't know—" *held* not prejudicial error, where court sustained objection to last sentence and instructed jury to disregard remark.

4. Criminal law ⟹1037(2)—District attorney's argument it was common knowledge that life sentence meant defendant would serve a while and be "turned out" held not reversible error without objection or request.

In murder prosecution, remark of district attorney that it was matter of common knowledge that sentence of life imprisonment meant that defendant would serve from seven to ten years and then be "turned out" on society *held* not reversible error, where no objection was made to remark and no request was made that jury be admonished to disregard statement.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Alphonse Reilly was convicted of murder in the first degree, and he appeals. Affirmed.

G. A. Benedict, Richard F. Bird, Frederic H. Vercoe, Public Defender, and Franklin Padan, Chief Deputy Public Defender, all of Los Angeles, for defendant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Thurmond Clarke, both of Los Angeles, for the State.

★Rehearing denied.

LANGDON, J. The defendant was convicted of murder in the first degree and sentenced to suffer the death penalty, the jury having made no recommendation of life imprisonment. He has appealed from the judgment, but does not contend that the offense was not committed by him nor that the crime was not murder in the first degree. The killing occurred in the commission of a felony and there is no dispute about the facts of the case.

[1] The only point made upon the appeal is that a new trial should be granted because, it is contended, that the jury was prevented, by certain matters to be hereinafter mentioned, from giving to the question of the proper penalty to be inflicted unbiased consideration. This contention is made, first, because the court limited the scope of the argument of defendant's counsel to the jury. A reference to the transcript discloses that the limitation was properly imposed. Counsel sought to urge before the jury that "the trend of the time is away from the death penalty. Whatever your verdict in this case is going to be, after you have sat upon the case and returned that verdict your neighbors, your friends, perhaps your acquaintances, are going to ask you something about that verdict." A mere reading of this line of argument discloses that it is improper. Juries are not to be influenced by the opinions of their neighbors, friends, or acquaintances.

[2] The attorney for the defendant also attempted to sketch for the jury, in vivid and harrowing detail, a word picture of an execution scene, for which they would be responsible if they permitted the death penalty to be imposed upon defendant. In directing counsel to refrain from this line of argument the court we think did not abuse its discretion.

[3] It is also contended that the district attorney committed prejudicial error in the course of his argument to the jury by using the following language: "Mr. Benedict has told you that I have said, and correctly, he told you I said that this defendant is a hardened criminal. I know things that you don't know—" To the last sentence objection was properly made. The objection was sustained, and the court instructed the jury to disregard the remark. Under the circumstances, the error would not warrant a reversal of the judgment. In the light of the entire record, it is clear that this remark did not influence the action of the jury.

[4] The other remark of the district attorney, which is assigned as error, was to the effect that it was a matter of common knowledge that a sentence of life imprisonment in this state means that a defendant will serve from seven to ten years and then be "turned out" on society. It is unfortunate that such overzealous argument sometimes occurs in the course of a criminal trial, but no objection was made thereto, nor was any request made that the jury should be admonished to disregard this statement, and, in view of the entire record in this case, we cannot say that a different result would have followed had this statement been omitted.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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208 Cal. 394

In re ROACH'S ESTATE.

ROACH v. ROACH.

(S. F. 13315.)

Supreme Court of California. Oct. 22, 1929.

Executors and administrators 🔑69—One opposing setting aside of entire estate to widow may show deed by deceased to wife shortly before death, while mentally incapable (Code Civ. Proc. § 1469).

On hearing to determine whether entire estate of deceased should be set aside to widow, under Code Civ. Proc. § 1469, it could be shown that deceased, shortly before death, while under influence of narcotics and mentally incapable, was influenced to execute deed, not recorded until after his death, of certain real property to wife, since probate court has jurisdiction to determine, as against administratrix, amount of money or property of estate that has come into her hands, for purpose of charging her therewith, and in determining such question to determine all issues necessarily incidental thereto.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Joseph Roach, deceased. From an order setting aside the entire estate to Marie Roach, the widow, Joseph Francis Roach appeals. Reversed.

Superseding Opinion of District Court of Appeal in 279 P. 817.

Matthew A. McCullough, of San Francisco, for appellant.

Kington & Cunningham, of San Francisco, for respondent.

PRESTON, J. The order appealed from is reversed. On March 3, 1928, Joseph Roach died intestate in the city and county of San Francisco, leaving surviving him a widow, respondent herein, their minor daughter, and, by a former marriage, a 30 year old son, appellant herein.

Respondent, upon proceedings in due form, having been appointed administratrix of the estate of said deceased, filed therein her duly approved inventory, listing as the entire estate the following items: $1,510.22 in money,

$250 in bonds, and an automobile appraised at $500, all stated to be community property of herself and said deceased. Thereafter she petitioned, under section 1469 of the Code of Civil Procedure, to have set over to her the whole estate, the net value of which did not exceed $2,500, but, after deduction of costs and expenses, was about $1,500.

Appellant thereupon filed his objections to the inventory and his petition for the removal of said administratrix upon two general grounds, to wit: First, her failure to account for, report, or inventory certain real estate, which at the time of his death was the separate property of said deceased; and, second, her failure to account for the sum of approximately $9,000, also the separate property of deceased, which was carried in their joint names in a certain bank, from which it was withdrawn by said administratrix and converted to her own use.

Upon the hearing, appellant placed on the stand as his first witness the pharmacist who had filled the physician's prescriptions during the last illness of deceased, preparatory to offering further proof by which he intended to show that deceased, shortly before his death, while under the influence of narcotics and mentally incapable, had been influenced to execute a deed, not recorded until after his death, of certain real property to respondent, which property, so fraudulently procured, she had failed to include in the assets of said estate. The court, upon learning its purpose, stopped the examination of said witness, and refused to hear further testimony upon the subject. After considerable discussion, he ruled that the only remedy of appellant was a suit to set aside the deed, or some proceeding in equity, and he thereupon granted respondent's application, and made his order settling her account, discharging her as administratrix, and assigning the entire estate to her as the widow of said deceased, for the use and benefit of herself and said minor child. From said order, appellant thereupon pursued this appeal.

The above ruling of the court below was erroneous. It is now well settled that the court, sitting in probate, is clothed with jurisdiction to hear and determine, as against an administratrix the amount of money or property of the estate that has come into her hands, for the purpose of charging her therewith, and in determining that question to determine all issues necessarily incidental thereto. Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; Estate of Fulton, 188 Cal. 489, 205 P. 681; Bauer v. Bauer, 201 Cal. 267, 256 P. 820, 821; Estate of Kelpsch, 203 Cal. 613, 265 P. 214. In the case of Stevens v. Superior Court, supra, where an executor alleged that the testator, prior to death, had transferred certain money to him in his individual capacity, which he claimed as his individual property, it was held that the probate court had power to determine the title.

A similar conclusion is reached in the other cases cited, all of which are directly in point. Indeed, the facts of the Bauer Case and the doctrine there set forth are so pertinent that they will be reviewed briefly as decisive authority for the holding we here announce. In said case the deceased had executed and placed in his safe deposit box, without delivery to any one, a gift deed to defendant of certain real property, which deed, after his death, she procured and caused to be recorded, thereafter selling the land and claiming the sale proceeds as her individual property, failing to include either money or land in the inventory of the estate. Plaintiffs sought relief through an equitable proceeding. This court, affirming the action of the court below in sustaining a demurrer without leave to amend, and granting a motion to dismiss the cause, said:

"It is undoubtedly the rule that the superior court, sitting in probate, is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. Ex parte Casey, 71 Cal. 269, 12 P. 118; Estate of Haas, 97 Cal. 232, 31 P. 893, 32 P. 327. * * * It has, however, been held that when the title to property is claimed by a representative of an estate in his individual capacity the superior court, sitting in probate, is vested with the jurisdiction of determining the validity of such claim upon the settlement of the final accounts of such representative. Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; Estate of Fulton, 188 Cal. 489, 205 P. 681; 2 Woerner's American Law of Administration (3d Ed.) note, p. 1007; 3 Woerner's American Law of Administration, p. 1769."

The necessary effect of the above decision, in dismissing said proceeding in equity, is to vest in the probate court exclusive jurisdiction to hear and determine issues of this character. Had appellant followed the ruling of the lower court here, and instituted an equitable proceeding, it could, under the holding of the Bauer Case, only have met with dismissal, and his efforts to so secure relief would have been unavailing; hence our conclusion first herein announced.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

208 Cal. 387

PEOPLE v. KELLEY. (Cr. 3195.)

Supreme Court of California. Oct. 22, 1929.

1. Homicide 🔑233—Presence or absence of motive is only one circumstance to be considered in connection with others surrounding homicide.

Presence or absence of motive for homicide is only a circumstance to be considered by jury in connection with other circumstances in case.

2. Homicide 🔑233—Motive for homicide need not be proved, if homicide can otherwise be established by sufficient competent evidence to overcome presumption of innocence.

Where homicide can otherwise be established by sufficient competent evidence to overcome presumption of innocence, it is not necessary to prove motive, and defendant must stand convicted, notwithstanding no motive has been shown.

3. Criminal law 🔑1184—Where evidence sustains contention that crime charged was not established, appellate court need not reverse, but may modify judgment in degree (Pen. Code, § 1181, amended by St. 1927, p. 1037).

Contention that there is no evidence to establish charge set forth in indictment presents question of law, but, on appeal from conviction, court having jurisdiction need not reverse judgment of conviction, if evidence sustains contention, in view of Pen. Code, § 1181, amended by St. 1927, p. 1037, providing that, if evidence shows defendant guilty of a lesser degree of crime than that of which he was convicted, appellate court may modify judgment accordingly.

4. Criminal law 🔑1184—Appellate court, if it finds evidence justifies conviction of lesser degree than that charged, or some lesser and included crime, may direct modification of judgment (Pen. Code, § 1181, amended by St. 1927, p. 1037).

Under Pen. Code, § 1181, amended by St. 1927, p. 1037, providing that, if evidence shows lesser degree of crime than that of which defendant was convicted, appellate court may modify judgment accordingly without granting or ordering new trial, where appellate court finds evidence insufficient to justify conviction of crime charged, but sufficient to justify conviction of lesser degree or some lesser and included crime, it may direct modification of judgment without ordering new trial and remand cause for sole purpose of enabling trial court to prescribe proper penalty.

5. Homicide 🔑347—Where circumstances in record on appeal from conviction of murder established defendant did not commit murder, Supreme Court adjudged defendant guilty of manslaughter (Pen. Code, § 1181, amended by St. 1927, p. 1037).

Where record on appeal from conviction for murder firmly established that defendant caused death of deceased, but there was nothing in record showing that acts causing death were inflicted with that intent or malice aforethought necessary to constitute murder, nor that killing was willfull, deliberate, or premeditated, nor circumstances showing an abandoned and malignant heart, Supreme Court, under Pen. Code, § 1181, amended by St. 1927, p. 1037, adjudged defendant guilty of manslaughter, and remanded cause, with directions to pronounce judgment as prescribed by law.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Leo P. Kelley was convicted of murder in the first degree without recommendation, and he appeals. Modified and remanded, with directions.

S. S. Hahn, Dan Heyfron, and Orfa J. Shontz, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Asa Keyes, Buron Fitts, and Tracy Chatfield Becker, all of Los Angeles, for the People.

WASTE, C. J. The defendant was indicted for the murder of Mrs. Myrtle Mellus. The jury returned a verdict of murder of the first degree, without recommendation. The court below denied a motion for a new trial, and pronounced sentence and judgment imposing the death penalty, whereupon the defendant appealed from the judgment of conviction and from the order denying him a new trial.

The decedent, a married woman, 43 years old at the time of her death, although residing with her husband, had maintained illicit intimacy with the appellant, much younger, for a period of 4 or 5 years. The appellant was often seen in company with the woman, and was a frequent visitor at her home when her husband was away, and on those occasions they indulged freely in intoxicating liquor and in sexual intercourse. Mrs. Mellus gave the appellant presents of clothing and personal effects, and assisted him in making his own purchases. On the morning of Sunday, August 5, 1928, the husband of the deceased left home at an early hour, leaving the decedent and a maid in the house. He intended to be gone the entire day. The appellant was summoned by telephone to the Mellus home by Mrs. Mellus shortly after the husband's departure, and arrived there about two hours later. He found Mrs. Mellus, partially dressed, and, according to his own testimony, the two spent the forenoon of the day drinking whisky and indulging in sexual intercourse.

The woman's husband returned to his home about 5 or 5:30 o'clock in the afternoon. The doors of the house were locked or fastened on the inside, and he gained entrance through a window. On going upstairs, he found his wife lying on a bed, partially covered. Her body had been frightfully maltreated, and she was dead. Further discussion of the gruesome condition of the body is unnecessary, in view of the conclusions we have reached, in considering the appeal. Police officers, making a search of the house, found the appellant hiding in a closet. His face and body were scratched, and there was blood on the shirt he was wearing. Blood was also found under his finger nails. When asked "why he so brutally attacked her (the deceased)," he said he loved her too much to kill her, but finally admitted that "he mussed her up a bit." Beyond that, he made but few answers when closely questioned by the arresting officers as to what had occurred. When taken to the police station, he gave other details as to what he said had occurred during the day, but strenuously denied intentionally so injuring the decedent as to cause her death.

It is first contended by the appellant that there is no evidence to sustain the verdict of murder in the first degree, for it raises only a suspicion of guilt, and fails to show any motive for the crime. The record of the trial in the court below is contained in a transcript of nearly 2000 pages, from which it irresistibly appears that the appellant, and none other, inflicted the injuries on the woman which caused her death. No jury, in our opinion would ever find otherwise. The evidence of the defendant, that of the witnesses called in his behalf, and the circumstances of the killing relied on by him fail to remove the absolute conviction, established by the entire record, that Kelley inflicted the fatal injuries on Mrs. Mellus during a sexual debauch in which the decedent was a willing participant, and while the passions of both were probably more or less inflamed by the use of intoxicating drink. We are, at the outset of our consideration, therefore, satisfied that on the facts of the case the verdict of the jury was just, in so far as it found the defendant guilty of causing the death of Mrs. Mellus, and that from that point of view no miscarriage of justice resulted.

[1, 2] The conclusion we have reached on the point just discussed disposes, also, of the further contention of the defense that the evidence is insufficient to sustain the conviction because of the absence of proof of a motive. The presence or absence of a motive is only a circumstance to be considered by the jury in connection with the other circumstances in the case. People v. Weston, 169 Cal. 393, 397, 146 P. 871. It is essentially a question of fact, and, like every other fact, is not necessary to be proved, if the crime can othwise be established by sufficient competent evidence. The absence of proof of motive is a fact to be reckoned on the side of innocence; but, if the proof of guilt is, nevertheless, sufficient to overcome the presumption of innocence, the appellant must stand convicted, notwithstanding no motive has been shown. People v. Tom Woo, 181 Cal. 315, 328, 184 P. 389. The proof in this cause, that appellant inflicted the injuries that caused the death of the decedent, is so strong and convincing that any benefit the appellant could seek to allocate to himself by reason of the absence of a motive is entirely swept aside in so far as it might be claimed that he did not inflict the fatal injuries on the woman.

But another phase of the conviction of the appellant presents itself on this appeal, on which the absence of a motive has a bearing. On reargument the prosecution and the defense were asked to discuss the following question (among others): "In view of the absence of a motive, which is a circumstance in favor of the defendant, is the evidence sufficient to support a verdict of murder in the first degree, carrying the death penalty? Should the verdict of guilty have been of any greater degree than manslaughter?" But for a vital change recently made in the law relating to criminal causes in this state, this query would not have been propounded. People v. Durrant, 116 Cal. 179, 48 P. 75; People v. Peete, 54 Cal. App. 333, 202 P. 51; People v. Weston, 169 Cal. 393, 146 P. 871; People v. Tom Woo, 181 Cal. 315, 184 P. 389. Section 1181 of the Penal Code, as amended in 1927 (St. 1927, p. 1037), which must now be considered for the first time by this court, provides that, if the evidence (in criminal causes) shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof or of a lesser crime included therein, the trial court may modify the judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed. The meaning and purpose of the amendment are so clear that we need not consume time in discussing the reason for its passage, beyond saying that its application to many criminal prosecutions will prevent reversals and new trials. The section was amended after the decision in the case of People v. Nagy, 199 Cal. 235, 248 P. 906, in which this court was compelled to reverse the cause for an entire new trial when there was ample evidence that the accused committed arson of the second degree, but not of the first degree, as found by the jury.

[3, 4] The contention that there is no evidence to establish the charge set forth in the indictment presents a question of law, but, on appeal, the court having jurisdiction is no longer confronted with the necessity of reversing a judgment of conviction if it sustains the contention. If it finds the evidence insufficient to justify the conviction for the crime alleged in the indictment, but sufficient to justify the conviction of a lesser degree of the crime or of some lesser, and included crime, it need not set aside the verdict entirely, but may direct a modification of the judgment without ordering a new trial, and remand the cause to the trial court for the sole purpose of enabling that court to prescribe the proper penalty in punishment for the crime the appellate court finds to have been committed.

The prosecution concedes that to be the effect of the new law; but its answer to the question propounded for reargument was that, as the present amendment to the statute imposed a new duty upon the court, the prosecution declined to "express an opinion" as to what the court should do. We have approached the consideration of this new duty with a great deal of hesitation, not only because the duty is one not to be assumed lightly, but also because the amendment to the Code section marks a complete departure in our criminal jurisprudence, and one which on first impression seems a startling innovation in our procedure. It is a matter of regret that a case of such shocking details should be the first one in which the provision of the new law should be invoked; but we are convinced that, but for the miserable circumstances under which the crime was committed, and which no doubt outraged the moral sense of the people of the community in which it was committed, including the jurors, a verdict of murder would not, in all probability, have been rendered. It is in just such a case that the provisions of the new law may well be invoked.

[5] That a crime was committed, and that the appellant committed it, are firmly established by this record. We have therefore concerned ourselves with the degree or the extent of the crime which was committed. The injuries inflicted on Mrs. Mellus, and from the effects of which she died, were disgusting, bestial, and shocking. But there is nothing in the record from which it may with reason be argued that they were inflicted with that intent or that malice aforethought which is a necessary ingredient of the crime of murder. Nor can we bring ourselves to believe that there was a willful, deliberate, and premeditated killing. The prosecution, the defense, and all others connected with the cause are so familiar with the crime that an analysis of the evidence seems unnecessary. No express malice was shown, for there was not manifested a deliberate, or any, intention to unlawfully take the life of a fellow creature, and the circumstances attending the killing in this case, as proved, do not show an abandoned and malignant heart.

We have gone over the evidence in this case with minute care. The errors alleged to have occurred during the trial have not escaped our attention. Were we compelled, as formerly, to either affirm the judgment or reverse the case, we would be driven to the latter course because of prejudicial errors committed. Appellant was properly found guilty, on competent evidence, of a most serious offense, and the errors complained of did not, in our judgment, prejudicially contribute toward bringing about the finding that he killed Mrs. Mellus. No miscarriage of justice, therefore, resulted, except that, as a matter of law, the jury improperly fixed the degree of the crime and imposed the penalty therefor. That injustice may now be righted without subjecting the state and the defendant to the delay and expense of a new trial.

The judgment of the lower court of murder of the first degree is modified. The cause is remanded to the trial court with directions to enter a judgment against the defendant finding him guilty of manslaughter, and to thereupon pronounce judgment upon him as prescribed by law.

We concur: LANGDON, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

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208 Cal. 429

LOS ANGELES COUNTY v. JUSTICE'S COURT OF BEVERLY HILLS et al.

(S. F. 13659.)

Supreme Court of California. Oct. 24, 1929.

Justices of the peace 🔑31—Justices' courts must exercise jurisdiction, when political subdivisions in which they are located have required population, as determined in any proper manner (Code Civ. Proc. § 112, as amended by St. 1929, p. 834; Pen. Code, § 1425, as amended by St. 1929, p. 861).

Where it is found by any proper mode of ascertainment that various political subdivisions in which justices' courts are located have required population, justices' courts must entertain and consider all matters and causes falling within jurisdiction prescribed by Code Civ. Proc. § 112, as amended by St. 1929, p. 834, and Pen. Code, § 1425, as amended by St. 1929, p. 861, relating to jurisdiction of justices' courts, though no census was taken by county supervisors under Pol. Code, § 4055, since jurisdiction of justices' courts depends on fact of there being specified number of inhabitants within respective territorial boundaries.

In Bank.

Application by the County of Los Angeles, through its duly authorized county counsel, for writ of mandate, prayed to be directed to the Justice's Court of Beverly Hills Township, Los Angeles County, and others, to compel respondents to exercise original jurisdiction in certain causes which respondent courts and justices have refused to entertain. Writ granted.

Everett W. Mattoon and S. V. O. Prichard, both of Los Angeles, and Robert A. Cushman, for petitioner.

Elliot Gibbs, of Pasadena, Edward H. Miller and Fogel & Beman, all of Los Angeles, F. D. Macomber, of Santa Monica, and Tanner, Odell & Taft, of Los Angeles, for respondents Garrett and Santa Monica Township Justice's Court.

Bert L. Cooper and Joseph A. Allard, Jr., both of Pomona, for respondent San Jose Township Justice's Court.

WASTE, C. J. The county of Los Angeles, through its duly authorized county counsel, is here seeking a writ of mandate to compel the respondent justices' courts, located in the county, and the duly elected justices of such courts, to exercise original jurisdiction in certain causes which the respondent courts and justices have refused to entertain.

At the recent session of the Legislature section 112 of the Code of Civil Procedure of the state of California and section 1425 of the Penal Code of the state, relating to the jurisdiction of justices' courts, were amended (Stats. 1929, p. 834; Stats. 1929, p. 861); the amendments, generally speaking, having the effect of changing and enlarging the jurisdiction of these courts, particularly in cities, cities and counties, towns, and judicial townships having a population of 30,000 or more. It is alleged in the petition that the townships in question have a population of 30,000 or more. This allegation, except as to the township of Pasadena, is denied by the answer of certain respondents, who also assert that there is no official census showing the number of inhabitants in the townships to be that alleged in the petition.

Respondents allege themselves to be ready, willing, and desirous of entertaining causes involving the increased jurisdiction prescribed by the sections, supra, but, because of the uncertainty as to the population in their respective political subdivisions, in the absence of a federal enumeration of inhabitants, they hesitate to act in such matters unless and until a census be taken by the supervisors of the county under section 4055 of the Political Code, or the federal census of 1930 be taken and the result announced. As an alternative, the respondents asked that this court judicially determine the jurisdiction of the respective courts conferred by the amendments, supra. This we have decided to do, because of the delays incident to an enumeration of the inhabitants by the taking of a census.

The jurisdiction of the respondent courts depends upon the *fact* of there being the specified number of inhabitants within their respective territorial boundaries, and not upon any report or proclamation of the fact. People v. Wong Wang, 92 Cal. 277, 280, 28 P. 270; Puterbaugh v. Wadham, 162 Cal. 611, 618, 123 P. 804. That being true, it would seem to follow that, when it is found by any proper mode of ascertainment that the various political subdivisions in which the respondent courts are located have the required population, the respondent courts must entertain, consider, and act in all those matters and causes falling within the jurisdiction prescribed by the present law.

By consent of all the parties to this proceeding, the court appointed Leonard E. Thomas, Esq., referee to ascertain, determine, and report the population of the various political subdivisions here in question. The referee has filed herein a report of his proceedings, from which it appears that he conducted hearings, took testimony, both oral and documentary, made an investigation, and examined witnesses concerning the population of each of the designated townships. No objection was made to the report of the referee, and all the parties to this proceeding joined in a written stipulation that the report be affirmed as presented. That was done, and the court now finds, as a fact and in accord with the report of the referee, that each of the following townships of the county of Los Angeles, state of California, has a population of 30,000 inhabitants or more, viz.: Beverly Hills township, Glendale township, Inglewood township, Montebello township, Pasadena township, San Antonio township, San Gabriel township, San Jose township, and Santa Monica township; and that each of the following townships of the county of Los Angeles, state of California, has a population of less than 30,000 inhabitants, viz.: Compton township, Redondo township, and Whittier township.

Therefore let a peremptory writ of mandate issue, directed to and commanding the respondents justice's court of Beverly Hills township and H. E. Billings, justice of the peace thereof; justice's court of Glendale township and Harry W. Chase, justice of the peace thereof; justice's court of Inglewood township and Albert F. Monroe, justice of the peace thereof; justice's court of Montebello township and E. P. Woods, justice of the peace thereof; justices' court of Pasadena township and Elliot Gibbs and J. Russell Morton, justices of the peace thereof; justice's court of San Antonio township and Edward H. Miller, justice of the peace thereof; justice's court of San Gabriel township and W. M. Northrup, justice of the peace thereof; justice's court of San Jose township and Ulysses E. White, justice of the peace thereof; justice's court of Santa Monica township and W. R. Garrett, justice of the peace thereof—all of said townships being situated in the county of Los Angeles, state of California, to forthwith accept and exercise the jurisdiction prescribed by section 112 of the Code of Civil Procedure of the state of California and section 1425 of the Penal Code of the state of California for justices' courts in cities, cities and counties, towns, and judicial townships having a population of 30,000 or more; and further commanding the justice's court of Compton township and Irving P. Austin, justice of the peace thereof; justice's court of Redondo township and Joseph G. Moodie, justice of the peace thereof; and justice's court of Whittier township and Frank G. Swain, justice of the peace thereof—all of said townships being situated in the county of Los Angeles, state of California, to forthwith accept and exercise the jurisdiction prescribed by section 112 of the Code of Civil Procedure of the state of California and section 1425 of the Penal Code of the state of California for justices' courts in cities, cities and counties, towns, and judicial townships having a population of less than 30,000.

We concur: SEAWELL, J.; PRESTON, J.; CURTIS, J. LANGDON, J.; RICHARDS, J.

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208 Cal. 420

PROMIS et al. v. DUKE et al. (S. F. 13252.)★

Supreme Court of California. Oct. 24, 1929.

Rehearing Denied Nov. 21, 1929.

1. Escrows 🔑9—Escrow holder cannot make valid delivery of deed to grantee who has not complied with stipulated conditions.

Where deed was placed in hands of third person as escrow with agreement between grantor and grantee that it should not be delivered until grantee had complied with certain conditions, grantee who had not satisfied such conditions was not entitled to delivery of deed, and escrow holder cannot make valid delivery; rule that actions subsequent to execution and delivery of deed cannot affect its integrity and subsequent failure of consideration or breach of personal covenant will not void deed being inapplicable.

2. Vendor and purchaser 🔑100—Delay in rescinding contract resulting from indulgences extended to defaulting party cannot be asserted as laches or affirmance of contract.

Delay in rescinding contract for sale of land, which is result of indulgences extended to defaulting party, may not be availed of by him as showing laches on part of his adversary, nor as constituting affirmance of contract by such adversary.

3. Estoppel 🔑110—Estoppel to be available as defense must be specially pleaded.

Estoppel to be available as defense to action to rescind contract for sale of land must be specially pleaded.

4. Escrows 🔑14(2)—Where purchaser acquired deed from escrow holder without performing stipulated conditions, vendors' attempts to secure performance held not to constitute ratification of escrow holder's delivery.

Where purchaser obtained deed from escrow holder without performing stipulated conditions, conduct of vendors in making efforts to have purchaser comply with contract and in relying on his promises of performance *held* not to constitute ratification of escrow holder's delivery.

5. Escrows 🔑9—Where title did not pass to purchaser acquiring deed from escrow holder without performing stipulated conditions, his grantee took no title.

Where title did not pass to purchaser who acquired deed from escrow holder without performing stipulated conditions, his grantee who had knowledge of vendor's claims *held* to have taken nothing under deed from purchaser purporting to transfer and convey property to her.

6. Equity 🔑36—In suit to rescind land contract, court having jurisdiction of parties may compel conveyance of land involved situated outside jurisdiction.

In suit to rescind contract covering sale of real property located outside jurisdiction, court of equity having acquired jurisdiction of parties may compel conveyance of real estate involved.

7. Vendor and purchaser 🔑104—In vendor's suit to rescind land contract, accounting held within issues where purchaser had received rents.

In vendor's suit to rescind contract covering sale of real property, accounting *held* to be within issues and proper subject of adjudication by court, where purchaser after having acquired deed from escrow holder without performing stipulated conditions received rents and profits from property.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Suit by Josephine Promis and others against G. E. Duke and others to rescind a contract covering the sale of real property. Judgment for plaintiffs, and defendants appeal. Affirmed.

Robert Duncan and Robert E. Hatch, both of San Francisco, Henry C. McPike, and G. E. Duke, both of Oakland, for appellants.

Louis O'Neal and Wm. F. James, both of San José, for respondents.

WASTE, C. J. This action, instituted to rescind a contract covering the sale of certain real property, for an accounting of the rents and profits received therefrom, and to secure a reconveyance thereof to the plaintiffs, terminated in the court below with the entry of a judgment for the plaintiffs, from which the defendants have prosecuted this appeal.

A painstaking examination of the reporter's transcript has satisfied us that there is no merit in the appellants' contention touching the asserted insufficiency of the evidence to support the findings of the lower court. In substance, it is found that on September 25, 1925, the respondents entered into a contract with the appellant G. E. Duke, under and by the terms of which the former agreed to sell and the latter to purchase certain described real property situate in the city of Victoria, British Columbia, for the sum of $55,000—respondents to deposit in escrow with the Alameda County Title Insurance Company a deed conveying good and merchantable title to Duke, who was thereupon to pay and deliver to the escrow holder $10,000 in cash and his promissory note for $45,000, together with a mortgage securing the same on certain improved real property situate in the city of Berkeley, county of Alameda; that in and by the terms of the agreement between the parties it was understood and agreed that

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★Rehearing denied.

the mortgage securing the promissory note for $45,000 was to be subject only to a then existing incumbrance of record against said Berkeley property in the sum of $22,500, and was to be subsequent to no other lien or incumbrance; that at the time of the making of said agreement there was, in addition to the incumbrance of $22,500, an existing and unpaid lien, or incumbrance of $9,605 secured by deed of trust on the Berkeley property, which latter incumbrance the appellant G. E. Duke was to pay and discharge prior to his taking the title to the Victoria property, in order that he might be in position to deliver the $45,000 mortgage on the Berkeley property free and clear of said incumbrance; that pursuant to this agreement the respondents signed, acknowledged, and deposited with the title company a deed to the Victoria property which would, on delivery, vest a good and merchantable title thereto in G. E. Duke; that shortly after the deposit of this deed in escrow, the appellant G. E. Duke obtained the possession thereof without the knowledge or consent of the respondents, and without having complied with the terms of the agreement between the parties, and in violation of the terms of the escrow agreement; that he thereupon caused the deed to be forwarded to the city of Victoria for recordation, thus causing the title to the property to be, in form, registered and vested in his name; that thereafter, and in the month of November, 1925, the respondents first learned of Duke's actions and thereupon demanded that he free the Berkeley property from the $9,605 incumbrance and comply fully with the terms of their written agreement, which he promised to do; that contrary to his repeated promise, Duke failed and neglected to free the Berkeley property of the $9,605 incumbrance, and by reason of such failure and neglect the property was sold on September 18, 1926, by the trustee under the deed of trust securing the $9,605 indebtedness; that the Berkeley property was thereby completely lost to all the parties hereto, and by reason thereof and wholly through the fault of the appellant G. E. Duke the consideration for which the respondents agreed to convey their Victoria property to Duke had wholly failed; that in due time the respondents gave and served Duke with written notice of their election to rescind the written contract, offering to return to him everything of value which they may have received thereunder; that subsequent to Duke's improper registration of the deed to the Victoria property he conveyed the property to the appellant M. E. Duke, his wife, who claims to be the owner thereof; that this latter conveyance was without consideration and in fraud of respondents' rights, the appellant M. E. Duke, having at the time full knowledge of the claims and rights of the respondents in and to the Victoria property, and of the improper acts of her husband in violation of his agreement and of the escrow; that, subsequent to G. E. Duke's registration of the Victoria deed, he and M. E. Duke incumbered the Victoria property to the extent of $30,000 and have since the recording of said deed received the rents, issues, and profits therefrom, for which they have never accounted to the respondents; that the appellants have received and retained and applied to their own use and benefit, over and above all proper credits or offsets, the net sum of $16,804.11. As conclusions of law, the trial court held that the deed to the Victoria property placed in escrow by the respondents and improperly withdrawn therefrom by the appellant G. E. Duke, in violation of the escrow instructions, had never been delivered to him and consequently passed no title; that he could not, therefore, transfer title to M. E. Duke, his wife; that these two deeds were, however, a cloud on respondents' title, from which they were entitled to be relieved; that the respondents were entitled to a judgment and decree directing and requiring the appellants to execute, acknowledge, and cause to be recorded and registered, according to the forms and laws of British Columbia, a deed conveying to the respondents and vesting in them title to the Victoria property, subject to the $30,000 incumbrance above referred to, and requiring appellants to do or perform such other act or acts as might be necessary or proper to restore the respondents to the ownership and possession of the Victoria property, or, in the event of their failure or refusal so to do, that a commissioner, appointed by the court, should execute such deed for them and in their names under the direction of the court; and that the respondents were entitled to recover of and from the appellants the sum of $16,804.11, together with their costs of suit. Judgment was entered accordingly.

[1] Where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed until he has strictly complied with the conditions. If he does not comply with the conditions when required, or refuses to comply, the escrow holder cannot make a valid delivery of the deed to him. Los Angeles City High School Dist. v. Quinn, 195 Cal. 377, 383, 234 P. 313; McLaughlin v. Clausen, 85 Cal. 322, 327, 24 P. 636. At the time the appellant G. E. Duke obtained possession of the Victoria deed from the escrow holder, he had not satisfied the conditions precedent to a valid delivery of that instrument to him. Title to the Victoria property did not, therefore, pass to and vest in him by virtue of such improper delivery. This being so, the early case of Lawrence v. Gayetty, 78 Cal. 126, 132–135, 20 P. 382, 12 Am. St. Rep. 29, so strongly relied on

by the appellants, is clearly distinguishable from the present case, and the principle therein announced is not at all pertinent to the inquiry now before use. The decision in that case merely declares that a conveyance of real property, *fully executed* on the part of the grantor, cannot be set aside for a failure of consideration, on the sole ground that the promises and agreements which induced its execution, and which, by the terms of the contract under which the deed was made, were not to be performed until after its execution, had not been performed. In other words, acts done subsequent to the execution and delivery of a deed cannot affect its integrity, and a subsequent failure of consideration or breach of a personal covenant, not amounting to a condition, will not avoid the deed. Duckworth v. Watsonville Water Co., 170 Cal. 425, 434, 150 P. 58; Masero v. Bessolo, 87 Cal. App. 262, 271, 262 P. 61. The deeds sought to be avoided in Lawrence v. Gayetty, supra, and in the cases last above cited had been properly delivered and were fully effective from the time of delivery. In the case now before us the delivery of the Victoria deed not having been such as gave it force, no title passed to the appellant, G. E. Duke, and the judgment entered herein has not the effect, as urged by the appellants, of undermining the integrity of a validly executed and delivered deed of conveyance.

[2-4] It is contended, however, that the respondents, after learning of the improper and ineffective delivery of the Victoria deed by the escrow holder, so conducted themselves as to estop them from thereafter asserting the invalidity of the instrument. The record discloses that the respondents, upon learning of Duke's improper withdrawal of the Victoria deed from escrow, made many efforts to have him fully and faithfully discharge his obligations under the terms of the written agreement, and that, as a consequence of his oft-repeated promise to so perform, they were lulled into temporary inactivity. However, upon the foreclosure of the $9,605 incumbrance on the Berkeley property, the respondents were, for the first time, confronted with definite and uncontrovertible evidence of the falsity of Duke's promises and the utter unfaithfulness of his purpose, and they thereupon, and in due season, proceeded to invoke the usual and ordinary processes of the law to undo the wrong done them. We have but recently held that a delay in rescinding which is the result of indulgences extended to a defaulting party, may not be availed of by him as showing laches on the part of his adversary nor as constituting an affirmance of the contract by such adversary. Hunt v. Field, 202 Cal. 701, 704, 262 P. 730. Moreover, respondents' efforts to have Duke perform as agreed were not pleaded by the appellants as an affirmance of the contract after breach. It is the settled law of this state that an estoppel to be available as a defense to an action must be specially pleaded. Producers' Holding Co. v. Hill, 201 Cal. 204, 209, 256 P. 207. Nor do we think respondents' conduct may properly be said to have worked a ratification of the escrow holder's delivery of the Victoria deed. Weghorst v. Clark, 66 Colo. 535, 180 P. 742, 744, presented a situation somewhat analogous to the one now before us, in that the plaintiff in that case was seeking to rescind a contract covering an exchange of real properties and to secure a reconveyance of his lands because of the defendant's violation of the escrow instructions. In response to the contention that the plaintiff had ratified the improper delivery of the escrow instrument, the court stated: "True, he was willing at all times to carry out the agreement according to its terms, and urged that that be done; and if it had been done the instrument would have been ratified and would have become a deed, but it was not done, and John R. Clark never signed or tendered a deed according to the terms of the contract, but refused to carry out the contract by paying the irrigation tax for 1913, by reason of which Weghorst rescinded. The conveyance, therefore, from Weghorst, never took effect." So it is in the present case. Respondents made many efforts to have Duke comply with the terms of his contract, and for a time accepted and relied on his promises of full and faithful performance thereof. In this he failed, and he is not now in a position to urge that respondents' conduct amounted to a ratification of the improper delivery by the escrow holder of the deed to the Victoria property. Furthermore, a ratification, to be binding, must have been made with full knowledge of all the material facts. Dixon v. Bristol Sav. Bank, 102 Ga. 461, 31 S. E. 96, 99, 66 Am. St. Rep. 193. The conduct asserted to have worked a ratification of the delivery of the Victoria deed transpired at a time when the respondents believed, and justly so, that Duke, in good faith, intended to satisfy and discharge his obligations under the contract.

[5] Title to the Victoria property not having passed to the appellant G. E. Duke, his grantee, M. E. Duke, took nothing under the deed purporting to transfer and convey the same to her. On competent and sufficient evidence the trial court found that she had full knowledge of the respondents' claims and rights at the time of her asserted purchase of the premises. However, even if she were to be regarded as a bona fide purchaser for value, it would avail her nothing, for, in line with the great weight of authority, it has been held in this state "that the fraudulent procurement of a deed deposited as an escrow from the depositary by the grantee named therein will not operate to pass the title, and the subsequent purchaser from such grantee,

without notice, and for a valuable consideration, derives no title thereby, and will not be protected." Gould v. Wise, 97 Cal. 532, 536, 32 P. 576, 577, 33 P. 323. In passing, it might be said that we are not now concerned, as appellants would have us be, with the rights of persons who have neither been named nor appeared herein as parties. It is unnecessary, therefore, that we consider and determine what rights in the Victoria property, if any, an innocent incumbrancer under the Dukes may have procured by reason of their claim of title. However, appellants' query, "How about the innocent incumbrancer?" tends to indicate that they have failed to read the judgment actually entered in the cause, for it is therein provided, among other things, that the appellants execute and deliver and cause to be recorded and registered, according to the forms and laws of British Columbia, a deed of conveyance of the Victoria property vesting in the respondents the title thereto "subject to an incumbrance of Thirty Thousand ($30,000.00) Dollars now of record. * * *" The respondents have not appealed from that portion of the judgment purporting to subject their Victoria property to the lien of the $30,000 mortgage placed thereon by the Dukes.

[6] Appellants' contention, raised in the lower court by means of demurrer, that the court was without jurisdiction to grant the relief sought, is, in our opinion, without merit. In 10 California Jurisprudence, 496 § 40, it is stated that: "A court of equity having acquired jurisdiction of the parties may, by decree operating on them in personam, control their actions with regard to properties situated without the jurisdiction, when such action is necessary for a complete disposition of a controversy. Thus a court of equity has jurisdiction to compel a conveyance of real estate situated outside the state, through its control of the parties before it. * * * In cases of fraud, trust or contract, the jurisdiction of a court of chancery is upheld whereever the person is found, although lands in another state may be affected by the decree." The following authorities support the text: Title Ins., etc., Co. v. Cal. Dev. Co., 171 Cal. 173, 198, 152 P. 542; Peninsular, etc., Co. v. Pac. S. W. Co., 123 Cal. 689, 697, 56 P. 604; McGee v. Sweeney, 84 Cal. 100, 23 P. 1117; Smith v. Davis, 90 Cal. 25, 30, 27 P. 26, 25 Am. St. Rep. 92.

[7] In conclusion, we find no error in the account made by the trial court. An accounting was well within the issues of the cause, and the proper subject of adjudication by the court.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.

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208 Cal. 417

SMITH et al. v. KIRKPATRICK et al.

(L. A. 9576.)

Supreme Court of California. Oct. 24, 1929.

Assignments for benefit of creditors ⇨268—Assignees, suing for benefit of creditors merely, could not recover consideration for drilling well, where such consideration had been returned by assignor's president (Civ. Code, §§ 3449, 3460).

Where president of company returned certain moneys and stocks to trustees of another firm, which had been paid as consideration for drilling oil well, trustees of company, suing as assignees for benefit of creditors, and not as individual creditors, who were misled, could not recover what president had returned, since they could have no greater right than their assignor had, as provided by Civ. Code, § 3460, and in view of section 3449, stating when debtor may execute assignment.

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by J. A. Smith and another, as trustees of and for the Orange County Drilling Company, against Charles Kirkpatrick and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Frank P. Dougherty, of Los Angeles, for appellants.

W. W. Hyams and Hyams & Himrod, all of Los Angeles (Aubrey Devine, of Los Angeles, of counsel), for respondents.

LANGDON, J. Plaintiffs brought this action as assignees of the Orange County Drilling Company, for the benefit of the creditors of said company. They alleged that the defendants and each of them had received $215,000 from said company, for the use of said company. This allegation was denied by defendants. The essential facts were stipulated by the parties to be as follows:

Some time in September, 1922, the Orange County Drilling Company entered into a contract with the Kirkpatrick Bros. Syndicate to drill a well at Santa Fé Springs for a price of $155,000, and this consideration was paid, $90,000 in cash and $65,000 in units of the Syndicate. In October, 1922, the Kirkpatrick Syndicate No. 2, an independent syndicate, made and entered into a contract with the Orange County Drilling Company for the drilling of a well at Santa Fé Springs for the total consideration of $175,000. In November, 1922, the Kirkpatrick Syndicate No. 3 made and entered into a contract with the Orange County Drilling Company for the drilling of a third well at Santa Fé Springs for a total cash consideration of $175,000. At the time of making the contracts, and at all times mentioned in the complaint, the defendants, C. H. Kirkpatrick, W. O. Kirkpatrick, and Willis H. Cates, were the trustees of Kirkpatrick Bros. Syndicate, and the defendants C. H. Kirkpatrick and Willis H. Cates were the trustees of Kirkpatrick Syndicates 2 and 3.

During the times mentioned in the complaint R. W. Edens was president and general manager of the Orange County Drilling Company and owner of all the stock in the company, and he returned to C. H. Kirkpatrick, W. O. Kirkpatrick, and Willis Cates said units of Kirkpatrick Syndicate of the par value of $65,000, which said units were part of the consideration for the drilling of the well provided for in the contract of September, 1922. These units were sold afterwards by the defendants for about $40,000 in cash. R. W. Edens, in his official capacity, returned to the defendants C. H. Kirkpatrick and Willis H. Cates $75,000 in cash out of the contract price for drilling the second well, and also returned to said C. H. Kirkpatrick and Willis H. Cates a like sum out of the contract price for drilling the third well.

The judgment went against the three defendants in the sum of $190,000. The theory upon which this judgment was predicated is not clear from the record, but it is immaterial, for we think that the agreed facts do not entitle the assignees of the Orange County Drilling Company to recover. The plaintiffs are not suing as individual creditors who have been misled, but as assignees to hold in trust for all creditors. As such they can have no greater right than their assignor. Section 3460, Civ. Code. In the case of Francisco v. Aguirre, 94 Cal. 180, 29 P. 495, 496, the court said:

"Upon the principle that an assignor cannot confer upon his assignee any greater right than he himself had in the property, it is held in an almost unbroken line of authorities that, in the absence of any statute giving such power, the assignee cannot maintain an action to recover property that had been conveyed by his assignor in fraud of his creditors. This rule rests upon the ground that the assignee is merely the representative of his assignor, and does not represent the creditors, and that notwithstanding the assignment they are not bound to accept its provisions, but may themselves subject such property to the satisfaction of their debts. This right is held by them, not as beneficiaries under the assignment, or by virtue of any of its provisions, but as creditors of the assignor, and wholly independent of its provisions. 'Under the common law of assignments the assignee stands in the place of the assignor, and can assert no claim to property which the assignor might not. The assignment, therefore, does not carry with it to the trustee the title to property which the assignor had previously transferred in fraud of his creditors, for the purpose of hindering, delaying, and defrauding them' [citing cases]."

The cases of Ruggles v. Cannedy, 127 Cal. 290, 53 P. 911, 916, 59 P. 827, 46 L. R. A. 371, and First National Bank v. Menke, 128 Cal. 103, 60 P. 675, also contain language directly in point and in favor of the appellants in this action. In the former case it is said: "The failure to observe the well-defined distinction between the powers of the assignee in insolvency, who thus represents the creditors, and those of an assignee for the benefit of creditors, who is the representative of the assignor, has led to much conflict of authority upon this question. In this state it is held that an assignee for the benefit of creditors may not maintain such an action, but the distinction between such an assignee and the assignee in insolvency is clearly pointed out."

A later case than those hereinbefore cited, and which is directly in point and applies the rule of the earlier cases to a voluntary assignment other than an assignment to the sheriff under the provisions of section 3449, Civil Code, is Moore v. Schneider, 196 Cal. 380, 238 P. 81. That case, together with the others cited herein, is conclusive against the right of the plaintiffs to recover.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

208 Cal. 433

PEOPLE v. POST. (Cr. 3223.)

Supreme Court of California. Oct. 24, 1929.

1. Criminal law 🔑778(5)—Instruction that defendant must prove mitigating circumstances when killing is proved held erroneous (Pen. Code, § 1105).

In prosecution for murder, instruction, under Pen. Code, § 1105, that when killing is proved defendant must show mitigating circumstances by preponderance of evidence, *held* erroneous for placing burden when killing was proved instead of when killing by defendant was proved.

2. Criminal law 🔑782(13)—Instruction requiring defendant's proof of mitigating circumstances after killing was proved held erroneous for statements requiring proof by defendant by preponderance of evidence (Pen. Code, § 1105).

In prosecution for murder, instruction under Pen. Code, § 1105, that when killing is proved defendant must show mitigating circumstances by preponderance of evidence, *held* erroneous for statement that defendant's proof of mitigating circumstances must be by preponderance of evidence, which was by some proof stronger in some appreciable degree than proof of prosecution, since under section 1105 defendant's only burden was to raise reasonable doubt as to guilt.

3. Criminal law 🔑1186(4)—In murder case, instruction requiring defendant to prove mitigating circumstances after killing was shown held prejudicial error, though verdict was for manslaughter (Pen. Code, § 1105; Const. art. 6, § 4½).

In prosecution for murder, instruction under Pen. Code, § 1105, that when killing is proved defendant must show mitigating circumstances by preponderance of evidence, *held* prejudicial error, notwithstanding Const. art. 6, § 4½, and notwithstanding that verdict of manslaughter was returned, where defendant's plea was that homicide was excusable because deceased was responsible for accident.

In Bank.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

Ralph N. Post was convicted of manslaughter, and he appeals. Reversed.

Superseding opinion of District Court of Appeal in 274 P. 988.

Fitzgerald & Gusweiler and Edgar B. Hervey, all of San Diego, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., John D. Richer, of Los Angeles, Stephen Connell, Dist. Atty., and J. H. McKinney, Deputy Dist. Atty., both of San Diego, for the People.

RICHARDS, J. [1-3] The appellant was informed against in the superior court in and for the county of San Diego for the crime of murder and was convicted of the crime of manslaughter, and, from the judgment and order denying his motion for a new trial, he appealed to the District Court of Appeal in and for the Second District, Division 1, which tribunal affirmed said judgment; whereupon a petition for hearing in this court was duly made and granted. The appellant presented to the appellate tribunal a number of contentions in urging a reversal of the judgment. These were disposed of in the main adversely to the appellant and were, with the exception of the single contention which appellant urges before this court, correctly disposed of. The sole contention which the appellant has presented in his brief for the consideration of this court arises out of the giving of the following instruction to the jury: "You are instructed that up to the moment when the killing is proved the prosecution must make out its case beyond any reasonable doubt. When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify by a preponderance of evidence on his part. That is, the killing being proved, the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. The burden of proof changes. It must be in some degree, no matter how small, stronger than the proof of the prosecution on the other side."

The foregoing instruction was an apparent paraphrase of section 1105 of the Penal Code, which reads as follows:

"*When burden of proof shifts in trials for murder.* Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

It is the contention of the appellant that the foregoing instruction departed, in at least two vital particulars, from the language and intent of the section of the Penal Code above quoted and in so doing imposed upon the defendant certain burdens which the letter and spirit of the law generally relating to trials for murder do not justify, and that said instruction was, for the reasons urged, prejudicially erroneous so as to entitle him to a reversal of the judgment. That this instruction does so depart from the language and apparent intent of the foregoing section of the Penal Code is made apparent by a comparison of the instruction with said provision. The code section in its opening sentence states that: "Upon a trial for murder, the commission of the homicide *by the defendant* being proved, the burden," etc. The opening sentences of the instruction read: "You are instructed that *up to the moment when the kill-*

ing is proved the prosecution must make out its case beyond any reasonable doubt. When the killing is proved, it devolves upon the defendant," etc. It is thus made plain that while the section of the Penal Code above quoted requires the presentation of proof of the commission of the homicide *by the defendant* before the burden of presenting evidence tending to prove circumstances in mitigation, justification, or excuse, the instruction by its terms placed no such requirement upon the prosecution, but, on the contrary, informed the jury that, from and after the moment in the trial of the cause when the killing was proved, the burden shifted to the defendant to establish whatever circumstances in mitigation, justification, or excuse of the homicide might constitute his defense. It will thus be seen that an entirely different rule is declared in this instruction for the shifting of the burden of proof from that which the terms and intent of the foregoing section of the Penal Code provide. The importance of this variation, in so far as it may be found to have constituted prejudicial error, is discovered when the facts of the instant case come under review. The homicide in question occurred on the evening of April 8, 1928, and resulted in the death of a woman named Parentha K. Simpson, who at the moment thereof was riding with the defendant in an automobile of which he was the driver, along the pier abutting upon the bay of San Diego, when suddenly the automobile was so turned as to run off the pier into the deep water of the bay. The defendant, by breaking a window, escaped from the submerged car, but the woman was drowned. The defendant, upon being charged with her murder, insisted throughout that the casualty was accidental and was caused by the fact that when the machine was being driven by him slowly near the edge of the pier it ran into a depression of some sort, whereupon the woman frantically seized the wheel and turned the car into the bay. It is thus seen that, while the killing of the deceased was an admitted fact in the case, the question as to whether such killing had occurred through any willful act of the defendant was at all times an issue in the case. This being so, the defendant was entitled to have the burden of proof as to the commission of the homicide by him remain with the prosecution until sufficient evidence had been introduced to establish at least prima facie the corpus delicti as to him.

All that the foregoing instruction, however, required of the prosecution was the mere proof of the death of the deceased in order to shift the burden of proof from the people to the defendant. That such instruction was erroneous in that regard standing alone was practically admitted by counsel for the people. It was, however, urged by the latter that when the foregoing instruction is considered in connection with the other instructions in the case, and also in the light of the evidence produced upon the trial thereof as to the circumstances attending the decedent's death, and which circumstances were fully presented by the prosecution upon its main case, the defendant was not prejudicially harmed by the giving of that portion of the instructions above referred to. We would be inclined to adopt this view were it not for the inclusion in the instruction of the concluding portions thereof which constitute the appellant's main ground for his claim of prejudicial error. The instruction proceeded to say that upon proof of the killing "it devolves upon the defendant to show any circumstances in mitigation to excuse or justify by a preponderance of evidence on his part." The instruction proceeded to amplify the latter statement by the following illustration thereof by stating that: "The killing being proved, the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. The burden of proof changes. It must be in some degree, no matter how small, stronger than the proof of the prosecution on the other side." The foregoing instruction as given in its entirety by the trial court seems to have been taken bodily from the instructions given to the jury in the case of People v. Hong Ah Duck, 61 Cal. 387, 394, and the instruction as thus given in that case met, for the time being, with the approval of this court. In the case of People v. Bushton, 80 Cal. 160, 165, 22 P. 127, 129, this court expressly withdrew its approval of said instruction, holding that the same as given in the Hong Ah Duck Case was "based upon an erroneous construction of section 1105 of the Penal Code," and the Bushton Case was reversed on account of the giving of such or a similar instruction. In the case of People v. Elliott, 80 Cal. 296, 22 P. 207, this court again expressed its disapproval of an instruction in substantially the same form, holding that the same was not only erroneous, but was prejudicially so, and reversing the case. The particular ground upon which this court in the two foregoing cases based its conclusion was that, under section 1105 of the Penal Code, the only burden cast upon the defendant under the provisions of said section of the code was that of presenting evidence sufficient to create in the minds of the jurors a reasonable doubt as to his guilt, and this conclusion as to the proper interpretation to be placed upon the foregoing section of the Penal Code has been consistently adhered to by this court since its decision of the foregoing cases. The latest declaration of this court upon the subject is to be found in People v. Roe, 189 Cal. 550, 565, 209 P. 560, 567, wherein, in criticizing a somewhat similar instruction to that given in the instant case, it was stated: "Under the law it was necessary only that defendant produce evidence the weight of which was sufficient to create in the minds of the jurors a reasonable doubt as to the existence of the alleged circumstances which justified the homicide, and if, based thereon, they entertained a reasonable doubt as to the existence of the same, the defendant was entitled to an acquittal. By the instruction as given, defendant was required to produce in her defense evidence of greater weight than that which the law demands, the effect of which is identically the same as though she had been wrongly deprived of evidence touching the subject altogether."

It is the contention of the respondent that conceding, as it must, the error in the foregoing instruction, it was rendered harmless by the fact that, the jury having returned a verdict of manslaughter, the instruction was rendered inapplicable to the case for the reason that section 1105 of the Penal Code has reference by its express terms only to trials for murder. It is argued by the respondent that, since the jury apparently considered the evidence of the defense sufficient to so far mitigate the homicide as to only justify a verdict of manslaughter, the defendant has suffered no harm from the giving of such instruction. The difficulty with this contention consists in the fact that the instant case was a trial for murder, and that the defendant's main defense consisted in his claim, supported by his evidence, that the homicide was excusable by virtue of the fact that the deceased herself was responsible for the accident which caused her death, and that this fact, if believed by the jury, would have resulted in his acquittal rather than in a verdict of manslaughter, and that he was therefore entitled throughout the entire trial to have the jury apply to this defense the rule as to reasonable doubt. A further answer to the contention of the respondent in this regard is to be found in the fact that, in People v. Bushton and People v. Elliott, supra, the verdict of the jury was one of manslaughter, and that this court, notwithstanding, held the instruction herein criticized to have been prejudicially erroneous. It is the further contention of the respondent that the error complained of was one in procedure and that the same ought not to be held sufficiently prejudicial to justify a reversal of the case in view of the provisions of article 6, section 4½, of the Constitution. This question, however, was apparently put at rest by the decision of this court in People v. Roe, supra, wherein it was held that an instruction which cast upon the defendant the burden of establishing his defense by a preponderance of evidence was so far prejudicial as to take the case beyond the curative provisions of section 4½ of article 6 of the Constitution. We are satisfied that a similar ruling should be applied to the facts and circumstances of the instant case.

It follows that the judgment and order should be reversed, and it is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.

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208 Cal. 397

FORSYTH v. SAN JOAQUIN LIGHT & POWER CORPORATION.★

(S. F. 13083.)

Supreme Court of California. Oct. 22, 1929.

Rehearing Denied Nov. 21, 1929.

1. Automobiles 🔑76—Words "transportation company," in statute prohibiting operation without certificate of public convenience and necessity, means common carrier (Auto Stage and Truck Transportation Act 1917, as amended by St. 1919, p. 457).

Words "transportation company" in Auto Stage and Truck Transportation Act (St. 1917, p. 330, as amended by St. 1919, p. 457), prohibiting transportation company from operating automobiles, etc., for transportation of persons or property for compensation without having first obtained certificate of public convenience and necessity, means a public transportation company or a common carrier.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Transportation Company.]

2. Judgment 🔑547—Railroad Commission's order to defendant to discontinue operation of stage line was not res judicata of question in action by one having certificate of convenience for damages for operating stage line.

Railroad Commission's order to defendant, which had been denied certificate of convenience and necessity, to discontinue operation of its stage line over route for compensation, *held* not res judicata of question whether defendant was common carrier, in action by one having certificate of public convenience and necessity authorizing him to operate stage line over such route against defendant for damages for operating stage line over such route.

3. Automobiles 🔑76—Corporation carrying its own employees, their families, and persons doing business with it was not "common carrier," and could transport them without certificate (Auto Stage and Truck Transportation Act 1917, as amended by St. 1919, p. 457; Civ. Code, § 2168).

Light and power corporation, carrying its own employees, their families, and those having business with it between its camps and certain town, *held* not to be "common carrier," under Civ. Code, § 2168, and it could operate stage line without procuring certificate of public convenience and necessity, under Auto Stage and Truck Transportation Act (St. 1917, p. 330, as amended by St. 1919, p. 457).

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Common Carrier.]

4. Automobiles 🔑76—That private carrier entered into written contracts with passengers did not make it common carrier required to obtain certificate (Civ. Code, § 2168; Auto Stage and Truck Transportation Act 1917, as amended by St. 1919, p. 457).

That light and power corporation, transporting its employees, their families, and per-

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★Rehearing denied.

sons doing business with it between its camps and certain town, entered into written contracts with passengers before hauling them in stages, did not make it a common carrier, under Civ. Code, § 2168, so as to require it to obtain certificate of public convenience and necessity, under Auto Stage and Truck Transportation Act (St. 1917, p. 330, as amended by St. 1919, p. 457).

5. Automobiles ⚷76—Company transporting employees, their families, and customers held not liable to one having certificate of convenience and necessity (Auto Stage and Truck Transportation Act 1917, as amended by St. 1919, p. 457).

Defendant company, transporting without certificate, its employees, their families, and persons doing business with it over route over which plaintiff operated its stage line under certificate of public convenience and necessity, under Auto Stage and Truck Transportation Act (St. 1917, p. 330, as amended by St. 1919, p. 457), *held* not liable to plaintiff, since defendant was not common carrier, and transportation of passengers did not legally damage plaintiff.

6. Automobiles ⚷107(1)—One operating stage line without certificate is liable only for net profit one having certificate would have made (Auto Stage and Truck Transportation Act 1917, as amended by St. 1919, p. 457).

One operating stage line without certificate of public convenience and necessity under Auto Stage and Truck Transportation Act (St. 1917, p. 330, as amended by St. 1919, p. 457), over route over which another operates stage line under such certificate, is liable only for net profit which latter would have made in carrying passengers carried by former.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Ross Forsyth, doing business under and by the fictitious name of the Kings River Transportation Company, against the San Joaquin Light & Power Corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Fred H. Pearson, of Fresno, for appellant.

Miller & Thornton, of San Francisco, for respondent.

CURTIS, J. On August 29, 1919, the Railroad Commission of the state of California issued and delivered to J. Scott and others, doing business under the fictitious name of the Kings River Transportation Company, a certificate of public convenience and necessity, authorizing them to operate an automobile stage line over the public highway between the city of Fresno and Maxsons, in the county of Fresno, state of California, for the purpose of transporting thereby persons for compensation. About the time of the granting of said certificate, the defendant, the San Joaquin Light & Power Corporation, began the construction of a hydroelectric power project in Kings River Canyon. The construction work upon said power plant continued to about the 14th day of January, 1928. In this construction work the defendant established a number of camps on and along Kings river. These camps were reached by means of the public highway from Fresno to Maxsons, a distance of approximately 40 miles, and from Maxsons over private rights of way leading to defendant's various camps. These camps were situated at different distances from Maxsons, ranging from 15 to 40 miles. After the granting to the Kings River Transportation Company of the certificate of public convenience and necessity, as stated above, the defendant filed its application before the Railroad Commission for a certificate of public convenience and necessity, authorizing it to operate an automobile stage line over the public highway between the city of Fresno and said Maxsons, for the purpose of transporting thereby, for compensation, its employees and those having business with it. This application was denied by the Railroad Commission on the 13th day of September, 1920. Thereafter the plaintiff, Ross Forsyth, purchased from J. Scott and others said automobile stage line, and, after application in due form therefor, the Railroad Commission, on the 22d day of August, 1923, granted to plaintiff, doing business under the fictitious name of the Kings River Transportation Company, a certificate of public convenience and necessity, authorizing him to operate said automobile stage line over the same route as that designated in the certificate to his predecessors, for the transportation of passengers, for compensation, and from the date of said order to the middle of February, 1928, plaintiff was the sole and exclusive owner of said certificate and the only person operating an automobile stage line over said route for the transportation of persons, for compensation, under authority of said Railroad Commission.

Notwithstanding the fact that it had been denied a certificate of public convenience and necessity, the defendant, on or about the 27th day of April, 1925, began to operate upon said public highway, between the city of Fresno and Maxsons, an automobile stage line, and from said last-named date up to the 15th day of January, 1928, continued to operate said automobile stage line over said route without any certificate, or other permission or authority so to do, from the State Railroad Commission. During said period of time defendant transported, by means of its said stage line and over the route between the city of Fresno and Maxsons, its employees, their families, and those having business with defendant. The defendant transported said persons under a separate contract, in writing, with each of said persons, whereby it collected and received the sum of $4 for transporting each of said persons from the city of Fresno to the

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said camps of defendant. Prior to January 20, 1926, these several contracts provided that the fare from the city of Fresno to the camps of defendant would be the sum of $4. On said last-named date, after proceedings had before the Railroad Commission, that body issued its order to said defendant to discontinue operating its said stage line between the city of Fresno and Maxsons, for compensation, unless and until defendant should receive from the Railroad Commission a certificate of public convenience and necessity permitting such operation. No such certificate was ever issued to defendant, but, after the making of said last-mentioned order, the defendant continued to operate said stage line and carried passengers thereon, but under a written contract differing somewhat from the contract formerly used by it. This latter contract provided that said passengers would be carried free of charge from the city of Fresno to Maxsons, but from Maxsons to the camps of defendant the charge or fare for each person would be the sum of $4. The defendant carried, on its said stage line, between the 27th day of April, 1925, and the 20th day of January, 1926, 2,106 passengers, for which it received the sum of $4 for each passenger. Between the 20th day of January, 1926, and the 15th day of January, 1928, when it discontinued to operate its said stage line, it carried 4,914 passengers, for which it received $4 per person. The passengers transported by defendant during the time it operated its said stage line constituted over 98 per cent. of the total number of persons transported by everybody, for compensation, during said period of time. The fare which the plaintiff was authorized to charge by the Railroad Commission for transporting passengers between the city of Fresno and Maxsons was $2.50 each way. There was evidence that the plaintiff was fully equipped to transport all persons over said route who might apply for transportation during the period of time defendant operated its said stage line. The total number of passengers transported by defendant, for compensation, during the period of time aforesaid between the city of Fresno and Maxsons was 7,020. This action was instituted by the plaintiff to recover from the defendant damages alleged to have been sustained by the plaintiff by reason of the operation by defendant of its said stage line from the 27th day of April, 1925, to the 15th day of January, 1928, and also for exemplary damages. The action was tried by a jury and resulted in a verdict in favor of the plaintiff in the sum of $17,550 actual damages; the jury refusing to award any exemplary damages. From the judgment entered thereon, the defendant has appealed.

As stated by respondent, in which statement the appellant acquiesces, "the vital question involved in this action—the one around which everything else revolves—is whether or not appellant herein, in the light of the admitted facts, was or was not a common carrier of persons, or a transportation company."

[1] It might be well to first consider the meaning of the words "transportation company" before taking up the main question just stated. By the Auto Stage and Truck Transportation Act (St. 1917, p. 330, as amended in 1919 [St. 1919, p. 457]) "The term 'transportation company,' when used in this act, means every corporation or person, * * * owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county."

The purpose of this act, as amended in 1919, was to make its provisions applicable to private carriers as well as common carriers. Frost v. Railroad Com., 197 Cal. 230, 234, 240 P. 26. In so far, however, as the act purported to give to the Railroad Commission the power to govern and regulate the business of private carriers or private transportation companies, the provisions thereof have, by the Supreme Court of the United States, been held to be unconstitutional and violative of the due process clause of the Fourteenth Amendment of the Federal Constitution. Frost v. R. R. Com., 271 U. S. 583, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457. A transportation company, therefore, under the Auto Stage and Truck Transportation Act, as thus construed, must be held to be a public transportation company or a common carrier. The pivotal question, therefore, is whether the appellant, under the facts in this case, was or was not a common carrier.

[2] Respondent contends that this question has been foreclosed against the appellant by the various findings and orders made by the Railroad Commission, which orders we have already referred to, and particularly the order and findings of the commission under date of January 20, 1926, in which the commission ordered the appellant to discontinue the operation of said stage line over said route for compensation. The finding upon which this order was based was as follows: "From the record herein we (the Railroad Commission) conclude and find as a fact that the operation by defendant, San Joaquin Light and Power Corporation, of an auto stage for the transportation of its employees and their families between Fresno and construction camps on Kings River, in so far as such operation is conducted over the public highways, for a fixed and definite compensation, is operation of a transportation company as such term is defined by Section 1 of Chapter 213, Statutes of 1917, and effective amendments thereto, and is being conducted by said defendant

without the authority of a certificate of public convenience and necessity from this Commission as required by the provisions of the above mentioned statutory enactment." It will be observed that by this finding the commission found that the auto stage line which the appellant was then operating was a transportation company as such term was defined by the Statutes of 1917, "and the effective amendments thereto." At the date of said order, January 20, 1926, the amendment of 1919, hereinbefore referred to, was in effect. By this amendment the term "transportation company," as we have seen, was broad enough to include private transportation companies as well as public transportation companies. The commission therefore made no finding that the auto stage line operated by appellant was a public transportation company. It is true it made an order based upon said finding that the appellant discontinue the operation of said stage line, and respondent argues that it was absolutely necessary for the Railroad Commission to find that the appellant was a common carrier before it could make said order. We agree with respondent in this contention, but he has failed to point out, and we have been unable to find, any finding of the Railroad Commission to the effect, that the appellant was a common carrier. This order may have been made under the mistaken belief that the commission had been given the power by said act to regulate private as well as public transportation companies operating upon the public highways. We are fortified in this assumption by the action of the commission in the Frost Case, as construed by the United States Supreme Court, 271 U. S. at page 590, 46 S. Ct. 606, of the opinion therein, wherein said court stated, "The commission, while agreeing that plaintiffs in error were, in fact, private carriers, held that they were subject to the provisions of the act and directed them to suspend their operations under their contract unless and until they should secure a certificate that public convenience and necessity required the resumption or continuance thereof." But, as we have seen, said court held that the provisions of said act which sought to confer such power upon the commission were in violation of the Federal Constitution. Under this state of facts, we think it manifest that the commission made no finding that the appellant in the operation of said stage line was operating as a common carrier. This question is not, therefore, res judicata as between the parties to this proceeding.

There may be some question under the recent rulings of this court (Stratton v. R. R. Com., 186 Cal. 119, 198 P. 1051; Motor Transit Co., v. R. R. Com., 189 Cal. 573, 209 P. 586; McCullagh v. R. R. Com., 190 Cal. 13, 210 P. 264) just how far the courts, or the commission itself, is concluded by a previous finding or order of the commission. This action, however, is not based upon any finding or order of the commission, nor was it instituted for the purpose of enforcing any order of the commission. On the other hand, it was brought to recover damages for certain acts of the appellant, some of which were alleged to have been committed long prior to the date of said finding and order of January 20, 1926. But as the commission made no finding that the appellant in the operation of said auto stage line was a common carrier, the question suggested does not arise in this proceeding.

[3] We now come to the question whether the appellant, in operating said stage line for the transportation of its employees, their families and guests, for compensation, was a common carrier of passengers. It was contended at one time during the trial that the appellant was transporting freight as well as passengers, but, by the stipulation of the parties, the freight feature was eliminated from this controversy, and the issues were narrowed to the single one of appellant's liability, if any, as a common carrier of persons.

Section 2168 of the Civil Code defines a common carrier as follows: "Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier, of whatever he thus offers to carry."

"Private carriers are such as carry for hire and do not come within the definition of common carrier. Certain prominent characteristics mark the difference between these two classes. To impress upon one the character of common carrier it must be shown that he 'undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for anyone, in the course of his employment and for a reasonable and customary price, he will be liable to an action.' On the other hand, private carriers are not bound to carry for any person unless they enter into a special agreement so to do." 4 Cal. Juris., 815. This same principle is enunciated in the case of Associated Pipe Line Co. v. R. R. Com., 176 Cal. 518, 169 P. 62, 65, L. R. A. 1918C, 849. In that case this court said, quoting in part from the case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77: "'When, therefore, one *devotes his property* to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.' But so long as he uses his property for private use, and in the absence of devoting it to public use, the public has no interest therein which entitles it to a voice in its control."

In Thayer v. California Dev. Co., 164 Cal. 117, 128 P. 21, 25, this court quotes with approval the following language from an early

California case: "This public use need not be a use general or common to all the people of the state alike. It may be a use in which a small portion of the public will be directly benefited, as a street in a town, a bridge, or a railroad, necessarily local in its benefits and advantages, but it must be of such a character as that the general public may, if they choose, avail themselves of it."

When measured by the definitions of a common carrier given in these authorities, the appellant appears to come far short of the characteristics required of one who exercises the privileges and is subject to the liabilities of a common carrier. The appellant in the operation of said stage line made no offer to the public to carry passengers or property. It did not, therefore, come under the definition of a common carrier contained in the section of the Civil Code above quoted and the other authorities cited. It confined its activities to carrying its own employees, their families, and those having business with it. The public was not invited, nor did it have any right to the use of the facilities provided by the appellant for transporting its own employees over said route. In its application before the Railroad Commission for a certificate of public convenience and necessity, it asked for no right or privilege to transport the public over said route, but confined its application for a certificate permitting it to transport its own employees and their families. It was stipulated in open court by counsel for the respondent that no one except the employees of the appellant, their families, and those having business with the company, were carried by appellant on the said stage line. This case in its essential features is much like the case of State of Utah v. Nelson et al., 65 Utah, 457, 238 P. 237, 239, 42 A. L. R. 849. Nelson was paid $20 per day by the Utah Out-Door Association to operate an automobile omnibus from Salt Lake City to the association's summer camp for the purpose of transporting persons from said city to said camp. A charge for the privileges of the camp was made, which charge included transportation to and from the camp. The association had been denied a certificate to operate the bus line by the Railroad Commission of the state of Utah, and a proceeding had been instituted by the state to enjoin Nelson from operating his said bus line. The Supreme Court of the state of Utah, in denying an injunction in that action, referring to the authorities cited in the opinion, said: "They all recognize that a common or public carrier is one who, by virtue of his business or calling or holding out, undertakes for compensation to transport persons or property, or both, from one place to another for all such as may choose to employ him. Running through the cases is a recognition of the dominant element of public service, serving and carrying all persons indifferently who apply for passage or for shipment of goods or freight. To constitute a common carrier such element is also requisite under the Utilities Act. It defines a 'common carrier,' as the term is used therein, to include among others every automobile corporation engaged in the transportation of persons or property for public service over regular routes between points within the state and an automobile corporation to include every corporation or person engaged in or transacting business of transporting passengers or freight, merchandise, or other property, for compensation by means of automobiles or automobile stages on public streets, roads, or highways along established routes within the state. Public service, as distinguished from mere private service, is thus a necessary factor to constitute a common carrier. Such element, in portions of the act, is not as clearly expressed as might be. Nevertheless, it necessarily is implied. It is only by the presence of such factor or element that the commission has power or authority to regulate or control such business."

Respondent has cited a number of authorities which he contends support his contention that the appellant in the operating of said stage line was engaged in the business of a common carrier. The principal authorities so cited by the respondent are as follows: Barbour v. Walker, 126 Okl. 227, 259 P. 552, 556, 56 A. L. R. 1049; Goldsworthy v. Public Service Commission, 141 Md. 674, 119 A. 693, 694; Restivo v. Public Service Commission, 149 Md. 30, 129 A. 884; Public Service Commission v. Western Maryland Dairy, 150 Md. 641, 135 A. 136; Doskovitch v. Board of Public Utility Com., 103 N. J. Law, 570, 138 A. 110; Davis v. People, 79 Colo. 642, 247 P. 801, 802. Practically all of these cases we think can be distinguished from the action now before us. The case of Barbour v. Walker was decided by the Supreme Court of Oklahoma after the case of Frost v. R. R. Com., supra. That case was decided by the court expressly upon the authority of Ex parte Tindall, 102 Okl. 192, 229 P. 125, and said court differentiates said last-named case from the Frost Case in the following language: "Thus the distinction between the California case and Ex parte Tindall, the case here controlling, is clear, in that the California law was held to be a regulation of a business of a private carrier, whereas the law in this state is a regulation of the use of the highways by motor carriers." That the Supreme Court of Oklahoma correctly construed "the California law" (the Auto Stage and Truck Transportation Act) is evidenced by the following excerpt from the decision of the Frost Case by the Supreme Court of the United States: "It is very clear that the act (The Auto Stage and Truck Transportation Act of California), as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. This, in effect, is the view of the court below plainly expressed. 240 P. 26 (70 Cal. Dec. pp. 464–465, 466)." 197 Cal. 230, 240 P. 26. It is true the Supreme Court of Oklahoma further distinguished the case of Barbour v. Walker from the Frost Case by the fact that in the Frost Case "the transportation company was operating as a private carrier under a single contract with a single concern, while in the case at bar the defendants were operating under five separate contracts with as many different firms dealing in different classes of commodities on a large scale." Respondent relies on this and other language of a similar import found in the case of Barbour v. Walker, as supporting his contention that the appellant, as it entered into a written contract with each passenger transported by it, amounting in all to over 7,000 contracts, was acting as a common carrier.

[4] The fact that the appellant entered into written contracts with its passengers before hauling them in the stages is a matter of slight significance in this action. In our opinion, these written contracts neither helped nor prejudiced the position of the appellant. If it was holding itself out as a common carrier—that is to transport any person who might apply for transportation—then if it carried only one passenger it would be held to be engaged in the business of a common carrier, even if it had made a written contract with such passenger, regarding his transportation. On the other hand, if the appellant was transporting only a particular class, such as, for instance, its employees, and was not holding itself out to serve the public generally, then it could not be held to be a common carrier and the fact that it might or might not be operating under written contracts with its passengers would be a matter of no materiality. In the recent case of Haynes v. MacFarlane (Cal. Sup.) 279 P. 436, the subject of written contracts entered into by a carrier was before this court. In that case the defendant had been ordered to discontinue his business of common carrier of freight by autotruck between Fresno and Hanford. Instead of complying with this order, he continued to operate his truck line and to carry on his business by means of a separate written contract entered into by him with each of his former customers. The trial court found that the status of the defendant had not been changed by the so-called "private contract" method of his operations, and we held that "the record supports the finding and the conclusion based thereon." It was evident in that case that the defendant was holding himself out to the public as a common carrier of freight. He had already entered into separate contracts with seven of his old customers and was about to make twenty additional contracts for the carriage of freight over his truck line. His position would have been the same had he attempted to carry on his business without these "private contracts" between him and his customers. It was the manner in which he carried on his business that determined his status as a common carrier, and not the fact that he was transacting business with his customers under a written contract. So in the present action we see nothing determinative of any question involved herein in the fact that the appellant entered into written contracts with its passengers. These contracts contained many provisions which we may consider the appellant deemed necessary to protect it in its transportation of its various employees, such as the agreement of the employee to pay for his transportation out of the wages earned by him, and, in the event of his discharge before such payment was made, an admission on the part of the employee that he was liable for the amount of said transportation. It also contained a further provision that, in case the employee should work 60 days, then a certain part of the cost of said transportation would be repaid him. The plan of having each passenger sign such a contract may have been adopted by appellant as a subterfuge to defeat certain provisions of the Auto Transportation Act. If so, it was a failure in that respect. But if adopted with the object of definitely setting forth the respective rights of the parties thereto, then it had some useful and meritorious purpose.

Goldsworthy v. Public Service Commission, supra, was an action instituted by the Public Service Commission of the state of Maryland against Goldsworthy and Buckell to enjoin them from operating a motor vehicle for the public transportation of passengers for hire. The defendants contended that they were not operating as common carrier, but under a contract between themselves, the purport of which clearly showed that they were simply operating a private carrier or transportation company. The court said, referring to the contract, "Its terms are peculiar, to say the least," and further added, "As Buckell was to pay $2 for each trip, whether there were 14 or less, it is not reasonable to suppose that he would not be expected by Goldsworthy to solicit business and take all he could get, up to the capacity of the truck, and there is nothing whatever in the contract to prevent that." The Supreme Court of Maryland held that a complaint showing these facts stated a good cause of action against the defendants, and sustained the order of the trial court overruling defendants' demurrer thereto. It is perfectly clear in that case that the defendants were soliciting business from the public and held themselves out at least to the carrying capacity of their truck as willing to carry all persons who might apply for passage. They were therefore common carriers under the definition of the authorities hereinbefore cited.

Restivo v. Public Service Commission, supra, was also decided by the Supreme Court of Maryland. The action was brought by Restivo against the members of the Public Service Commission of that state to restrain the Public Service Commission from preventing the plaintiff from operating certain busses and touring cars belonging to the plaintiff. The facts in the case show that the plaintiff was the owner of an autobus line and operating it between two certain cities of the state of Maryland under a legal permit from said commission. While such owner he sold the good will of said business for $6,000, and his permit was transferred to the purchaser. Shortly after the sale of the good will, the plaintiff began to run his busses and cars on Sunday over a portion of the same route without obtaining any permit to do so. He was indicted and convicted of operating said busses and cars without a permit from the commission. He continued after his conviction to operate his busses and cars as he had done before conviction. He was notified by the commission that he would be further prosecuted if he did not cease his operation. He then brought action against the commission as stated above. The Supreme Court held he was operating a common carrier and sustained a judgment in favor of the commission. There was no pretense in that case but that the plaintiff held himself out to carry any and all persons who would apply for passage. He therefore brought himself clearly within the terms of the law defining a common carrier.

The case of Public Service Commission v. Western Maryland Dairy, supra, was decided upon the authority of the two cases of Goldsworthy v. Public Service Commission, supra, and Restivo v. Public Service Commission, supra. The case of Public Service Commission v. Western Maryland Dairy is more favorable to the contention of plaintiff than any of the cases cited by him. The Western Maryland Dairy conducted its place of business in the city of Baltimore. It purchased at wholesale its milk supply from the farmers residing in the state of Maryland and nearby states, and retailed the same to the inhabitants of the city of Baltimore. It owned its own trucks, and the greater part of its milk supply was transported on said trucks from the different dairies or farms on which it was produced to its own place of business in the city of Baltimore. The Public Service Commission of the state threatened to prosecute the dairy company for its failure to obtain a permit from the Public Service Commission for the operation of its motortrucks in the transportation of milk. This the company refused to do on the ground that it was merely transporting its own milk. Thereupon the dairy company filed a bill in equity against the commission to enjoin such prosecution. The trial court rendered judgment enjoining the commission, but on appeal this judgment was reversed. It appears that the main, if not the only, grounds advanced by the dairy company for its refusal to obtain a permit was that it was transporting its own milk in its own trucks to its own dairy in Baltimore and was not subject to the provisions of the act. The Supreme Court held that the contention of the dairy company that it was transporting its own milk was not supported by the evidence and accordingly reversed the judgment. This case may lend some slight support to respondent's contention that the appellant is a common carrier and therefore subject to the provisions of the Auto Transportation Act of this state. But, if it does, it is the exception to the rule, and is contrary to the general rule enunciated by both the courts of this state and those of other jurisdictions. The parties to that action, if the opinion correctly states their position, appear to have been principally concerned with the issue as to the ownership of the milk which the dairy company was transporting, and, the court having decided that the producers of the milk and not the dairy company owned the milk, both court and counsel appear to have considered that the decision of that issue was determinative of the action itself. There was no showing whatever that the dairy company had ever carried or solicited transportation of any milk except that which it had purchased from the producers, nor was there any proof that it had held itself out to the general public as a carrier of milk or any other commodity. It is difficult, therefore, to understand, in view of the great unanimity of authority upon this subject, how the court could have held the dairy company under such circumstances was a common carrier.

The case of Doskovitch v. Board of Public Utility Commissioners, supra, involved the construction of a section of Kates Act, passed by the Legislature of the state of New Jersey (P. L. 1916, p. 283, as amended by P. L. 1926, p. 219) governing the use and operation of automobile busses for hire in that state. Doskovitch contended that he was transporting only the employees of the Michelin Tire Company and therefore was not a common carrier. The Supreme Court of that state held to the contrary. That case differs from the present one in that there was no proof or even claim that Doskovitch had any connection with or was acting on behalf of the Michelin Tire Company. Had the facts shown that the tire company was transporting its own employees through the agency of Doskovitch, a different case would have been presented to the court, and one in which a different determination would probably have resulted.

In the case of Davis v. People, supra, the facts show that Davis was engaged in the transportation of freight of all kinds between

Grand Junction and Paonia in the state of Colorado. His purported employer was an association of merchants, which he himself had formed, evidently for the purpose of evading the statute of the state of Colorado, governing the operation of common carriers. The court held that his scheme or plan was "a mere device to hoodwink the law."

The case of Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, 131 P. 864, 867, Ann. Cas. 1914C, 1197, has been cited by each of the parties hereto, and some reliance appears to be placed upon the decision in this case by each of said parties. The plaintiff was the owner of a franchise to operate a ferry between the city of Vallejo and Mare Island. Mare Island is owned by the government of the United States, and there were located thereon extensive ship-building plants in which were employed a large number of men, practically all of whom, resided in the city of Vallejo. These government employees, or at least a considerable part of them, organized a club called the Solano Aquatic Club, which club after its organization and incorporation, began the operation of a ferry between the city of Vallejo and Mare Island for the transportation of its members only. Regarding the defendant corporation, the court said: "Moreover, while it is said that the membership consists exclusively of government employés, and while for the purpose of this consideration this may be conceded to be a fact, it is nevertheless true that the by-laws do not limit the membership to such persons, but expressly throw the membership open to the general public, making no other requirement of an applicant than 'good character and industrious habits.' Furthermore, the by-laws declare that the membership shall not be limited, but 'shall depend upon the facilities available, the same to be increased in the discretion of the board of directors.' This, so far as concerns the ferry business of appellant (defendant) can mean nothing more than that the corporation will take into its so-called membership as many individuals as it can transport, and will increase its membership with its transportation facilities. Finally, it should be stated that defendant is not operating under any ferry license from the state or its mandatories, or from the United States or any of its agencies. It runs its launches at its pleasure, owing responsibility to no one and denying responsibility to any one." The result of that litigation was that the order of the trial court granting a temporary injunction pendente lite against the defendant was affirmed by the court. We find nothing in that case nor in the opinion of the court rendered therein which in the least lends any support to the respondent herein in its conclusion and claim that the appellant in operating its stage line for the transportation of its employees and their families was engaged in the business of a common carrier. This concludes the review of respondent's authorities. We find nothing in them which would cause us to change or modify our conclusion already stated herein that the appellant in the operation of its said auto stage line was not acting as a common carrier.

[5] Under the Frost Case, as decided by the Supreme Court of the United States, the Railroad Commission of this state, therefore, had no jurisdiction over appellant in any manner whatever. It was free under these circumstances to operate its auto stage line in the manner shown by the evidence herein without securing any certificate of public convenience and necessity from said commission. The operation of said stage line, and the carrying and transportation of passengers therein, did not, therefore, legally damage the respondent. The implied finding of the jury adverse to this conclusion finds no support in the evidence.

[6] There is one other contention of the appellant which should receive consideration in this opinion. The court instructed the jury that the measure of the plaintiff's damage was the sum of $2.50 for each passenger carried by the defendant. This the appellant claims was error, and we think its contention must be sustained. Plaintiff, if damaged at all, would only have been damaged to the extent of the net profit, which he would have made in transporting the passengers which he lost by reason of their riding in defendant's stage. This net profit would have been the difference between $2.50 per passenger, the fare which plaintiff was entitled to charge, and the cost to the plaintiff of transporting said passenger. This cost would be the expense of maintaining and operating said stage line. It is true that the evidence shows that the plaintiff maintained and operated his stage line, during all the time the defendant was transporting its said employees, and that during this time it carried only 2 per cent. while the defendant carried 98 per cent. of all the passengers transported over said route. Had plaintiff transported all of said passengers, including the 98 per cent. carried by defendant, it is manifest that the cost of said transportation would have exceeded the cost incurred by plaintiff in transporting only the 2 per cent. which he did carry in his own auto stage; at least the court could not say as a matter of law that the cost in the two instances could have been the same.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

101 Cal. App. 291

WRAY et al. v. CHATTERSON et al.
(Civ. 1.)

District Court of Appeal, Fourth District, California. Oct. 17, 1929.

Joint adventures ⚿4(1)—Contract between contiguous landowners to acquire land for street extension purposes held to show intention to jointly and severally assume purchase price.

Contract between parties mutually engaged in subdividing and developing contiguous tracts of land which they owned in severalty, to acquire strip of land for street extension purposes wherein they jointly and severally agreed to pay grantor $2,500, and to proportionately share all expenses of paving, installing of curb and gutter, sewer, gas, and water lines, *held* to show intention to jointly and severally assume liability for purchase price of strip of land, so that corporation by paying for the land exceeding cost of improvements more than met its share of contribution to the total obligation.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Newton Wray and others against L. H. Chatterson and another. Judgment for plaintiffs, and defendant the Southern California Investment Company appeals. Reversed.

J. M. Chatterson, of Los Angeles, for appellant.

Head, Rutan & Scovel, of Santa Ana, for respondents.

SLOANE, P. J. This appeal, taken to the Second District Court of Appeal from the judgment of the superior court of Orange county, has been transferred to this court for decision, and is submitted, by stipulation of the parties, on the briefs on file.

The appeal is from a judgment for plaintiffs for the recovery from the defendant Southern California Investment Company the sum of $930.63 by way of contribution for appellant's share of a liability claimed under joint and several obligation entered into by plaintiffs and defendant. Shortly prior to July 28, 1924, the plaintiffs and defendant were mutually engaged in subdividing and developing certain contiguous tracts of land in the city of Santa Ana, which they owned in severalty, and, in order to secure certain street extensions deemed desirable for the subdivision, said plaintiffs and defendant, of date July 28, 1924, negotiated and executed with said M. Nisson and Charlotte L. Nisson, his wife, as parties of the first part, and Newton Wray and Isabel Wray, his wife, Walter Fine and Olive Fine, his wife, J. L. Stephenson and Ida E. Stephenson, his wife, and the Southern California Investment Company, a corporation, of which L. H. Chatterson is president, as party of the second part, a contract in writing, whereby the parties of the first part agreed to grant and convey the parcel of land heretofore referred to, for street extension purposes, for a consideration of $2,500, whereby, in consideration of the granting of the parcel of land referred to by said parties of the first part, the said parties of the second part jointly and severally agreed to pay to the parties of the first part, on or before one year from the date of said agreement, the sum of $2,500, together with interest thereon, at the rate of 7 per cent. per annum, payable semiannually, as set forth in a certain promissory note executed as of even date therewith, and wherein it was further agreed by the parties of the second part, jointly and severally, to cause to be paid all of the expenses of the paving and installing of curb and gutter upon the land so to be conveyed and used for said street extension, and to cause to be installed, prior to the paving of said portion of the street, and in the said portion thereof to be so paved, all sewer lines, gas lines, and water lines, with laterals, so that, after the paving thereof, the cutting of the pavement would not be necessary for said installation; and to pay, or cause to be paid, all of the expense of the installing of said lines, and that said parties of the first part should not be required to pay any of the aforesaid expense of paving, gutter, curb, and pipe lines, in and upon said portion of the street extension, and that the parties of the second part shall cause to be paid all expenses of the aforesaid paving and pipe lines.

There were other conditions attached to this contract, but it is not disputed, and the trial court finds, that all of the conditions of the contract as to the payment for said real property, and of the accruing charges for installing improvements thereon, have been fully met.

The only controversy in the case is as to the liability for and apportionment of these payments between the plaintiffs and the defendant.

It is conceded that as between the parties to this action no liability attached to Walter R. Fine or Olive N. Fine. The responsible parties, then, to this contract are the plaintiffs and the defendant. On the face of the contract, and by its terms, being a joint and several obligation, each of the obligors become liable to contribute his or her proportionate share of the stipulated expenditures, which would be four-fifths for the plaintiffs and one-fifth for the defendant. Nothing appears in the evidence or the findings to indicate any limitation on the contractual liability of the wives of plaintiffs Wray and Stephenson. So far as the record discloses, they were equally bound with their husbands and the defendant corporation under this contract. The proportionate liability of joint

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and several obligors on a written contract is fixed by section 1432 of the Civil Code.

Plaintiffs rely, however, upon, and claim to base their action upon, a verbal agreement alleged to have been made between the plaintiffs and the defendant shortly prior to the execution of the written contract, and in the course of the negotiations for the Nisson land, whereby Wray and Stephenson were to assume one-half of the expense to be incurred in this deal, and the defendant company was to pay the other half, and that the contract was executed under this agreement.

The trial court, over the objection of defendant, admitted evidence as to this oral agreement, and found that it was binding on the defendant. This is assigned as error, on the ground that all prior oral negotiations are to be deemed merged in the written instrument, and that the implied obligations of the parties under the statute can no more be varied by previous oral agreements than the express terms of the writing.

There is, however, another phase of this case, which, in our view of the law and the evidence, calls for a reversal of the judgment, and renders a discussion of the foregoing point unnecessary. The expenditures, jointly and severally assumed under the written contract by the plaintiffs and defendant, included not only the $1,792.60 chargeable to the parties for installing paving, curbs, gutters, sewer, gas, and water lines, etc., but also the purchase price of $2,500 for the strip of land acquired. This latter fund has been entirely ignored in the findings of the trial court, although the attorney for the defendant asked findings thereon, by proposed amendments of the findings submitted to and adopted by the court, which amendments were denied, and judgment was given in favor of plaintiffs for $896.30, being one-half of the total expenditure for improvements of $1,792.60, without reference to the $2,500 agreed consideration for the parcel of land.

The obligations of the parties to contribute to this payment of $2,500 rests upon precisely the same footing under the written contract as does that of the $1,792.60. Evidence that this $2,500 was paid by the defendant company is clear and explicit and undisputed. Even if it can be held that the oral agreement that each party was to pay one-half of these obligations, which amounted to the total of $4,292.60, is established, it appears that the defendant has contributed more than one-half of that amount, and is thereby absolved from further liability to the plaintiffs.

We think it is clear that the liability for contribution relied on in this action arises on the written agreement of July 28, 1924. This is the only contract by which the parties bound themselves to pay the $2,500 consideration for the land acquired, and the additional $1,792.60 for the improvements, the cost of which they assumed. This written obligation includes both of these items; and even under the oral agreement, as testified to by the plaintiffs, that the plaintiffs were to assume one-half of the liability and the defendant one-half, both the $2,500 and the cost of the improvements were contemplated in such oral agreement. The plaintiff Wray testified that the oral agreement took place shortly before the execution of the written contract, and that the statement of the liability each party was to assume "relates solely to the price and terms and conditions of the contract we drew up afterwards with Mr. Nisson." Plaintiff Stephenson testified that the oral agreement was preliminary to the written contract, and it was to the effect that the oral agreement "related to the matter of deciding how we should prorate the expense of doing this, and that the expense was to be prorated among three of us, half by Mr. Chatterson as I remember, and the other half by Mr. Wray and myself." These oral negotiations seem to relate clearly to the combined purchase price of the Nisson land and the installation cost of the improvements, and, when the defendant corporation paid the $2,500 for the land, it more than met its share of the contribution to the total obligation.

Judgment reversed.

We concur: BARNARD, J.; MARKS, J.

101 Cal. App. 396

PEOPLE v. WYATT. (Cr. 1797.)★

District Court of Appeal, Second District, Division 2, California. Oct. 22, 1929.

Rehearing Denied Nov. 6, 1929. Hearing Denied by Supreme Court Nov. 21, 1929.

1. False pretenses ⟹51—Defendant was not as matter of law entitled to acquittal of grand theft, where people's evidence showed defendant obtained trust deeds under pretense of procuring loan.

In prosecution for grand theft of notes and trust deeds, in which evidence was conflicting, and people's testimony, adopted by trial court in findings, showed that defendant procured deeds under subterfuge that he was securing loan, and required them as collateral security, whereas in fact he intended to and did sell them, defendant was not as matter of law entitled to acquittal.

2. Witnesses ⟹219(3)—Conversations between defendant and counsel during negotiations which led to criminal charges held admissible on issue of intent.

In prosecution for grand theft, conversations between defendant and his counsel during negotiations which led to filing of criminal charges, while not binding upon court or jury, could be received for their consideration as rebutting evidence of defendant's criminal intent in connection with the other evidence before the jury.

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Owen E. Wyatt was convicted of grand theft, and he appeals. Reversed.

Henry G. Bodkin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. The determinative question upon this appeal has recently been decided, and we need not here for the purposes of a ruling thereon discuss the facts involved. Appellant was charged by information with grand theft, the pleading consisting of eight counts or separate alleged offenses. His counsel at the opening of the trial announced that "the defendant consents and requests that the case be tried by the court sitting without a jury," to which the district attorney also consented. The defendant did not personally express any consent to a trial by the court or waiver of his right to a jury. The Attorney General confesses error on behalf of the people, and, upon the authority of People v. Garcia (Cal. App.) 277 P. 747, and People v. Spinato (Cal. App.) 280 P. 691, the judgments and order appealed from must be reversed.

[1] It is further contended by the appellant that he was convicted of grand theft upon the theory that he stole the property in controversy, whereas the evidence tended to show that it was obtained by trick and device, and that the judgments should be reversed upon that ground. It is argued that the complainants signed written instruments of conveyance under which they parted with their property, and for which they received certain money as consideration; that, if made under misrepresentation and through fraud practiced by the defendant, the contract was voidable, and that a tender and rescission would be necessary to repossession, or they might affirm the contract and sue for damages, in which event no crime would have been committed, for the reason that title had passed. However, the theory of the prosecution, which there is evidence tending to support, was, as stated by the trial judge, that the signatures and certain notes secured by trust deeds were obtained by false pretenses as to the purposes of the transactions. According to testimony of the people's witnesses and the findings of the court, Wyatt obtained them under the subterfuge that he was securing a loan and required them as collateral security, whereas in fact he intended to and did obtain the notes for the purpose of selling them, and depriving the complainants thereof. Since there was a substantial conflict in this respect, we cannot say as a matter of law that the trial court erred. It is not a question which can be determined upon appeal. If the complaining witnesses were induced to part with their property with the understanding and intention that title thereto should remain contingent upon the repayment of a loan, with the right to repossession, the defendant's undisclosed intention to dispose of the property became felonious when consummated, and his asserted theory of defense would not be conclusive.

[2] Error is assigned to certain rulings of the trial court excluding conversations between the defendant and his counsel during the negotiations which led to the filing of criminal charges, offered for the purpose of rebutting evidence asserted to have shown criminal intent. We think the rule stated in Wood v. Etiwanda Water Co., 147 Cal. 228, 81 P. 512, 514, is here applicable. In that case the appellant complained of a ruling admitting such evidence, and the Supreme Court said: " 'The communication or advice of an attorney to his client may, however, be given in evidence by the consent of the client.' Code Civ. Proc. § 1881, subd. 2. * * * 'Whenever evidence of the motive or intent with which an act was done is relevant, direct testimony is admissible, although, of course, not conclusive evidence of such motive or intent.' Am. & Eng. Encyc. of Law (2d Ed.) vol. 11, p. 507." Under the facts presented by the record in the instant case, while such evidence would not be binding upon the court or jury, it may be received for their consideration in conjunction with all of the other evidence before them.

The judgments and order denying a new trial are reversed.

I concur: WORKS, P. J.

IRA F. THOMPSON, J., deeming himself disqualified, does not participate in the foregoing decision.

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101 Cal. App. 290

COOPER v. CEREGHINO. (Civ. 3893.)

District Court of Appeal, Third District, California. Oct. 17, 1929.

1. Specific performance ⟹49(2)—Judgment awarding specific performance must be reversed, where adequacy of consideration which plaintiff agreed to pay for property is not alleged as shown (Civ. Code, § 3391).

Judgment granting specific performance of contract for sale of land must be reversed, where there is no allegation, proof, or finding of adequacy of consideration which plaintiff agreed to pay for the property under Civ. Code, § 3391.

2. Specific performance ⟹117—Admitting written modification of contract sought to be enforced, but not alleged, held error.

In suit for specific performance, admitting in evidence a written modification of the contract sought to be enforced, but which was not alleged, *held* error.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Mrs. E. E. Cooper against C. Cereghino. Judgment for plaintiff, and defendant appeals. Reversed with directions.

Randall & Bartlett, of Los Angeles, for appellant.

Henry W. Mahan and O. M. Peabody, both of Los Angeles, for respondent.

FINCH, P. J. This is an action for specific performance of a contract for the sale of land. Judgment was entered in favor of the plaintiff and the defendant has appealed.

[1] A careful examination of the record shows that there is no allegation, proof, or finding on the question of the adequacy of the consideration which the plaintiff agreed to pay for the property. The judgment therefore must be reversed. Civ. Code, § 3391; Salisbury v. Yawger, 184 Cal. 783, 795, 195 P. 682; Laguna Land & Water Co. v. Greenwood (Cal. App.) 268 P. 699; Boulenger v. Morrison, 88 Cal. App. 664, 264 P. 256; Walker v. Clark, 80 Cal. App. 520, 252 P. 334; 23 Cal. Jur. 438. "The accepted rule in this state is that the question of the inadequacy of the consideration relates to the time of the formation of the contract—that is, at the time the contract was made." O'Connell v. Lampe (Cal. Sup.) 274 P. 336, 337.

[2] The court erroneously admitted in evidence a written modification of the contract sought to be enforced, but which was not alleged. The decree was based on the contract as so modified.

The judgment is reversed, and the trial court is directed to grant leave to the plaintiff to amend her complaint.

We concur: ROLFE L. THOMPSON, J.; PLUMMER, J.

PHILLIPS & HOLLMAN, Inc., v. PEERLESS STAGES, Inc. (Civ. 6966.)★

District Court of Appeal, First District, Division 2, California. Oct. 22, 1929.

Rehearing Denied Nov. 21, 1929. Hearing Granted by Supreme Court Dec. 19, 1929.

1. Landlord and tenant 🔑109(4)—There must be acquiescence in abandonment on part of both parties before surrender of leasehold can be accomplished.

Where evidence showed that lessee merely surrendered possession of leased premises, there was no surrender of leasehold, since it is necessary that there be an acquiescence in an abandonment on part of both parties before surrender can be accomplished.

2. Landlord and tenant 🔑202(1)—Where lessee repudiates lease or abandons premises, lessor cannot recover installments to accrue in future.

Repudiation of lease or abandonment of premises by lessee does not operate at once to mature all rent reserved so as to enable lessor to recover not only installments already accrued but also those to accrue in future.

3. Landlord and tenant 🔑49(2)—Where lessor elected to take possession of premises on lessee's default and re-rent them for lessee's benefit, he could not recover damages before end of term.

Where lessor, on default by assignee of lessee in payment of rent, elected to take possession of premises and re-rent them for his benefit, lessor could not recover damages piecemeal or before end of term specified by lease, since before that time it could not be known what credits for rentals must be allowed and amount of damage suffered by lessor could not be accurately computed.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action for rent by Phillips & Hollman, Incorporated, against Peerless Stages, Incorporated. From the judgment, plaintiff appeals. Affirmed.

C. Morton Booth, of Los Angeles, for appellant.

Preston Higgins and Alfin N. Nelson, both of Oakland, for respondent.

LAMBERSON, Justice pro tem. On February 27, 1925, plaintiff, who is appellant herein, leased to assignors of the defendant and respondent, certain portions of a building in the city of San Jose, known as the Auzerais Building, for the term of ten years, beginning May 1, 1925, for a total rental expressed in the lease, payable in advance in specified monthly instalments. The lease provided in part as follows:

"Said lessees hereby agree that if the rental hereunder reserved be not paid within five (5) days after the same becomes due and payable hereunder, or if default be made in the performance of any of the other covenants on their part herein contained, and shall continue for five (5) days after written notice thereof given to the lessees by the lessor, such default or breach shall, at the option of the lessor, work a termination of this lease to the same extent and with all the legal incidents as if the term hereof had expired by efflux of time, and it shall then be lawful for the said lessor, his agent, or agents, to reenter the said premises and remove all persons therefrom and to repossess himself of said premises as of his original estate.

* * *

"Said lessees further agree that should they vacate or abandon the demised premises prior to the expiration of the term hereunder provided for, or should said lease prior to the said time be determined in any manner in these presents agreed upon, except by reason of the total destruction of the said premises, or by cancellation by agreement in writing, or

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★Hearing granted. 291 P. 178.

by the lessees for cause, and the said lessor shall enter in and upon said premises and take possession thereof, notwithstanding the same the said lessees shall not be released from liability for the full rental herein called for, but said lessor may let said premises, in whole or in part, and upon such terms as his judgment may dictate (the lessor, however, agreeing to make diligent effort to realize the best obtainable rent therefor) and the said lessees shall be liable unto the said lessor, for the balance of the full term hereof, for the difference between the said rental procured by said lessor and the rental herein called for.

"The lessor may at any time during the term of this lease terminate and end this lease upon six (6) months' written notice to the lessees, sent by registered mail and addressed to the lessees at the demised premises, etc."

Respondent, as assignee of the lessees, went into possession of the premises on May 1, 1925, and continued in possession until December 31, 1925. The respondent having defaulted in payment of the rent due December 1, 1925, appellant, on December 15th, caused to be served upon the respondent a written notice, stating in substance that respondent was thereby notified to immediately vacate the premises occupied by respondent for its failure to pay the rent as provided in the lease, and in the event of its failure to vacate the premises, it would be necessary for appellant to commence legal proceedings for possession. Demand was made in the notice for the rental then due for the month of December.

Respondent continued in default and vacated the premises on December 31, 1925. Appellant then went into possession and made diligent effort to re-rent the premises, and did re-rent them up to the 1st day of June, 1927.

At some time after December, 1925, the appellant commenced an action against the respondent in the superior court, by which it sought to recover the rent due under the lease for the month of December, 1925, and also such rent as would accrue during the remainder of the term. The trial court, on February 23, 1927, caused judgment to be entered in favor of the plaintiff for the rent due for the month of December, 1925, but as to all other matters found that the action had been prematurely commenced.

On May 12, 1927, the appellant caused written notice to be served upon the respondent, notifying the latter in substance that the lease was thereby canceled and terminated, as of the 1st day of June, 1927, in accordance with the covenants and conditions of the lease, for the reason that respondent had paid no rent since December 31, 1925.

Respondent was further informed by said notice that the lessor had used all due diligence to rent the premises for such rental as could be obtained, and that the greatest amount of rental that had been obtained from January 1, 1925, to date of notice, was the sum of $2,297.50; that the difference between the amount so obtained and the amount due the lessor up to the first day of June, 1927, was $8,002.50, for the payment of which sum demand was made in said notice. On June 11, 1927, appellant filed its complaint in the action now before the court, seeking to recover the said sum of $8,002.50, after alleging that the appellant had rented the said premises for the benefit and on account of said defendant and had collected the sum of $2,297.50 as rentals. The trial court found that the action was prematurely brought, and gave judgment that appellant take nothing as against respondent. From said judgment this appeal has been taken.

It appears from the evidence that respondent gave no notice of abandonment or repudiation of the lease, and the trial court found that the respondent vacated and quit the premises pursuant to the notice from appellant, and not otherwise.

It is apparent that the first notice was given in accordance with the provisions of the lease, and the lessor rented the premises, according to its own statement, in accordance with the provisions of the lease and for the benefit of the respondent. No notice of termination or cancellation of the lease was served upon respondent prior to May 12, 1927. The appellant has sought to justify a recovery of the sum named in the complaint for the period ending June 1, 1927, by serving such notice of cancellation and termination of the lease upon the respondent, and urges that such action on its part had the effect of absolutely canceling the lease and terminating the rights of the parties hereunder.

[1] So far as appears from the records in the case, the respondent voluntarily surrendered possession of the premises in December, 1925, and there was no evidence that it surrendered anything under the lease except the possession of the premises, or expressed in any manner an intention or desire to consider the lease at an end. Under these conditions, it cannot be said that the respondent abandoned or surrendered its leasehold. It was necessary that there be an acquiescence in an abandonment on the part of both parties before a surrender could be accomplished. "A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds, it can be done only by express consent of the parties in writing, or by operation of law, when the parties do something which implies that both have consented." Welcome v. Hess, 90 Cal. 507, 512, 27 P. 369, 370, 25 Am. St. Rep. 145.

As already appears, after December, 1925, the appellant continued to rent the premises for the benefit of the respondent. To change this condition it was necessary that both parties should manifest their intention to consider the lease at an end.

In the case of Welcome v. Hess, supra, 90 Cal. at page 513, 27 P. 371, the court said:

"The term is an estate in lands. The tenant, subject to the covenants of his lease, is the owner for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender. The landlord has no more right to the possession or to lease than a stranger. * * *

"The tenant cannot abandon his title; and notwithstanding he has gone out, unless the surrender is accepted, that continues. It is his right to resume possession at any time during his term."

[2] A repudiation of a lease or an abandonment of the premises by a lessee does not operate at once to mature all the rent reserved so as to enable the lessor to recover, not only instalments already accrued, but also those to accrue in the future. Bradbury v. Higginson, 162 Cal. 602, 123 P. 797; Oliver v. Loydon, 163 Cal. 124, 124 P. 731; Melone Co. v. Acquistapace, 73 Cal. App. 199, 238 P. 734; Syrett v. Strickland, 86 Cal. App. 623, 261 P. 484.

From the opinion in the case of Bradbury v. Higginson, supra, the following language, appearing at page 604 of 162 Cal., 123 P. 798, has been often quoted: "That a landlord may have an action for damages for breach of contract when a tenant abandons his lease is not questioned by any of the authorities. His damages, however, in that event, are to be ascertained in a particular way. Where a lease is repudiated and the premises abandoned, the landlord may pursue one of two courses: He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; or he may take possession of the premises and recover damages, which damages will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease. Where he sues for damages, he cannot in advance recover the full price to be paid for the unexpired term, but the amount of his recovery is limited as just indicated. In re Bell, 85 Cal. 119, 24 Pac. 633; Respini v. Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488; Massie v. State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797; Jones on Landlord & Tenant, § 140. It is said by Mr. Gear, in his work on Landlord & Tenant: 'If the premises are abandoned without cause, the landlord may elect to leave them vacant and recover rent, or enter and determine the tenancy; but he cannot both enter and treat the contract as subsisting. * * * Under the Roman Civil Law and in Louisiana, the tenant who abandons during the term may be sued at once for the whole rent of the term.' From the decision in the case of Respini v. Porta, supra [89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488], we quote: 'But we cannot support him in his contention that because the defendant, against his (plaintiff's) wishes and without right, abandoned the property, he is entitled to recover the full amount provided for by the terms of the lease to defendant. Our code provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Civ. Code, § 3300. * * * In cases of this kind the landlord is not entitled to recover for rent of the premises after the abandonment of them by the defendant, but has compensation for the injury, and his measure of damage is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided there has been good faith in the subsequent letting' "—citing cases.

[3] We are of the opinion that the principles above stated are decisive of the instant case. Having elected to take possession of the premises and re-rent them for the benefit of respondent, the appellant must pursue the remedy outlined in the opinion last quoted, and which has been affirmed frequently in more recent decisions.

The amount of damage suffered by appellant cannot be recovered piecemeal, or prior to the end of the term specified by the lease, because until that time arrives, it cannot be known what credits for rentals must be allowed respondent, as lessee, and the amount of damage suffered by the appellant cannot be accurately computed until those credits are known.

We are of the opinion that the judgment should be affirmed. It is so ordered.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

101 Cal. App. 174

LIM BEN v. PACIFIC GAS & ELECTRIC CO. (Civ. 6942.)★

District Court of Appeal, First District, Division 2, California. Oct. 14, 1929.

Rehearing Denied Nov. 12, 1929. Hearing Denied by Supreme Court Dec. 9, 1929.

1. Electricity 🔑14(3)—Rule that negligence cannot be imputed from methods generally used in business does not relieve electric power company from exercising ordinary care in constructing and maintaining transmission system.

The rule that negligence is not to be imputed from methods in general use in any business does not relieve electric power company from its general duty to exercise ordinary care in construction and maintenance of its transmission system.

2. Negligence 🔑4—"Ordinary care" is care reasonably prudent person would exercise under circumstances.

Ordinary care means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise under the circumstances in order to prevent injury.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Ordinary Care.]

3. Negligence 🔑4—"Ordinary care" requires use of every means known or discoverable by reasonable inquiry to prevent death which may be caused by agency lawfully used.

Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or which would be known with reasonable inquiry, be used to prevent it.

4. Negligence 🔑59—Company is liable for any injury proximately resulting from its negligence, which it should have anticipated was likely to cause injury.

A company which ought to have anticipated, in exercise of ordinary care, that its negligent act or omission was likely to result in injury to others, is liable for any injury proximately resulting therefrom, though it might not have foreseen the particular injury which happened.

5. Electricity 🔑19(6)—Negligence in hanging heavy electric transformer from cross-arm of pole held for jury.

Whether electric power company was negligent in hanging 750-pound metal transformer from cross-arm of 40-foot pole but one foot from curb of public street, which was constructed on 7 per cent. grade and generally traveled by automobiles, by means of half-inch hangers extending but 1¼ inches down over cross-arm, *held* for jury in action for death of automobile driver on whom it fell after car struck pole.

6. Electricity 🔑19(12)—Contributory negligence of automobile driver killed by fall of electric transformer from pole struck by car held for jury.

Contributory negligence of automobile driver, on whom electric transformer suspended from cross-arm of pole near street curbing fell after automobile struck pole, *held* for jury in action against electric power company for his death.

7. Negligence 🔑122(1)—Contributory negligence is affirmative defense, which defendant must establish by preponderance of evidence.

Contributory negligence is an affirmative defense, the burden of establishing which by a preponderance of the evidence is on defendant.

8. Negligence 🔑136(9)—Negligence is fact question for jury, if reasonable minds might draw different conclusions.

If reasonable minds might draw different conclusions on the question of negligence, such question is one of fact for the jury.

9. Electricity 🔑19(4)—Testimony as to whether expert witness ever heard of electric transformer falling from pole held inadmissible in action for death so caused.

In action for death of automobile driver, on whom electric transformer fell from pole near street curbing after automobile struck pole, testimony of electrical engineer in defendant power company's employ as to whether he had ever known of transformer falling from pole *held* properly excluded as of no probative value, particularly in absence of showing of similar conditions.

10. Evidence 🔑506—Expert testimony as to whether electric transformer was properly installed held inadmissible.

In action for death of automobile driver, on whom electric transformer fell from pole near street curbing after automobile struck pole, testimony of electrical engineer in defendant power company's employ as to whether transformer in his opinion was installed in proper and prudent manner *held* properly excluded as calling for opinion on matter for jury to determine from all the evidence.

11. Negligence 🔑141(8)—Instruction that "contributory negligence" is such negligence as, concurring with defendant's negligence, was "the" proximate cause of injury, held not erroneous.

Instruction that contributory negligence is such an act or omission of plaintiff, "amounting to a want of ordinary care as, concurring or cooperating with the negligent act of the defendant, was the proximate cause of the injury complained of," *held* not erroneous as advising jury that contributory negligence must be "the" proximate cause of injury to bar recovery.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Contributory Negligence.]

12. Trial 🔑251(8)—Instruction that independent act, to constitute proximate cause of injury, must be so disconnected as to show plainly that damage was not natural or probable consequence of original negligence, was inapplicable in action against electric power company for death by fall of transformer.

Instruction that, where negligence is continuous at all times up to moment of injury, an independent act, to constitute the proximate cause thereof, must be so disconnected in time

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★Rehearing denied. Hearing denied by Supreme Court.

and nature as to make it plain that the damage was not a natural or probable consequence of the original wrongful act or omission, *held* improper as inapplicable in action against electric power company for death of automobile driver, on whom transformer fell from pole near street curbing.

13. Electricity ⚷19(13)—Instruction that defendant was bound to exercise ordinary care in "construction" of electric transformer to prevent its escape from pole held not erroneous.

In action against electric power company for death of automobile driver, on whom transformer fell from pole, to which it was alleged to have been insufficiently attached, after automobile struck pole, instruction that defendant was bound to exercise ordinary care in construction and maintenance of transformer to prevent its escape from pole *held* not erroneous as injecting into case new element of care in construction of transformer.

14. Trial ⚷296(4, 5)—Instruction to find for plaintiff if alleged negligence occurred and proximately caused intestate's death held not erroneous as ignoring defense of contributory negligence, in view of other instructions.

Instruction to find for plaintiff in death action, if negligence charged in complaint occurred and was proximate cause of death, *held* not erroneous as ignoring defense of contributory negligence, in view of other instructions that such negligence, however slight, would bar recovery, if proximately causing or contributing to fatal injuries, and that any negligence of decedent proximately contributing to his injury defeats recovery.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Lim Ben, as administrator of the estate of Lim Sing Pong, against the Pacific Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. J. Straub and Chas. E. Finney, both of San Francisco (Leo H. Susman, of San Francisco, and John J. McDonald, of Oakland, of counsel), for appellant.

Snook, Snook & Chase, of Oakland, for respondent.

LUCAS, Justice pro tem. This action was brought by plaintiff and respondent, Lim Ben, as the administrator of the estate of Lim Sing Pong, deceased, to recover damages for the death of said decedent, due, it is alleged, to the negligence of the defendant corporation, appellant herein. A jury returned a $15,000 verdict for respondent, and, from the judgment thereon, appeal is taken on the following grounds: (1) That the evidence was insufficient to support the implied finding of the jury that there was actionable negligence on the part of appellant; (2) that decedent was guilty of contributory negligence; and (3) that the court committed error (a) in denying appellant's motion for a nonsuit, (b) in denying appellant's motion for a directed verdict, (c) in denying appellant's motion for a judgment notwithstanding the verdict, (d) in refusing to grant a new trial, (e) in sustaining objections to certain questions asked the witness Worthington, and (f) in the giving of certain instructions.

Decedent, who was 27 years old, married, and the father of one child, was engaged in the laundry business and had an earning capacity of about $150 per month. Just prior to the accident which caused his death he was driving a light Ford laundry delivery car easterly along the southerly side of Mather street, between Howe street on the west and Piedmont avenue on the east, in the city of Oakland. Mather street is 44 feet wide from curb to curb, and slopes downward from Howe street to Piedmont avenue on a 7 per cent. grade. The sidewalk on the south side of the street is 18 feet wide, consisting of a 6-foot cement strip in the center, with 6 feet of dirt on either side of the cement. Situate therein, about midway between Howe street and Piedmont avenue, in the dirt portion thereof between the cement strip and the plank curb, stood one of appellant's power line poles. The northerly portion thereof at the bottom was approximately 1 foot south of the said curb and about an equal distance easterly of an open, uncurbed cement driveway leading from the street to a private garage. Suspended on the pole near the top, 36 feet 4 inches above the ground, was a metal transformer 34 inches in height and 21 inches in diameter, weighing 750 pounds. It was neither bolted nor otherwise fastened to the pole, being maintained in place merely by two L-shaped steel hangers one-half inch in thickness bolted to the transformer 10 or 12 inches apart. These hangers were hooked over a 4-inch by 6-inch cross-arm and extended down "a little better than 1¼ inches" on the side of the cross-arm opposite the transformer. The bottom part of the transformer rested against another cross-arm or rest-arm lower down on the pole, so that in place it would maintain an erect position. The cross-arms ran at approximately right angles with the street curb and were attached to the westerly side of the pole.

Decedent's delivery car was proceeding along the southerly side of Mather street from the west at a rate of between 10 and 15 miles an hour. At no time did its speed increase, but before it reached the pole in question it was seen for some distance to swerve from side to side, one witness testifying that it swerved a couple of feet each way, and another that it swerved half the length of the car. Finally, curving toward the south, the front portion of the car struck the pole at an angle, shoved it over 2 inches at the surface of the ground, and splintered a 1½ inch thick hollow wooden moulding which incased a ground wire running down the pole. The Ford was badly damaged. Immediately after the impact the decedent alighted and stood near the pole in the dirt portion of the sidewalk between the paved part and the curb. The transformer was seen to sway back and forth several times in a northerly and southerly direction until it fell, crushing and instantly killing decedent.

The witness Worthington, an electrical engineer in the employ of the appellant, testified that the transformer was hung on the pole in the same manner that is usually and generally employed, not only by appellant, but by other power companies whose lines he had observed, and that he had never seen or heard of a transformer being bolted to a pole or cross-bar.

[1] It is the contention of appellant in support of its first ground of appeal that the transformer, its hangers, and the cross-arms were all in good condition and in proper location, and that, since it was shown that the method employed in hanging the transformer to the pole was the usual method followed by appellant and others in appellant's business, it was established as a matter of law that appellant was in the exercise of due care. Reliance in part is placed upon the opinion of Mr. Justice St. Sure in the case of Webber v. Bank of Tracy, 66 Cal. App. 29, 36, 37, 225 P. 41, 44, wherein the court said: "Negligence is not to be imputed from methods in general use in any business. The standard of ordinary care is established by competent testimony upon the custom and general usages of the business. * * * No man is held by law to a higher degree of care than the fair average of his profession, business, or trade, and the standard of due care is the conduct of the average prudent man. * * * However strongly they may be convinced that there is a better, no jury can be permitted to say that the usual way and ordinary way is a negligent way, for which liability shall be imposed."

It may be conceded that this is a correct statement of a general principle of law, but it is not, in the opinion of this court, controlling herein. While it is true that negligence is not to be imputed from methods in general use in any business, this rule in no wise relieves appellant from its general duty of exercising ordinary care in the construction and maintenance of its power transmission system.

[2-4] "'This means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it.' * * * 'If the negligent act or omission is one which the company ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then it is liable for any injury proximately resulting therefrom, although it might not have foreseen the particular injury which did happen.'" Carroll v. Central Counties Gas Co., 74 Cal. App. 303, at page 307, 240 P. 53, 54.

[5] Appellant's contention would have more force had the pole in question been located on private property, or away from traffic, or at any point where a reasonably prudent person would have been justified in concluding that no outside agency would disturb it; but we cannot hold as a matter of law that appellant was in the exercise of ordinary care when it hung, by means of one-half inch hangers extending but an inch and a quarter down over a cross-arm, a 750-pound metal weight near the top of a 40-foot pole situate in the sidewalk area of a public street, but 1 foot from the wooden curbing, and equidistant from an uncurbed driveway leading off said street. Particularly is this true when such street, constructed on a 7 per cent. grade, is located in a thickly populated city and is generally traveled by automobiles which might, for any one of many reasons and through no fault of the drivers thereof, come in contact with such pole.

That the pole in question was not sufficiently protected from traffic is established by the evidence that at the time the radiator of decedent's car came in contact with it none of the wheels struck or was stopped by the sidewalk curbing. Considering all these facts we are of the opinion that the question of appellant's negligence was not one of law but one of fact for the jury, and, the jury having by its verdict impliedly found the evidence sufficient to establish negligence on the part of appellant, this finding will not be disturbed.

[6] As to the second point made by appellant, namely, that respondent should not recover because of contributory negligence on the part of the decedent, we are also of the opinion that this question was one of fact for the jury to decide, and that its implied finding against appellant should not be disturbed.

[7] Contributory negligence is an affirmative defense, and the burden of establishing such defense by a preponderance of the evidence was upon appellant. What actually caused decedent's Ford delivery car to come in contact with appellant's pole will probably never be known—at least it has not been proven. It was not for the jury to enter into the field of speculation or conjecture in order to arrive at a conclusion as to what probably happened, but it was for appellant to prove by a preponderance of the evidence exactly what did happen. Having failed to prove as a matter of fact what actually happened, it cannot be heard to complain of the jury's finding.

In support of the contention that the proximate cause of decedent's death was his own negligent driving, and that the presence of the pole with the transformer hanging to it was but a remote circumstance to be considered, appellant cites the case of Allen v. Atlantic & Pacific Tel. Co., 21 Hun (N. Y.) 22, as squarely applicable to the case at bar, stating the rule of that case to be, if the proximate cause of the breaking of a telegraph pole was collision with a runaway team, and the pole was so placed as to be safe from ordinary danger of collision, a person injured by or because of the breaking of the pole, cannot recover against the telegraph company; and this irrespective of the strength or weakness of the pole.

The weakness of this authority as applied to the facts set forth hereinabove is that it presupposes that the pole was so placed as to be safe from ordinary danger of collision. Here the pole with the dangerous instrumentality hanging to it was not so placed.

[8] Most of the cases cited in support of appellant's contention that deceased was guilty of contributory negligence appear to be cases where the acts of the party killed or injured were either clearly negligent or deliberate. For example, in the case of Hontz v. San Pedro, etc., R. R. Co., 173 Cal. 750, 161 P. 971, 973, Mr. Justice Henshaw found it was "equally clear that deceased's negligence, amounting to recklessness, was a direct and contributing cause to his death"; and in the case of Smith v. Associated Oil Co., 53 Cal. App. 142, 199 P. 879, 880, Mr. Justice Waste laid down the rule that, where "as here [the case he was then considering], the facts are undisputed, and the dictates of common prudence point to only one reasonable conclusion, the question [of contributory negligence] is then one of law for the court." In the case we are now considering, however, while the dictates of common prudence might point to any one of several reasonable conclusions as to the cause of decedent's Ford coming in contact with the power pole of appellant, the evidence that for some distance before the impact his car was zigzagging or swerving from side to side, coupled with the presumption of law that "a person takes ordinary care of his own concerns" (section 1963, Code Civ. Proc., subd. 4), would seem to point to the more reasonable conclusion that the conduct of decedent was the result of some sudden happening and was neither negligent nor deliberate. In any event, we feel the case comes squarely within the rule that, "if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." Reinders v. Olsen, 60 Cal. App. 764, 214 P. 268, 270.

If, as here held, the evidence was and is sufficient to support the implied findings of actionable negligence on the part of appellant and freedom of contributory negligence on the part of the decedent, the trial court properly denied appellant's motions for a directed verdict and for a judgment notwithstanding the verdict, and was guilty of no abuse of discretion in refusing to grant the motion for a new trial.

[9, 10] Of the remaining assignments of error, the one directed to the sustaining of objections to questions asked the witness Worthington we feel to be without merit. The questions put to Mr. Worthington were: "Have you ever in your experience in the city of Oakland, with respect to the maintenance of pole transmission, known of a transformer falling from a pole?" and "In your opinion, Mr. Worthington, was the transformer, as installed on the pole in question at the time in question installed in a proper and prudent manner?"

The answer to the first question would obviously have been of no probative value, particularly in the absence of a showing of conditions existing similar to those in the case at bar; and the answer sought to be elicited by the second question, as to the prudence of the installation, was one to be given by the jury after hearing all of the facts and circumstances, rather than one to be given by an expert witness. The jury heard from this witness all that it was entitled to hear on the subject of proper installation when, after detailing the method of installation, the witness told them this method was the one usually and generally followed, and that he had never heard of or seen a transformer bolted to a pole or cross-bar.

[11] In reference to alleged erroneous instructions, appellant complains of the following instruction given by the court: "Contributory negligence is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care as, concurring or cooperating with the negligent act of the defendant, was the proximate cause of the injury complained of," on the ground that the article "the" before the words "proximate cause" caused the jury to be advised that contributory negligence to bar a recovery must be *the* proximate cause of the injury. We do not so construe the instruction, for the definition expressly refers to want of ordinary care on the part of the plaintiff *concurring or cooperating with the negligent act of the defendant.*

[12] The next instruction complained of was an instruction requested by the respondent, reading as follows: "Where negligence is continuous in its nature, existent at all times up to the moment of the injury, an independent act, to constitute the proximate cause by displacing the original proximate cause must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission. The original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as an in-

dependent, but as conjoining with the original act to create the disastrous result."

This instruction more properly applies to cases where an independent act of a third party is involved and should not have been given in the instant case. In the light of all of the instructions, however, we feel the error was harmless.

[13] A further instruction assigned as error was the instruction that "the defendant was under obligation to exercise ordinary care in the construction and maintenance of its transformer to prevent its escape from the pole upon which it was suspended," it being urged that this instruction injected a new element into the case, namely, care in the construction of the transformer. We see no merit in this contention. While a more appropriate word than the word "construction" might have been used to describe the attaching of the transformer to the pole upon which it was suspended, the words "to prevent its escape from the pole upon which it was suspended" show with sufficient clarity that the obligation of the appellant to exercise ordinary care related not to the physical construction of the transformer itself but to the method by which it was attached to the pole. The same instruction contained the additional language: "Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it."

This is a correct statement of the law, as set forth hereinabove in the quotation from the case of Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53, and we believe it to be applicable to the case at bar for the reasons heretofore given.

[14] The final instruction at which criticism is aimed by appellant is the instruction that, "if you find from the evidence that such negligence existed or occurred as charged by the plaintiff's complaint, and that it was the proximate cause of the death of Lim Sing Pong, the plaintiff's intestate, then the plaintiff is entitled to recover such damage as from the evidence and proofs, under all of the circumstances of the case, you may deem to be just."

This instruction is said to be erroneous because it ignores the pleaded defense of contributory negligence. Appellant cites the case of Beyerle v. Clift, 59 Cal. App. 7, 209 P. 1015, among others, in support of this contention. If this instruction were given to or accepted by the jury as a "formula" instruction, and purported to be a complete statement of the law upon which plaintiff below might recover, appellant's position would be correct.

The reasoning in the opinion of Mr. Chief Justice Waste in the case of Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237, 238, wherein the case of Beyerle v. Clift, supra, is commented upon and distinguished, is particularly applicable to the case at bar. In the Douglas Case the following instruction was complained of: "It is admitted by defendant in this case that A. J. Beck, E. L. Carr, C. J. Clouth, D. Frazer, and Leslie Straight were employees of defendant and were acting within the scope of their employment at the time of the accident. If you should find that the injury to one plaintiff and the death of the other were caused by the negligence of these employees, or either of them, while operating defendant's engine and car, at the time of or immediately prior to the accident, your verdict should be for plaintiffs and against the defendant, since an employer is bound by the acts of his employees while acting within the scope of their employment, and their negligence is, in law, deemed to be the employer's negligence."

Concerning it the Chief Justice said: "We are not prepared to say, * * * that said instruction was given to, or accepted by, the jury as a 'formula' instruction. It does not purport to be a complete statement of the law upon which the plaintiffs might recover, but served merely to inform the jury that responsibility attaches to a principal for the negligent acts of his servant committed within the scope of the latter's employment. The concluding language thereof supports this view, for, following the direction that verdicts be brought in for the plaintiffs, if the jury be of the opinion the accident resulted from the negligent operation of the train by defendant's employees, the instruction states: 'Since an employer is bound by the acts of his employees while acting within the scope of their employment, and their negligence is, in law, deemed to be the employer's negligence.' In our opinion, the instruction constitutes nothing more than an expression of the doctrine of respondeat superior. This being so, the instruction need not have set forth all of the elements essential to recovery by the plaintiffs. Our examination of the record discloses that these several elements were fully and properly expressed to the jury in the many other instructions given by the lower court."

Exactly the same situation obtains here. The instruction under consideration headed the instructions given by the court on the subject of damages. Elsewhere in the instructions, both before and after this instruction, the court fully advised the jury as to the rule of contributory negligence, informing them among other things that "such negligence, if any there was, however slight it may have been, on the part of Lim Sing Pong, which proximately caused or contributed to the collision and fatal injuries to him, would bar plaintiff's right to recover," and that, "if decedent was guilty of any negligence which proximately contributed to his injury, * * * the decedent's contributory negligence in such case defeats recovery."

Just as the instruction assigned as error in the Douglas Case was properly held to constitute nothing more than an expression of the doctrine of respondeat superior, so here the alleged erroneous instruction must be held to constitute nothing more than an expression on the subject of measure of damages.

The judgment appealed from is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

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101 Cal. App. 382

KIMES v. DAVIDSON INV. CO. et al.★
(Civ. 3897.)

District Court of Appeal, Third District, California. Oct. 21, 1929.

Rehearing Denied Nov. 20, 1929.

1. Contracts ⟹313(1)—City planning architect, on defendants' repudiation of his contract before completion of work, could sue for reasonable value of services.

Where defendants employed city planning architect to plat and lay out certain tract of land, and repudiated contract notifying architect of their refusal to be bound, before the work was fully completed, architect was entitled to maintain action for reasonable value of services performed.

2. Work and labor ⟹27(4)—Where defendants repudiated contract with city planning architect before his work was completed, correspondence tending to prove special contract was admissible in architect's action for reasonable value of services.

In action by city planning architect for reasonable value of services performed at defendants' request in platting and laying out tract of land, correspondence between architect and defendants relative to his employment and amount to be paid him for his work, though tending to prove special contract of employment at agreed price, was admissible where defendants repudiated the contract before the work was completed.

3. Work and labor ⟹27(4)—Correspondence indicating agreed price for work held admissible as bearing upon value of services in action on quantum meruit.

In action by city planning architect for reasonable value of services performed for defendants in platting and laying out tract of land, correspondence between plaintiff and defendant tending to show special contract of employment at agreed price was admissible as bearing upon value of services performed and to be performed.

4. Work and labor ⟹24(2)—Evidence of damage resulting from delay of city planning architect was properly rejected in architect's action for reasonable value of services, where question was not tendered by pleadings.

In action by city planning architect for reasonable value of services rendered at defendants' request in laying out tract, refusal to permit introduction of evidence by defendants as to effect of plaintiff's delay was proper, where no question of damage by reason of delay was tendered by pleadings.

5. Evidence ⟹571(7)—Where facts as to services rendered are in evidence, opinion of expert as to value of services is not binding.

Where facts concerning work performed are shown by evidence, opinion of expert as to value of such services is not binding on court or jury, but court or jury may make its own estimate of value of services rendered.

6. Work and labor ⟹29(3)—Evidence in action by city planning architect for reasonable value of services warranted judgment for services for $3,000.

In action by city planning architect for reasonable value of services performed at defendants' request in platting and laying out certain tract of land, in which correspondence between plaintiff and defendants fixed value of services at $4,000, and $500 had been paid, evidence which showed that work had been almost completed justified trial court in ordering judgment for $3,000.

7. Work and labor ⟹29(1)—Interest held not recoverable before judgment in action for reasonable value of services.

In action on quantum meruit for work and labor performed by city planning architect in laying out tract of land at defendants' request, interest *held* not recoverable before entry of judgment.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by H. Z. Kimes against the Davidson Investment Company and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellants.

Avery M. Blount, of Los Angeles, for respondent.

PLUMMER, J. The plaintiff had judgment against the defendants for the principal sum of $3,000 and interest in the sum of $630, upon an action instituted to compel payment of the reasonable value of work and labor performed by the assignor of the plaintiff at the instance and request of the defendants. The complaint is in two counts, but as a nonsuit was granted as to the first count it is only necessary to consider the allegations of the second. The allegations of the second count upon which judgment was rendered read as follows: "That within four years last past, defendants became indebted to Franz Herding upon an open book account for services rendered to defendants at defendants' special instance and request, and for which the defendants promised and agreed to pay the reasonable value thereof; that the reasonable value thereof at all times was and now is the sum of $3500.00." The answer denies the rendering of the services, the value thereof, and then

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

pleads that the services have been fully paid for. The record shows that Franz Herding, the assignor of the plaintiff, was a professional city planning architect; that the defendants owned a certain tract of land which they desired to have platted, laid out, and a country club house erected thereon; that after a number of conversations had been had relative to the contemplated work and the employment of Franz Herding to do the work, it appears that on or about January 3, 1924, Franz Herding wrote a letter to W. G. Hamilton relative to the work to be performed by the defendants, outlining it and explaining it to some extent, and stated in his letter that the fee for such services would be the sum of $4,000. On January 18, 1924, H. C. Davidson, the president of the Davidson Investment Company, wrote to Franz Herding as follows:

"Long Beach, Cal., January 18, 1924.

"Mr. Franz Herding, 2005 Argyle, Hollywood, Calif. Dear Mr. Herding: We are handing you herewith our check for $500.00, which is the first payment on your total fee of $4,000.00, as set forth in your letter of January 3rd, for doing the planning of the Los Serranos property. We are inclined to think that it might be best to have a more formal contract drawn, and the writer will do this as soon as possible and submit it for your approval. In the meantime we hope you will proceed with the work as you now have it in mind and the writer expresses the sincere hope that the relations in connection with this work may continue as happily as they have begun. Sincerely yours,

"Davidson Investment Company

"By H. C. Davidson, President."

[1-3] In pursuance of this letter, Franz Herding proceeded with the contemplated work and had performed, according to the testimony adduced, most of the contemplated drawings, etc., for the improvement of the property. While not set up in the pleadings, it would appear from the contentions of the appellants that the architectural work not being completed as soon as they had anticipated, the appellants gave notice to Franz Herding to discontinue the work. No payment being made other than the $500 mentioned in the letter bearing date of January 18, 1924, the claim of Franz Herding against the defendants was assigned to the plaintiff, and plaintiff instituted this action. Upon this appeal it is contended that the lower court erred in admitting in evidence the correspondence relative to the employment and work to be done by Frantz Herding; that this being an action for the reasonable value of the services performed, such testimony tended to prove a special contract of employment at an agreed price, and therefore was inadmissible and constituted a variance between the allegations and the proof. The point is also made that the lower court erred in refusing the defendants to testify as to the effect upon the business of the Davidson Investment Company of the delay of Franz Herding in completing his work. Objection is also made that in an action upon quantum meruit, interest is not allowable before the entry of judgment. The transcript shows that the defendants refused to be bound by the alleged contract, if any such existed, and notified Franz Herding before the architectural work was fully completed. This presents a case where Franz Herding, by reason of the breach of the contract of the defendants, was entitled to begin an action for the reasonable value of the services performed. Under such circumstances the contention of the appellants is fully answered in the case of Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 P. 86. We quote from the syllabus: "Although proof of a contingent contract would be a fatal variance, where a contract to pay a definite sum absolutely is alleged, yet where the cause of action is upon a quantum meruit, and a contingent contract has been broken, proof of such contingent contract and of its breach without cause, shows no variance justifying a nonsuit, but supports the quantum meruit." And further: "Where an employee is discharged by his employer without cause during the term of his employment, he may regard the contract as rescinded and sue upon a quantum meruit, and recover the reasonable value of his services, as if the special contract of employment had never been made." We do not need to review the authorities cited by the appellants, as this case and the authorities relied upon therein show that the trial court was not in error in denying the appellants' motion for a nonsuit as to the second cause of action. Again, the correspondence was admissible for another purpose, to wit, as bearing upon the value of the services performed and to be performed. In 27 California Jurisprudence, p. 232, § 40, we find the rule of law thus stated: "Evidence of a special contract to pay a sum certain for services is admissible under a common count for work and labor, as tending to show the value of the services, even where performance was prevented by one of the parties, or the terms were varied by agreement. * * * Where services are rendered under a written memorandum of employment, the memorandum is admissible, though not specifying the commission or compensation." The text here set forth is supported by a number of California cases cited in the footnotes.

[4] The contention that the appellants were not allowed to introduce testimony as to the effect upon the business of the Davidson Investment Company, in delays in the work by Franz Herding, is without merit. No question of any damage by reason of delay is tendered by the pleadings. No such issues were raised by the answers of any of the defendants, and therefore the ruling of the court was and is correct.

[5, 6] It is further contended that there is no testimony as to the reasonable value of the services performed. Upon this point the appellants set forth the following questions and answers:

"Q. Up to the time when you had ceased work what portion of the work to be done had been completed, and based upon your experience in this line of business, what was the reasonable value of the service to that date? A. I would say all the creative work had been done. The last to be done yet was simply to get it in shape for reproduction and could use it in a report, and this is entirely a mechanical piece of work which draftsmen to a large extent can do, and a photographer, and it involves some cash expenses, and I did not get to finish this work because I did not get the payments.

"Q. What would it cost to do that mechanical work that you spoke of, according to the agreement? A. I would say it would be an outlay of $500.00."

This statement, however, is not correct. At considerable length respondent in his reply brief sets forth the testimony of the architect, showing the work performed by him and how nearly the same was completed, and just what remained to be done at the time the contract was rescinded by the defendants. In the case of Nylund v. Madsen, 271 P. 374, this court had occasion to set forth, at considerable length, the authorities in relation to the testimony necessary to sustain a judgment based upon quantum meruit for work and labor performed. In addition to the facts, as we have just shown, the correspondence between Franz Herding and the president of the Davidson Investment Company, showing the value of the contemplated work to be $4,000, and that about $500 more of work would have to be performed, the testimony introduced goes to some length in explaining just what work had been performed by the architect. It is true he did not answer specifically that the value of the work performed by him was worth, in his opinion, a certain sum. This is identical with the circumstances presented in the case of Nylund v. Madsen, supra. This court there held that where the work was explained, the court or jury was authorized to fix the value thereof. Here, as in the Nylund Case, no question is made that the sum fixed as the value of the work was excessive. In the case at bar, just as in the Nylund Case, the facts constituting the service were placed before the court and furnished the basis for fixing the value of the work already done. While it might have been inquired into more particularly by counsel for the appellants as well as by counsel for the respondent, it nevertheless, according to the rule announced in the cases cited in the case of Nylund v. Madsen, furnished a sufficient basis for the court finding the value of the services performed. When the facts are placed before the court, the opinion of an expert as to the value of the services is not binding upon the court. While, as we have said in the case of Nylund v. Madsen, such testimony is admissible, it yet remains for the court or jury to make its own estimate of the value of the services. The correspondence to which we have referred fixed the value of the services at $4,000; $500 was paid. The evidence shows that there is approximately $500 worth of work yet to be performed. This, with the other testimony, justified the court in ordering judgment in the sum of $3,000.

[7] That the court was in error in allowing interest before the entry of judgment in an action of quantum meruit, for work and labor performed, appears to be the settled law of this state. While other cases might be cited, one is sufficient. See American-Hawaiian, etc., Co. v. Butler, 17 Cal. App. 764, 121 P. 709. While this case is sufficient, two recent cases announcing the same rule may be cited. Grass v. Rindge Co., 84 Cal. App. 750, 258 P. 673; Clark v. Conley School District, 86 Cal. App. 523, 261 P. 721.

It follows from what has been said that the judgment of the trial court awarding the plaintiff the sum of $3,000 should be and the same is hereby affirmed, while that portion of the judgment awarding the plaintiff interest in the sum of $630 should be and the same is hereby stricken therefrom. The appellants are awarded their costs on appeal.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

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101 Cal. App. 343

GREVE v. TAFT REALTY CO. et al.★

(Civ. 3902.)

District Court of Appeal, Third District, California. Oct. 19, 1929.

Rehearing Denied Nov. 18, 1929. Hearing Denied by Supreme Court Dec. 16, 1929.

1. Corporations 🔑452—Official character of officers affixing signature of corporation to commission agreement need not be set forth in connection with their names.

Official character of officers affixing signature of corporation to agreement to pay broker commission need not be set forth in connection with their names, to make agreement valid.

2. Corporations 🔑407(5)—General manager held authorized to bind corporation to commission agreement by fixing its signature thereto.

General manager of corporation *held* authorized as such to sign agreement for payment of commissions to broker, and to bind corporation by affixing its signature thereto.

★Rehearing denied. Hearing denied by Supreme Court.

3. Corporations ⚷519(3)—Testimony of officers signing agreement that they did not read it, and did not intend to bind corporation, held not to relieve corporation.

Testimony of two of officers affixing signature to agreement to pay commissions to broker that they did not read the agreement, and did not intend to bind the corporation, *held* insufficient to prevent the corporation from being bound by the agreement.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Frank H. Greve against the Taft Realty Company and others. From the judgment, plaintiff appeals. Reversed.

Miller & Ellis, of Los Angeles, for appellant.

Farrand & Slosson and L. J. Faust, all of Los Angeles, for respondents.

PLUMMER, J. The plaintiff began this action to recover of and from the defendants, and especially from the Taft Realty Company, the sum of $6,266.50, based upon an instrument in writing which is in the words and figures following, to wit:

"Hollywood, Calif. 6/6/23

"It is understood and agreed that Frank H. Greve is to receive 2% of the gross sales made by us in the Greve Tract at the S. W. intersection of Pico Blvd. and Preuss Road, known as Tract No. 6800, in consideration of his getting this tract for us to handle.

"We also agree that he shall be paid 2% gross on sales from any other acceptable tract he secures for us to handle, or any other person bringing us an acceptable tract shall be paid the same amount.

"Taft Realty Co.
"By B. Y. Taft
"Mildred Taft Tinkham
"George W. Zent
"Chester A. Taft."

The defendants had judgment, and the plaintiff appeals.

The complaint alleges that the writing just referred to was made and executed on the 6th day of June, 1923, whereby it was agreed to pay the plaintiff commissions as provided in said writing as a consideration to the plaintiff for procuring and delivering to the Taft Realty Company an agreement covering a tract known as the "Greve Tract," at the southwest intersection of Pico boulevard and Preuss road, designated as "Tract No. 6800," by the terms of which it was agreed and provided that the Taft Realty Company should subdivide and sell said tract for an agreed compensation of 15 per cent. of the amount of all sales made in said tract; that under said agreement the Taft Realty Company had proceeded to sell lots in the tract referred to, to the value of $328,765, upon which it had received commissions in the sum of 15 per cent. It further alleged that the company had not paid to the plaintiff the amount specified in the contract, and judgment was asked to the amount of 2 per cent., as specified in the writing set forth herein. The record shows that on or about the 14th day of June, 1923, an agreement relating to the tract referred to was entered into between Marie E. Greve, Rudolph E. Greve, Mamie Greve, George C. Greve, Frank H. Greve, and Margarita M. Greve, as parties of the first part, and Taft Realty Company, as party of the second part, by A. Z. Taft, Jr., first vice president, and B. Y. Taft, second vice president, whereby it was agreed that the party of the second part should proceed with the subdivision and sale of approximately 34 acres of the tract herein named, according to the terms and conditions set forth in the agreement, and to receive as compensation therefor 15 per cent. of the selling price in and to all lots sold. The record further shows that, under the terms of the agreement just referred to, the Taft Realty Company proceeded to sell all of the lots included in said tract for the sum of money herein stated.

The court found, among other things, that the Taft Realty Company did not, on the 6th day of June, 1923, or at any other time, execute the 2 per cent. agreement hereinbefore referred to. It further found that the Taft Realty Company did not receive or retain 15 per cent. of the gross sales of said property under or by virtue of any contract for the sale thereof procured by plaintiff in performance of the alleged agreement set forth in said complaint. It may be here stated in this connection that the court did not find that the plaintiff did not procure the agreement for the subdivision and sale of the lots referred to by the Taft Realty Company, but only that it was not in pursuance of the 2 per cent. commission agreement. The court further found that "B. Y. Taft did not, in the capacity of acting executive officer or second vice president of said corporation, Taft Realty Company, sign his name to or execute said contract, and said B. Y. Taft did not intend to obligate, and did not obligate said corporation to perform said alleged agreement, nor was he, by said corporation, authorized to execute the same." The same finding was made by the court as to the signing of the 2 per cent. agreement by Mildred Taft Tinkham, George W. Zent, and Chester A. Taft, save that Mildred Taft Tinkham was described as the secretary and treasurer, George W. Zent as the general manager, and Chester A. Taft as the junior vice president. In other words, that none of the parties signed the 2 per cent. agreement as officers of said corporation, and did not intend to obligate the defendant corporation to comply with the terms of the agreement. Based upon these findings, the court concluded that the plaintiff was not entitled to judgment as prayed for.

The answer of the defendants does not deny the signatures to the 2 per cent. agreement, or that the name of the Taft Realty Company was affixed to the 2 per cent. agreement, and the names of the persons signed thereto, just as appears in the copy which we have hereinbefore set forth, but does deny that, at the time of the execution of said alleged contract, the persons whose names are signed thereto were anthorized by the defendant realty company to execute said agreement in its behalf. It also denies that the parties who signed the name of the Taft Realty Company and their own names to the agreement intended to bind the Taft Realty Company thereby. The answer admits the official character in the corporation of the persons whose names are affixed to the 2 per cent. agreement, and also that George W. Zent was the manager of said corporation. So far as the answers of the defendants are concerned, there is nothing set forth to indicate that the parties signing the same did not know the contents thereof. There is testimony set forth in the record to the effect that the parties did not read the paper. The pleadings are absolutely silent as to the question of knowledge. Nor is there anything in the pleadings indicating any fraud, duress, or mistake; nor is there anything in the testimony indicating fraud, duress, or mistake. The testimony, as we have said, is simply to the effect, by the witnesses Taft, that the agreement was not read, and its contents unknown.

That George W. Zent was the general manager of the Taft Realty Company during all of the time involved in the transactions considered upon this appeal is an admitted fact. It appears that he became such manager sometime during the year 1920. By resolution of the board of directors of the company, adopted on September 1, 1921, certain powers to sign papers were conferred upon the officers of the company. The resolution conferring the powers reads as follows, to wit: "It was decided that all checks, deeds or notes or obligations of any kind incurring liability against the company should be signed by the president, the first vice president or the second vice president and the first vice president or second vice president and the secretary or the assistant secretary, and that official documents should be signed by both vice presidents or by a vice president and the secretary or assistant secretary." The record also shows that an executive committee, composed of A. Z. Taft, Jr., George W. Zent, and B. Y. Taft was empowered to transact the business of the corporation. This executive committee passed upon matters concerning the corporation, though the record fails to show in what manner this committee transacted its business, or passed upon matters pertaining to the corporation, other than as appears by the signatures of members of the committee to the exhibits set out in the transcript.

No question is raised as to the authority of the two members of the executive committee who signed the agreement with the six members of the Greve family by which the Taft Realty Company took upon itself the subdivision and sale of the 34 acres referred to in this opinion, but the minutes of the corporation are absolutely silent as to any resolution or the adoption of any motion authorizing the entering into the agreement for the subdivision and sale of said lands, or anything in relation thereto. The same is true as to the 2 per cent. commission contract. The same is true as to agreements set forth in the transcript as "Exhibits 3 and 4." In other words, it appears that four instruments of writing, set forth in the transcript as "Exhibits 1, 2, 3, and 4," were signed by officers of the corporation with the name of the corporation attached, and all, with the exception of the 2 per cent. agreement, related either to the expenditures of money on tracts to be divided, or to the subdividing and sale of tracts, and acted upon by the corporation through its officers, without any resolution of the board of directors of any kind, or any mention in the minutes of such transactions being considered by the board of directors. From which only one inference can be drawn, and that is that the executive committee or persons signing the agreements transacted the business of the corporation with the knowledge and consent of the corporation, and this inference is strengthened by the fact that for the Greve tract alone, to say nothing of the others, the corporation received $328,765, and retained the agreed commission of 15 per cent. on the selling price thereof.

Just how much money was spent on the other tracts and how much money was received, the record does not disclose. It may be here stated that we find nothing in the record indicating that the corporation did not know of the agreements for the subdivision and sale, or the expenditure of money upon the tracts involved, nor is the contention made that the signature of the corporation to any of those agreements was attached by officers unauthorized so to do, or not possessing the authority to attach the name of the corporation. In other words, so far as the record discloses, the board of directors took no action whatever in relation to the contracts mentioned in this proceeding relative to the subdivision and sale of lands; the whole matter appears to have been left to the executive committee, consisting of three members, as heretofore stated. The record also discloses that there were two corporations, one called the Taft Realty Company, and the other the Taft Land & Development Company. The officers of both corporations were the same. The executive committee of one corporation was the executive committee of the other, and George W. Zent was the manager of both corporations. In this particular it may be stated that the record shows the signature of the corporation to the agreement called "Exhibit 1," being the agreement covering the subdivision and sale of the 34-acre tract known as the "Greve Tract," was affixed by A. Z. Taft, Jr., first vice president, and B. Y. Taft, second vice president; that the signature of the Taft Land & Development Company to the agreement known as "Exhibit 3," providing for the improvement of the 34-acre tract, was affixed by George W. Zent, and to the agreement known as "Exhibit 4," covering a tract of 31.52 acres owned by one Ella H. Somers, the signature of the Taft Realty Company was affixed by George W. Zent. In the agreements known as "Exhibits 3 and 4," the official character of George W. Zent is not set forth. In the 2 per cent. commission agreement, known as "Plaintiff's Exhibit 2," the signature of the Taft Realty Company appears to have been affixed by B. Y. Taft, Mildred Taft Tinkham, George W. Zent, and Chester A. Taft, without any designation as to their official characters. The record, however, shows B. Y. Taft to be second vice president, Mildred Taft Tinkham secretary and treasurer, Chester A. Taft, Jr., vice president, and George W. Zent manager. B. Y. Taft and George W. Zent were also two of the three members of the executive committee.

In consideration of the foregoing premises, is the testimony of B. Y. Taft and Chester A. Taft that the commission agreement was signed by them without having read its contents, and that they did not intend to bind the corporation to the agreement, sufficient to support the finding of the court that the corporation is not bound by the terms and conditions of the 2 per cent. commission agreement. The contention is also made that the affixing of the name of the corporation to the commission agreement by the officers without setting forth their official designation is insufficient to constitute the agreement an obligation of the corporation.

The insufficiency of the testimony to support the findings of the court, as alleged by the appellant, can be determined by a consideration of the following propositions and authorities:

[1] First. Was the commission agreement signed in such a manner as to bind the corporation; that is, was it, or is it, necessary that the official character of the officers affixing the signature of the corporation be set forth in connection with their names? In the case of Armour v. Rosenberg & Sons, 36 Cal. App. 773, 173 P. 404, 405, we find a case directly in point showing that the setting forth of the official character of the officers signing the corporation's name is unnecessary. There the instrument and signature was as follows: "We herein guarantee payment of 40 barrels of salad oil to be delivered to the American Packing Company. Very truly yours, Rosenberg & Sons Co., by J. R." The person signing the name of the corporation was shown by parol testimony to be the manager. In the case of Baden Brick Co. v. Chubbuck, 7 Cal. App. 725, 95 P. 905, the signature held to bind the company was in the following words: "The Baden Brick Company, per Thos. Butler." In the case of Rauer v. Nelson & Sons, 53 Cal. App. 695, 200 P. 809, an instrument was held to be the agreement of the corporation, although it did not appear upon its face to be signed by its president in his official capacity. These cases sufficiently establish the law that, when the name of a corporation is attached to an agreement by its proper officers, it is unnecessary to attach to the names of the persons executing the agreement for the corporation the official designation of the one who signs his name, but that such official designation may be otherwise established. The 2 per cent. agreement contains the names of two of the three members of the executive committee of the corporation, which, as we have shown, conducted the business of the corporation.

[2] Second. George W. Zent, as the general manager of the corporation, had authority as such to sign the 2 per cent. agreement and bind the corporation by affixing its signature thereto. Before citing any authorities, it may be stated that the record shows other agreements involving much money, signed simply by the general manager, notably Exhibits 3 and 4. In 6 Cal. Juris. p. 1109, § 481, the powers of a manager are thus stated: "In the case of a corporation organized for commercial purposes, its general manager, or whoever may be given immediate direction or control of its affairs, is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do, in respect to the management of the ordinary and usual affairs of the corporation, what the corporation itself could do within the scope of its authority. * * * Therefore, a general manager may perform such acts as the following: Making contracts for the corporation in the ordinary conduct of its affairs, including contracts of hire, or of employment, or of agency for the sale of land, or of lease of premises for the use of the corporation; the execution of notes, and the endorsement and transfer of commercial paper belonging to the corporation," etc. In the case of Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 P. 177, 178, in relation to the power of the manager, who, in that case was also president, we find the following in the opinion: "It is conceded law that in order to bind a corporation by his acts it is not necessary that any resolution should be passed appointing a general manager. It will be sufficient if it be shown that he was manager de facto."

In the case at bar it is admitted that

George W. Zent was appointed general manager. That case then goes on to hold as follows: "While the president of a corporation, if he is only that and nothing more, has no authority to bind the corporation by contract employing another to perform services for it, yet if he is also a general manager of the corporation, he is acting within his scope and authority in employing an agent for the purpose of making sales, and also to sign an agreement for the corporation providing for the payment of the services so performed." Other authorities might be cited but these are sufficient to show the authority of a general manager to bind the corporation by agreements such as we are considering in this case.

[3] The third proposition which we have to consider is whether the testimony of two of the officers, that they did not read the agreement and did not intend to bind the corporation, can be given any legal effect. The authorities all seem to be in the negative, a few of which we will cite:

In Silva v. Silva, 32 Cal. App. 115, 162 P. 142, the law in such cases is thus stated: "A separation agreement, in the absence of a claim that the signature of either party was obtained by fraud, duress, or undue influence, and no reformation being sought for mutual mistake, is binding, although one of the parties claims that she did not intend to sign a contract of separation, and did not understand its terms when she executed it, * * * and therefore there was no meeting of minds."

In Knox v. Modern Garage, etc., Shop, 68 Cal. App. 583, 229 P. 880, 881, it is said in the opinion, where the action was upon a contract: "In such an action a party cannot be heard to say that he had not read the same and did not know the contents thereof. Where a party to a written contract wishes to avoid liability thereon on the ground that he did not know its contents, the question, in the absence of misrepresentation, fraud, undue influence, and the like, turns on whether he was guilty of negligence in signing without such knowledge. When he is negligent in not informing himself of the contents, and signs or accepts the agreement with full opportunity of knowing the true facts, he cannot avoid liability on the ground that he was mistaken concerning such terms in the absence of fraud or misrepresentation."

In Floyd v. Tierra Grande Dev. Co., 51 Cal. App. 654, 197 P. 684, 687, where the same question was presented in a slightly different form, the court held, quoting from the syllabus: "The force of a resolution passed by the directors of a corporation ratifying a contract for the exchange of real properties cannot be avoided on the ground that all the parties present were ignorant of the contents of the agreement which they assembled to ratify. * * * A corporation is bound by the same rules of law that govern individuals and no concealed resolution, however artfully worded, may give a corporation an advantage that does not belong to an individual."

In Hawkins v. Hawkins, 50 Cal. 558, the law in relation to signing agreements without reading them is thus stated: "If a person enters into a contract with another, between whom and himself no relation of especial trust or confidence exists, and it is reduced to writing by such other person, and the means of a knowledge of the terms of the writing are equally open to both, and he signs it without reading, or having it read by someone for him, he cannot avoid a liability created by the writing," etc.

To the same effect is the recent case of Gridley v. Tilson, 202 Cal. 748, 262 P. 322, where it is said: "A party signing a contract to purchase corporation stock cannot excuse himself and escape its effects by testifying that he did not have his glasses with him at the time he signed the contract and gave promissory notes for the purchase price, and therefore did not read the contract or a provision thereof limiting the representations of the seller to those contained in the contract, in the absence of a showing that he was prevented by the agent from reading the limiting clause or was otherwise tricked into signing the document without reading it, and he made no request to have the contract read to him."

To the same effect is the case of Placer County Bank v. Freeman, 126 Cal. 90, 58 P. 388, where it is said, that in the absence of any allegation of fraud or undue influence, a party cannot rely upon his own negligence in failing to read the instrument signed by him.

These cases and others which might be cited clearly establish the law that the testimony of the witnesses Taft that they did not read the commission agreement is wholly insufficient to support the finding of the court that the corporation was not bound by the agreement. As we have shown, the signature of the general manager would be sufficient, without the signature of any other officers of the corporation.

In view of what we have stated, we do not need to discuss the claim of the appellant that commissions were paid for bringing in other tracts and charged as overhead expenses, nor do we need to give any consideration to the minutes of the corporation, relied upon by the respondents, relative to the proposed payment to the plaintiff of the sum of $4,500 as commissions in the event he brought in a certain other tract of land for subdivision and sale, as being the only one ever considered by the corporation. Whether these minutes had any proper place in the proceedings need not be determined. They do show, however, that the corporation was willing to pay commissions for the bringing in of tracts of land to be subdivided and sold.

The case of Howard v. Winton Co., 199 Cal. 374, 249 P. 511, 47 A. L. R. 1012, is inapplicable here. The questions there considered are readily distinguishable from anything involved in this action. There the agreement purported to give the employee or agent an interest in the net profits of the concern, as his compensation. No net profits are involved in this action. The record shows that the tract which was subdivided and sold, and for which the plaintiff claims commissions in the sum of 2 per cent., was brought in for subdivision and sale by the plaintiff, and placed in the hands and under the control of the Taft Realty Company for subdivision and sale. Whether the two agreements constituted one transaction, or are two separate and distinct instruments, appears to us to be wholly immaterial. We think that both agreements are the agreements of the Taft Realty Company, and that what we have said clearly establishes that the findings of the court are not sustained by the testimony.

The judgment is reversed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

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101 Cal. App. 263

BROWN et al. v. ST. PAUL CONSOL. OIL CO. et al. (Civ. 6878.)

District Court of Appeal, First District, Division 1, California. Oct. 17, 1929.

1. Corporations 🔑189(12)—Testimony of president and secretary relative to board's action in levying assessment on stock was admissible to establish regularity of resolution (Civ. Code, §§ 331, 334).

In stockholders' action seeking an adjudication that assessment levied on stock and subsequent sale of such stock for nonpayment of assessment were void, testimony of president and secretary of corporation as to what actually occurred at meeting relative to board's action in levying assessment was properly admitted, for purpose of showing regularity of resolution in accordance with requirements of Civ. Code, §§ 331, 334.

2. Corporations 🔑189(12)—Evidence held insufficient to sustain finding that order levying assessment on stock complied with statute (Civ. Code, § 334).

Evidence in stockholders' action for adjudication that assessment levied on stock and subsequent sale of such stock for nonpayment of assessment were void *held* insufficient to support finding that order levying assessment was in compliance with requirements of Civ. Code, § 334.

3. Corporations 🔑189(1)—Stockholders in case of invalid assessment were not required to pay or tender assessment before suing to set aside sale for nonpayment of assessment (Civ. Code, § 347).

Where assessment on stock was invalid, and not merely irregular, stockholders, seeking adjudication that assessment and subsequent sale of stock for nonpayment thereof were void, were not required to comply with Civ. Code, § 347, requiring a payment or tender of sum for which stock was sold as condition precedent to maintenance of action.

4. Corporations 🔑189(1)—Failure to publish notice of assessment on stock was defect, within law requiring payment or tender before suing to recover stock (Civ. Code, §§ 335, 347).

Failure to publish notice of assessment on corporate stock, in accordance with requirement of Civ. Code, § 335, was merely a defect or irregularity of sale, within provision of section 347, requiring payment or tender of assessment as condition precedent to action to recover stock.

5. Corporations 🔑189(1)—Secretary's failure to publish notice of delinquency 15 days prior to sale of stock was irregularity, within law requiring payment or tender of assessment (Civ. Code, §§ 339, 347).

Failure of secretary of corporation to publish notice of delinquency as to stock assessment 15 days prior to sale, as required by Civ. Code, § 339, was merely an irregularity or defect, within section 347, requiring payment or tender of assessment as condition precedent to action for recovery of stock.

6. Corporations 🔑189(1)—That void assessment was to pay corporate debts, and was mostly paid, was immaterial as respected stockholders' right to recover stock sold for nonpayment of assessment (Civ. Code, § 334).

The fact that assessment on stock was levied to pay corporation's debts, and that most of stockholders had paid their assessments and moneys so realized expended, was immaterial as respected right of stockholders to adjudication that assessment and subsequent sale of stock for nonpayment of assessment were void, because of failure of order levying assessment to comply with Civ. Code, § 334.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by F. H. Brown and others against the St. Paul Consolidated Oil Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

John W. Woten, of San Francisco, and Cosgrave & Barstow, of Fresno, for appellants.

Milton M. Dearing, of Fresno, for respondents.

GRAY, Justice pro tem. Plaintiffs, as stockholders of the defendant corporation, sought an adjudication that an assessment levied upon their stock and a subsequent sale of such stock for nonpayment of that assessment were void. The court found that the assessment was valid; that, while there were irregularities in the proceedings leading up to the sale, yet plaintiffs were not entitled to relief, because of noncompliance with the provisions of section 347 of the Civil Code; and that plaintiffs' laches barred their recovery. Upon this appeal from the judgment based on those findings, plaintiffs urge that certain findings are not only not supported by the evidence, but are contrary thereto, and that other findings, not only do not support the judgment, but require a different judgment favorable to their prayer.

Firstly, the court found that at a meeting of the board of directors, all being present, legally convened on July 16, 1925, "said board * * * made an order levying an assessment on the subscribed capital stock of said St. Paul Consolidated Oil Company in the sum of ten cents (10¢) a share, payable on or before the 17th day of August, 1925, to Louis Doerr, president of said corporation, at 94 South First street, San José, California, and fixed August 17, 1925, as the date on which unpaid assessments would be delinquent, and September 3, 1925, as the date for the sale of delinquent stock." "The directors of any corporation * * * may * * * levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein." Civ. Code, § 331. "Every order levying an assessment must specify (1) the amount thereof; (2) when, (3) to whom, and (4) where payable; (5) fix a day * * * on which the unpaid assessments shall be delinquent, * * * and (6) a day for the sale of delinquent stock. * * *" Civ. Code, § 334. (The numerals have been inserted for clarity.)

Appellants urge that the evidence clearly shows a failure of the directors to make an order containing all of six matters to be specified, and that, therefore, the above finding is unsupported and contrary to the evidence. The pertinent part of the resolution of July 16th (being the only one on that date bearing upon the matter) reads as follows: "President Doerr then called the directors' attention to the previous directors' meetings, at which time the importance of making an assessment was gone into and at the meeting of June 29th, 1925, it was unanimously decided by a full board to make an assessment, but discovering the importance of having a stockholders' meeting and the possibility of a new board being elected, Acting President Doerr thought that it was advisable to defer said assessment until the views of the new board had been heard and upon hearing all the facts and viewing the situation as presented, concurred with the previous board action in ordering the assessment be made on the same base as has been decided, viz. 10¢ per share of all stock of record." Did the new board concur with the previous board action? Grammatically it would seem to mean that "Acting President Doerr thought that it was advisable to defer said assessment until the views of the new board * * * concurred with the previous board action. * * *" Thus construed, it is an opinion of what was to be done in the future, not an act then done by the board. Even assuming that it is intended to show action by the board, yet as an order levying an assessment, it contains only the amount of the assessment and is silent as to when, to whom, and where the assessment was payable, and the dates of delinquency and sale.

[1] Realizing the deficiencies in the resolution, respondents offered the testimony of the president and secretary as to what actually occurred at the meeting of July 16th, relative to the board's action in levying the assessment. Over appellant's objection, the court properly admitted this testimony. Lawrence v. Premier Indem. Assur. Co., 180 Cal. 688, 182 P. 431; Citizens' Securities Co. v. Hammel, 14 Cal. App. 564, 112 P. 731, 732; Bank of Napa v. Ferguson Burns Estate, 48 Cal. App. 319, 192 P. 66.

[2] All of the testimony of Secretary Barnhisel, here material, after the elimination of unnecessary matter, but without changing the sense, is as follows:

"Q. This resolution in the minutes of the directors' meeting of July 16 relative to the assessment is the only order authorizing the levying of the assessment? A. Yes.

"Q. Those minutes were prepared by you? A. Yes.

"Q. At the meeting of July 16, 1925, was the time when this assessment would become delinquent and the time of delinquency discussed? A. Yes.

"Q. Was there any discussion about who the assessment was to be paid to? A. Yes; Mr. Doerr. I showed them one of the forms I had drawn up, and I was instructed to go ahead and proceed with the assessment.

"Q. According to the time of payment and delinquency as set forth in these forms? A. Yes. They said: 'We will approve what the other board did by authorizing you to go ahead and make the assessment, and then Mr. Doerr told me to go ahead and do it.'

"Q. What was said regarding when the stock would be delinquent for this assessment and to whom the assessment would be paid and when the sale would take place? Were those matters discussed? A. Yes. I had that form made, and I says, 'We will use that form.'

"Q. The form you referred to is this form of assessment notice introduced? A. Yes.

"Q. There was a general discussion. A. Among the directors.

"Q. As I understand it, no formal resolution; is that correct? A. Only that I was directed by the president to go ahead.

"Q. There wasn't any formal resolution, and the president instructed you to go ahead. A. Certainly."

The gist of President Doerr's testimony, after the elimination of unessential words, is as follows:

"Q. What was said regarding this assessment? A. We debated the necessity for getting some money very quickly.

"Q. State what the discussion was regarding the assessment and why it was necessary. A. There was a discussion about that.

"Q. Did all the directors take part in the discussion? A. Yes.

"Q. Was there any discussion about the time when the assessment was to be levied, and when it had to be paid and to whom, and when it would be delinquent? A. Yes; all those things entered into the discussion.

"Q. State what happened about those matters. A. We asked Mr. Barnhisel if he could give us the date when this thing would become operative and when delinquent, which he did and furnished us with the dates; one of the board made a motion that we assess each member for each share of stock 10 cents and gave Mr. Barnhisel authority to publish the same in a newspaper in the county of Fresno.

"Q. Can you fix what dates Mr. Barnhisel furnished? A. It was from the latter part of August until some time the middle of September. We figured out the time.

"Q. Was there any discussion about whom the assessment should be paid to? A. It was decided it should be made payable to me.

"Q. Was there any discussion about where the assessment would be paid? A. I couldn't say as to any discussion, although it seemed to be the consensus of opinion that it should be paid to me personally in San José."

Viewed as favorably as possible in support of the finding, the secretary's testimony merely discloses that he furnished the board with a written notice of assessment, containing the matters missing from the resolution (i. e., when, to whom, and where the assessment was payable, the date of delinquency, and the date of sale), and that the board discussed these matters. It utterly fails to show any agreement or action by a majority of the board relative thereto. He does state that the board instructed him to make the assessment; but, obviously, it could not delegate to him its discretionary power to determine these matters. The president's testimony shows the same discussion as to the amount of the assessment, with possibly a decision as to where and to whom the assessment was payable. It does not disclose any action fixing the dates of payment, delinquency, and sale. The testimony of neither officer measures up to that held sufficient to establish the passage of a resolution in Bank of Napa v. Ferguson Burns Estate, supra, but is more analogous to that held insufficient in Citizens' Securities Co. v. Hammel, supra, where the following language, here pertinent, was used:

"It does appear, however, that after the seven members of the board had assembled a conversation took place between four of the members, during which 'it seemed the sense of the three or four talking about it was that the company (meaning plaintiff) should have the furniture as security for the rent.' * * * We are of the opinion that some action in the nature of a resolution would be necessary in order to warrant an officer of the corporation in thus pledging corporate property. The resolution need not necessarily be spread upon the minutes, if actually passed, but a conversation simply between four members—the other three present not being shown to have participated therein, nor in fact to have been aware of such conversation—is far from showing any resolution or authority upon the part of the board."

Appellant's contention that the evidence does not support the finding is well taken. We are satisfied that the evidence discloses that no order, meeting the requirements of said section 334 was made and that therefore the assessment was not valid. Ruck v. Caledonia Silver Min. Co., 6 Cal. App. 356, 92 P. 194.

Respondents pleaded, appellants admitted at the trial, and the court found that appellants had not met the requirements of section 347 of the Civil Code. This section provides that "no action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, * * * the sum for which the same was sold; * * * and no such action must be sustained unless the same is commenced * * * within six months after such sale was made." Respondents earnestly urge that the assessment was irregular only and that therefore this last finding compels affirmance of the judgment. The effect of the omission from the order levying the assessment of the matters required by said section 334 is well stated in the following excerpt from Ruck v. Caledonia Silver Min. Co., supra, 6 Cal. App. at page 358, 92 P. 195:

"The above-quoted section states in positive terms what *must* be specified in the order levying the assessment. It is there stated that the order must specify where the assessment is payable. We look in vain for any such specification in the order. It states the assessment is payable to the secretary, but his residence, office, or place of business is not mentioned. He may, for aught that appears, have been absent from the state. We cannot speculate as to whether or not the plaintiff could have been injured by the omission in the order. The proceedings by which the property of a stockholder is declared forfeited without suit, or personal notice of any kind, must be strictly construed. All the conditions precedent to such forfeiture must exist. Courts have not the power to dispense with any one of such conditions. The Legislature has said that the order must specify where the assessment is payable, and it is not for us to eliminate the provision for any reasons which might appeal to us. It is said that that the stockholder could easily have ascertained the business office of the secretary, or the place where the assessment was payable. If the order had omitted the amount of the assessment, or the person to whom it was payable, or any other matter required, it might with equal force be urged that the stockholder could have ascertained by inquiry the amount of the assessment, the person to whom it was payable, and any other omitted matter.

"Such construction would leave the law as to the validity of an assessment in a sea of uncertainty. No lawyer could advise his client as to whether or not an assessment is valid, because he could not by any possible means guess what omission the court would say was harmless. To require the order levying the assessment to comply with the statute in its essentials is to leave the rule plain so that everyone may understand it. We do not mean that an assessment would be declared void if it did not literally follow the language of the Code, but it must contain the substance of every requirement therein. It is the rule, well established by the authorities, that proceedings in regard to the levy of an assessment and sale of the stock of a shareholder of a corporation for a delinquent assessment are in invitum. The right must come from the law or the charter, and can only be legally exercised in the manner provided by the law, or by the charter. The reason for a strict construction in such case is that the sale, if regular and founded upon a valid assessment, forfeits the stock, and equity has no power to relieve from such forfeiture."

The court in Cheney v. Canfield, 158 Cal. 342, 111 P. 92, 32 L. R. A. (N. S.) 16, in holding that said section 347 does not apply to sale under a void assessment used the following pertinent language:

"It is insisted by appellant that the levy of this assessment was void for several reasons, but principally on the ground that the board of directors, he asserts, had no authority to levy it because the meeting at which they did so was neither a regular meeting of the board nor a special meeting regularly called.

"It is the settled law that an assessment can be legally levied upon the capital stock of a corporation by the board of directors only at a regular meeting of the board or at a special meeting thereof regularly called. Harding v. Vandewater, 40 Cal. 78; Thompson v. Williams, 76 Cal. 155, 18 P. 153, 9 Am. St. Rep. 187.

"As all proceedings whereby an assessment is levied upon the stock of a corporation, and under which a forfeiture of the stock of the stockholders may be had are in invitum, it is elementary law that they must be strictly followed. The levy of such an assessment can only be accomplished legally by a strict compliance with the statutory provisions relative thereto, or with the provisions of the charter of the corporation upon the subject. Herbert Kraft Co. Bank v. Orland, 133 Cal. 64, 65 P. 143; Ruck v. Caledonia Silver Mining Co., 6 Cal. App. 356, 92 P. 194. * * *

"The court found that the plaintiff was guilty of laches in bringing his action, and also that his right of action was barred by section 347 of the Civil Code and section 341 of the Code of Civil Procedure. Both these Code sections referred to make the same provision, namely, that 'no action must be sustained to recover stock sold for delinquent assessment upon the ground of irregularity of the assessment, * * *' unless the tender of the amount for which the stock was sold at said time, and unless such action is commenced within six months after the sale of the stock. The sale of the stock in question here was made December 20, 1904. This action was commenced January 4, 1906.

"The sections referred to only apply where there has been some irregularity in the assessment or irregularity or defect in the notice of sale or the sale itself. The assessment in question here, as we have seen, was not merely an irregular assessment. It was absolutely void. Herbert Kraft Co. Bank v. Orland, 133 Cal. 64, 66, 65 P. 143. Hence these sections have no application."

[3] The assessment being invalid, not merely irregular, appellants were not required to comply with the provisions of said section 347. Richman v. Bank of Perris, 73 Cal. App. 321, 238 P. 754.

[4] Secondly, the court found "that * * * notice of assessment was not published in any newspaper but that notice of assessment was mailed in the form and manner required by law to each and all the stockholders * * * including plaintiffs. * * *" Section 335 of the Civil Code requires the secretary to publish a notice of assessment in the form therein specified. Appellants contend that this finding compels a judgment in their favor, because the failure to publish invalidated the sale. Respondents reply that this is a mere irregularity within the provisions of said section 347. Section 346 of the same Code in providing that this failure to publish invalidates all proceedings for the collection of the assessment, but not the assessment itself, and that, in such event, all notices shall be republished, clearly shows the legislative intent that this publication forms part of the proceedings for collection rather than for the creation of the assessment. The case of Smith v. Gate City Oil Co., 160 Cal. 446, 117 P. 525, decides that a failure to publish notice of sale would invalidate a sale on the date fixed in the resolution levying the assessment, but not the assessment, and a valid sale could be had, if a resolution fixing new dates of maturity, delinquency, and sale

were passed and all proceedings subsequent to order levying the assessment were repeated. Inferentially the court must have considered the publication of the notice of assessment as part of the proceedings leading up to sale, or otherwise it would not have required a publication of a new notice. Also it is apparent that the court considered that any defect in one step in those proceedings required a repetition of the entire proceedings. In Shannon v. Tooker, 167 Cal. 484, 140 P. 10, the publication of notice of delinquency was defective, and, after publication of a proper notice, but without a republication of the notice of assessment, a sale was made. It was held a stockholder to recover stock so sold must comply with said section 347. The court, impliedly, held that the failure to republish was a mere irregularity or defect in the sale. The mere fact that the publication there discussed was in the second set of proceedings would lead to no different conclusion than if the court were concerned with the original proceedings, because under Smith v. Gate City Oil Co., supra, each proceeding must be complete in itself. It is interesting to note, in view of the fact that appellants received the mailed notice, that in Stephens v. Lemoore Canal & Irr. Co., 22 Cal. App. 579, 135 P. 707, the court found it unnecessary to pass upon the sufficiency of the publication of the notice of assessment, when the evidence disclosed that the stockholder received the notice mailed to her. We are satisfied that the failure to publish was a defect or irregularity in the sale, within the purview of said section 347.

[5] Thirdly, the court found that the secretary published on August 21 and 28, 1925, a notice of delinquency, stating that the sale would be on September 3, 1925, and that, on said last day, he sold plaintiff's stock to the defendant corporation. No criticism is made as to the form of the notice, and both parties admit that the first publication was not "at least fifteen days prior to the day of sale," as required by section 339 of the Civil Code. Appellants claim that this failure invalidated the sale and that this finding compels a reversal. Respondents claim that this failure is an irregularity or defect, specifically provided for in said section 347, and that, because of appellant's noncompliance with this section, judgment was properly rendered against them. Were the corporation, as the moving party, seeking to collect the assessment by a personal judgment against the stockholder, this failure would be fatal (San Bernardino I. Co. v. Merrill, 108 Cal. 490, 41 P. 487); but where, as here, the stockholder asks relief from the forfeiture because of this failure, he must comply with this section, as a condition precedent to recovery (Burham v. S. F. Fuse Mfg. Co., 76 Cal. 26, 17 P. 939; Shannon v. Tooker, supra; American Well, etc., Co. v. Blakemore, 184 Cal. 343, 193 P. 779, 19 A. L. R. 1087).

[6] Lastly, the court found that the assessment was levied to pay the corporation's debts; that most of the stockholders paid their assessments; that the moneys so realized have been expended; that if the assessment is declared void, and the corporation forced to pay its debts out of its assets, a substantial loss of investment would result; that as a result of the payment of the debts and a reorganization the net assets have considerably increased, and that it would be unjust and inequitable to the other stockholders, who paid, to permit appellants to recover their stock without payment of their assessment. Appellants challenge respondent's claim that this finding requires affirmance of the judgment. This finding is no more than a statement of reasons which would serve as an argument for the enactment of said section 347, and does not state any facts warranting the application of any other principle of law than is stated in said section. At least the facts found do not curtail appellant's right to recover, further than is already done by that section. Newhall v. Hunsaker, 38 Cal. App. 399, 176 P. 380. In fact, as is well stated in Glenn v. California Trona Co., 38 Cal. App. 601, 177 P. 178, the section is but declaratory of the maxim of equity—that he who seeks equity, must do equity. In Richman v. Bank of Perris, supra, it was held that the fact that certain stockholders in good faith paid a void assessment and performed a public service in rehabilitating an insolvent bank will not justify the court in relaxing the safeguards placed by corporate by-laws upon the actions of directors. What has been heretofore said as to effect of noncompliance with section 347 is here equally applicable, and needs no further amplification.

Being satisfied that, under the evidence, the assessment is void, and that section 347 of the Civil Code has no application where the assessment is void, the judgment is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

101 Cal. App. 251

Ex parte McBRIDE. (Cr. 4.)

District Court of Appeal, Fourth District, California. Oct. 16, 1929.

1. Criminal law ⇨1001—Parole confers no right other than conditional suspension of sentence or execution of judgment during good behavior, and may be terminated upon breach of conditions.

Parole of one sentenced to prison confers no right other than conditional suspension of sentence or execution of judgment during good behavior, and privilege is subject to termination immediately upon breach of its conditions.

2. Extradition ⇨30—Person committing, while on parole, same offense for which he was sentenced, became fugitive from justice in state of conviction upon revocation of parole.

Since parole is subject to termination immediately upon breach of its conditions, one who had been sentenced to imprisonment in Oregon for larceny and grand larceny, committing same offense while on parole granted to him under Or. L. § 1586, was subject to rearrest and became fugitive from justice in state of conviction immediately upon revocation of parole, as provided for by Or. L. § 1589.

3. Extradition ⇨31—Person committing offense while on parole from another state which revoked parole therefor became subject to extradition (Const. U. S. art. 4, § 2; Pen. Code, §§ 1203, 1548).

Where person on parole from Oregon committed within state like offense for which he was sentenced, he became subject to extradition when state of Oregon revoked parole, making him fugitive from justice, under Const. U. S. art. 4, § 2, relating to extradition, Pen. Code, § 1548, dealing therewith, and section 1203, relating to revocation of probation, and under Or. L. §§ 1586, 1589, providing for parole and revocation of parole.

Application by William McBride for a writ of habeas corpus against the Sheriff of Imperial County to prevent petitioner's extradition to the state of Oregon. Writ discharged, and petitioner remanded for extradition.

Utley & Nuffer, of El Centro, for petitioner.

Elmer W. Heald, Dist. Atty., and C. B. Smith, Deputy Dist. Atty., both of El Centro, for respondent.

SLOANE, P. J. The petitioner, William McBride, was convicted in the circuit court of the state of Oregon, for Washington county, under four indictments charging him with larceny and grand larceny, after pleading guilty to the charges, and was on the 9th day of June, 1928, sentenced to be imprisoned in the state penitentiary of the state of Oregon for indeterminate periods, not to exceed five years each, upon each count. At the time of imposing sentence, it was further ordered, in consideration of the fact that defendant had made full restitution to those injured of all moneys taken, and payment of costs incurred by the county in the prosecution of the case, that defendant be paroled, on condition that said defendant report to the court and to the said parole board of the state of Oregon promptly, giving his place of residence, post office address, and occupation, and it was further ordered that, if defendant violates any laws or the terms of his parole, said parole will be revoked, and said defendant will be required to suffer the penalties herein imposed upon him. It further appears that the petitioner was given permission by the court, during the continuance of his parole, to return to the state of California, his former home.

Petitioner returned to California in pursuance of this permit, and thereafter was arrested in the county of Imperial, Cal., for an offense similar to that for which he was under sentence in Oregon, and was in the superior court of the state of California, in and for the county of Imperial, on March 6, 1929, found guilty as charged, and sentenced to serve a term of 180 days in the Imperial county jail. Thereafter proof of the petitioner's offense in California and conviction thereon having been brought to the attention of the Oregon court in which he had been first convicted and sentenced, an order of that court was made revoking the probation. This order recites that, "it appearing to the court that the above-named defendant was paroled upon his promise to refrain from other similar acts in the future, and to conduct himself as a law-abiding citizen, and it appearing that he has since been convicted in the state of California of a crime committed in the same manner, and under the same circumstances as the crime heretofore committed in the state of Oregon, and that the defendant has violated the terms of his parole; it is therefore ordered and adjudged that the parole of the above-named defendant be and hereby is revoked, and that a warrant issue directing the sheriff of said Washington county, Oregon, to arrest the above-named William McBride, wherever he may be found." Pending and prior to the expiration of said jail sentence in Imperial county, Cal., and after revocation of petitioner's parole in Oregon, extradition proceedings were instituted from the state of Oregon, and C. L. Gillett, sheriff of the county of Imperial, was served with a warrant based thereon, bearing the seal of the state of California, and signed by the Governor of the state, directing the delivery of the petitioner into the custody of an officer of the state of Oregon authorized to receive him into his custody and return him to the state of Oregon.

This proceeding under writ of habeas corpus, was instituted to release petitioner from custody on the ground that he was, under the circumstances of the case, not a fugitive from justice in the state of California and was being illegally held.

The question presented under this state of facts is as to whether or not petitioner is a fugitive from justice from the state of Oregon and subject to extradition.

It is contended on the part of the petitioner that the Oregon court, having granted him probation, and having permitted him to come into the state of California, voluntarily waived any further jurisdiction over said person, and lost jurisdiction to revoke said parole order, and regain the custody of said petitioner, unless and until such time as petitioner might have returned to the state of Oregon voluntarily.

The provision of the Federal Constitution (art. 4, § 2) relating to extradition is as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Section 1548 of the Penal Code of California is as follows: "A person charged in any state of the United States with treason, felony, or other crime, who flees from justice and is found in this state, must, on demand of the executive authority of the state from which he fled, be delivered up by the governor of this state, to be removed to the state having jurisdiction of the crime."

It is apparent that one, to be subject to the extradition laws, must be shown to be a fugitive from justice from the state seeking his return. It may be conceded that the petitioner here was not a fugitive from justice within the state of California, so long as he was here by virtue of the conditions of his parole. If he is subject to extradition, it is by virtue of the fact that the revocation of his parole at once deprived him of his right to liberty, and subjected him to the execution of the sentence pronounced by the Oregon court.

Section 1586 of the laws of Oregon makes the following provision for the parole of one sentenced in that state on conviction of a felony:

"*Parole, in What Cases Granted—Under What Supervision.*

"When any person who has not previously been convicted of a felony shall have been convicted in the circuit court of this state of any felony or misdemeanor, and sentenced not to exceed ten years' imprisonment in the penitentiary, with or without fine, and sentence shall have been pronounced, the court before which the conviction shall have been had, if satisfied that such person, if permitted to go at large, would not again violate the law, may, in its discretion, by order of record, parole such person and permit him or her to go and remain at large under the supervision of the court, or under the supervision of any prisoners' aid society now organized or hereafter to be organized under the laws of the state of Oregon, subject always, however, to the order of such court as such court may deem best until such parole shall be terminated as hereinafter provided, but such court shall have no power to parole any person after he or she has been delivered to the warden of the penitentiary, or where it shall be made to appear to said court before such parole shall have been granted that such person shall have been before convicted of a felony." L. 1905, c. 177, p. 306; L. 1909, c. 153, p. 222; L. 1911, c. 108.

And it is provided by section 1589 of the Oregon law, as follows:

"*Revocation of Parole, Proceedings on.*

"If any prisoner when required shall fail to give such bail, bond, or security, or shall fail to observe all and every of the conditions and requirements of said parole and order of said court, or shall be again convicted of a felony, then said parole shall be by order of said court revoked with or without notice to such prisoner, and said prisoner shall be committed to the penitentiary to serve out the original sentence imposed in the same manner as though said parole had not been granted. The clerk shall deliver to the sheriff a certified copy of the sentence, together with a certificate that such person had been paroled and his parole has been terminated, and the sheriff shall, upon the receipt of such certified copy of sentence, immediately arrest such person and transport and deliver him or her to the warden of the penitentiary, and the time such person shall have been at large upon parole shall not be counted as part of the sentence, but the time of sentence shall be counted from the day of delivery to the warden of the penitentiary." L. 1905, c. 177, p. 306, § 5.

Under the authority of the foregoing provision for revoking parole, it is expressly provided that such revocation may be made upon satisfactory evidence to the court granting the same, that the conditions of the parole have been violated, and such order may be made without notice to or the presence in court of the prisoner. The same rule is held to obtain in the state of California, under the provisions of section 1203 of the Penal Code relating to probation. The Second District Court of Appeal, in the case of People v. O'Donnell, 37 Cal. App. 192, 174 P. 102, 104, says that it is clearly deducible from the language of said section 1203:

"That the court may, whether the defendant be present in or absent from court at the time, revoke the order suspending the imposition of sentence or the execution thereof and admitting him to probation, upon a sufficient showing that he has violated any of the terms and conditions upon which such order was made."

[1] Our attention has been called to no restriction on the summary authority of the court under such a statute to revoke the parole or probation of a defendant without

notice, and without his presence in court, upon proof of violation of the terms on which he has been set at liberty. Such parole confers no right, other than a conditional suspension of sentence or execution of the judgment, during good behavior, and the privilege is subject to termination immediately upon a breach of its conditions.

[2] It is apparent, then, that the petitioner was subject to rearrest, and became a fugitive from justice in the state of Oregon immediately upon the revocation of his parole. Is there anything, then, in the fact that he had departed from the state of Oregon and was in the state of California, by permission of the Oregon court when he committed the act which forfeited his parole, that prevents his extradition as a fugitive from justice?

The matter of In re Whittington, 34 Cal. App. 344, 167 P. 404, is cited as authority for the contention that the state of Oregon has lost its right to follow this petitioner into the state of California. In that case the defendant, who was under arrest in the state of Texas for a felony committed in that state, and while so held in custody, a requisition issued by the Governor of California was honored by the Governor of the state of Texas, upon a showing that petitioner had theretofore committed the crime of murder in the state of California, and was thereupon surrendered to and brought into the state of California under extradition proceedings. The case against him in California was subsequently dismissed, and a requisition was made by the state of Texas for his return to that state for trial, under the charges pending against him there. Extradition was denied on the ground that one who has been brought by legal force from the state having original jurisdiction of his person cannot be held to become by reason of that fact a fugitive. It is argued by petitioner's counsel, with some force of reason, that one who has voluntarily come into the foreign state, with the consent of the state seeking his extradition, cannot be held in any worse plight than one who is brought into the foreign state by legal compulsion. There is this difference, however. In the Whittington Case, the state of Texas released the prisoner from its jurisdiction and turned him over to the state of California without any qualifications; whereas, in the instant case, the state of Oregon did not waive its jurisdiction over the defendant but expressly set him at liberty, subject to the right to again take him into custody and enforce the judgment of the court against him at any time upon his violation of the conditions of his parole. In Ex parte Nabors, under a decision of the Supreme Court of New Mexico, reported in 267 P. 58, 60, another case involving extradition proceedings instituted by the state of California, it was held that the defendant was a fugitive from justice from the state of California under a state of facts almost identical with those here presented. Upon the petition of William J. Nabors, a writ of habeas corpus was issued in New Mexico to test the legality of his restraint under an extradition warrant issued by the Governor of New Mexico upon a requisition of the Governor of California, said warrant reciting that petitioner stands charged with the crime of assault with intent to commit murder, committed in the county of Los Angeles, Cal., in the year 1923, and that said William Nabors is a fugitive from justice, and has taken refuge in New Mexico.

It appears that petitioner had been convicted in California upon his plea of guilty of the crime mentioned in the warrant. After serving some time in the penitentiary, he had been granted a parole, by the terms of which, accepted by him in writing, he was to proceed directly to his place of employment in San Ysidro, N. Mex., and thereafter to remain until he might receive permission to go elsewhere; that, while on parole, and until the expiration of his sentence, he should continue to be in the legal custody and control of the board of prison directors, and, if he should fail to live up to the requirements of his parole, he should be returned to prison. After some time the California prison board saw fit to revoke his parole; the assigned causes being that, without permission of the board, the petitioner had left his employment and had gone to another place in New Mexico, and that he had had certain firearms in his possession in New Mexico, which, while not contrary to any express provision of his parole, was contrary to a statute of California. Commenting upon the facts as set forth, the opinion of the Supreme Court of New Mexico continues:

"Petitioner's contentions are that all charges upon which the state of California now seeks to deal with him relate to his conduct and acts in New Mexico, and that, even if such charges render him amenable to any punishment in California, or to the revocation of his parole, the admitted facts that they were not committed in that state, and that he did not leave that state after their commission, are conclusive against the contention that he is a fugitive from the justice of California. * * *

"In determining the two questions before us, it is important to avoid confusion as to the crime charged against petitioner for which California desires to exact punishment. Petitioner contends as if the charged offenses were the matters stated as the occasion and reason for the revocation of his parole. If we regard the accusation as involving merely the leaving of Sandoval county, or the having of firearms in his possession, it would be difficult to hold, either that there was a substantial charge of any offense under the law of California, or that petitioner is a fugitive from the justice of that state. Such is not, however, the correct view to take of the charge The accusation is founded upon the felony of which he stands convicted. For this his punishment is not complete. For this California demands his extradition. There is abundant and well-reasoned authority that this is the correct view in a case where one whose parole has been revoked contends that he is not a fugitive. Perhaps the leading case is Drinkall v. Spiegel, 68 Conn. 441, 36 A. 830, 36 L. R. A. 486, where the doctrine is developed that one who is allowed to go at large upon a parole becomes, upon the revocation of his ticket of leave, in legal effect, an escaped convict, and may, if found outside of the state, be extradicted, not necessarily for the escape, nor for the violation of parole, but for the original crime which he has not fully expiated. See, also, In re Gertz, 21 Hawaii, 526; Albright v. Clinger, 290 Mo. 83, 234 S. W. 57; Hughes v. Pflanz (C. C. A.) 138 F. 980; Ex parte Carroll, 86 Tex. Cr. R. 301, 217 S. W. 382, 8 A. L. R. 901; * * *

"Under this doctrine we are clearly required to hold that the Governor had before him a substantial charge of crime committed in the state of California. The doctrine serves, also, to narrow the question whether petitioner is a fugitive to this single point: Does the fact that petitioner left California, not in violation of, but pursuant to, his parole, defeat California's right to his rendition as a fugitive? * * *

"Under some of the earlier decisions, the words of the Constitution, 'flee from justice,' were thought to carry an implication of a voluntary and conscious attempt by leaving the state to escape an apprehended prosecution; but such is no longer the accepted doctrine.

"In Ex parte Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. Ed. 250, it was held that, if the person demanded had committed a crime in the demanding state, and when sought to answer for it had left that state and was found in another, he was a fugitive.

"In Appleyard v. Mass., 203 U. S. 222, 27 S. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073, it was said that one was a fugitive who left the state after commission of a crime, 'no matter for what purpose or with what motive, nor under what belief.' * * *

"In Von Walden v. Geddes, 105 Conn. 374, 135 A. 396, it was held that one who was in Connecticut pursuant to parole from confinement in California should be surrendered on the requisition of Michigan, though the latter state had knowledge of and consented to the purpose of California so to parole him."

After reviewing at some length other decisions bearing on the facts as recited, the court concludes: "It is our conclusion, therefore, that the writ must be discharged, and the petitioner remanded to the sheriff of Valencia county for delivery to the agent of the state of California for return to that state pursuant to the warrant of the Governor of this State."

In Ex parte Williams, Criminal Court of Appeals of Oklahoma, 10 Okl. Cr. 344, 136 P. 597, 51 L. R. A. (N. S.) 668, it appears that the petitioner, under writ of habeas corpus, had been legally charged by indictment, and was tried and convicted of the crime of grand larceny in the state of Indiana and was sentenced to imprisonment in the penitentiary of that state; that, before the expiration of said sentence, petitioner was paroled by the board of commissioners of the Indiana state prison and removed from the state of Indiana to the state of Oklahoma; that thereafter petitioner was declared a delinquent and his parole revoked. On this state of facts, the Governor of Indiana presented requisition papers for the said Williams to the Governor of Oklahoma, which were honored by the Governor of that state, and his warrant issued for the arrest of petitioner, to be returned to the state of Indiana as requested by the Governor of that state. It is held by the decision of the Oklahoma court that to be a fugitive from justice under the act of congress it is not necessary that the person charged with having left the state in which the crime was alleged to have been committed did so for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against the laws thereof, he leaves such state, and, when he is sought to be subjected to its criminal process to answer for his offense, he is found in the territory of another state.

Another Oklahoma case, Ex parte Hamilton (Cr. App.) reported in 273 P. 286, in which it was held that the extradited prisoner was a fugitive from justice, is stated in the syllabus as follows:

"Where a convicted prisoner in another state is there paroled and voluntarily comes into this state, and thereafter his parole is revoked by the proper authorities of the former state, the prisoner then has the status of an escaped convict, and is a fugitive from justice from the former state, and if apprehended in this state he may upon requisition be rendered to that state. His status is not changed by the fact that he came into this state after being paroled with the consent of the authorities of the former state."

"Under the conditions named in the preceding syllabus, the legality of the revocation of the parole of the prisoner is a question for the courts of that state, since they alone have the right to construe the Constitution and laws of that state."

People v. Mallen, 126 Misc. Rep. 591, 214 N. Y. S. 211, 214, is another case in which the petitioner was discharged from custody after a warrant of extradition. Ostensibly the discharge was granted on the ground that the petitioner was in the foreign state by compulsion of the state demanding extradition, and purports to follow the rule laid down in the California case, In re Whittington, supra. The petitioner, Malon, had been convicted of a felony in the state of California, and committed under a sentence to a term in the penitentiary, and, after serving 2½ years of his sentence, was paroled and directed by the prison board to go to New York to accept employment with the American Press Association. In pursuance of this requirement, the petitioner took up his residence in New York. His parole was thereafter revoked by the California authorities on the ground that, instead of taking employment with the American Press Association, he was acting in the capacity of private secretary of the president of that association. On requisition from the Governor of California, a warrant of extradition was granted by the Governor of New York. The New York decision in the habeas corpus proceeding comments as follows:

"The chief executive of this state evidently acted upon the theory that, when the authorities of California revoked the parole, the relator became ipso facto a fugitive from justice, regardless of the motives or justice of the revocation, and despite the fact that the person wanted was here, not only by the prior consent, but by the very direction, of the demanding state.

"Ordinarily the question of whether the individual sought is actually a fugitive is one of fact, which the Governor of the state upon whom the demand is made must decide upon such evidence as he may deem satisfactory. * * * How far his determination may be reviewed judicially in habeas corpus proceedings has not been satisfactorily and adequately determined by the courts. But there can be no doubt that, if the Governor's finding of fact is the result of an erroneous application of the law, it is positively reviewable."

Citing the Bassing Case, 208 U. S. 386, 28 S. Ct. 392, 52 L. Ed. 540, 13 Ann. Cas. 905, the decision continues:

"It is unnecessary to decide whether the Bassing Case would authorize extradition of a person who had been released on parole, without any direction to depart to another state, and whose parole had been revoked while in the latter state. On the other hand, it can not be construed to establish the proposition that a departure from the state, under the circumstances occurring in the instance of this relator, necessarily constitutes him a fugitive from justice. What it does determine in this respect is that, although a person leaves a given state with its tacit consent or acquiescence, he may nevertheless be a fugitive and subject to extradition upon a subsequent demand.

"This situation, evidently, is quite different from the instant case, where the person requisitioned came to New York at the express direction of the state of California. His departure from that state was not his voluntary act. He was constructively just as much under the escort of California when leaving as was the prisoner in the Whittington Case, supra, who left in the physical custody of an officer of the law."

"Notwithstanding that the decision in the above matter apparently rests on the proposition that the petitioner was in the state of New York by compulsion, and that the state of California had thereby waived any right to extradition, it is apparent that the court took into account the further circumstance of the frivilous grounds upon which the California authorities had revoked the petitioner's parole. In any event, this case is clearly distinguishable from the case at bar.

[3] None of the other decisions which have been called to our attention is sufficiently in point to affect our decision in this matter. The weight of authority and the requirements of effective law enforcement sustain the proposition that one convicted of a crime in a foreign state and removing to another jurisdiction under parole, whether with or without the consent of the paroling authorities, and whose parole is subsequently revoked for a violation of its terms in the foreign jurisdiction, is subject to extradition.

The petition for discharge is denied, and the petitioners remanded to the custody of C. C. Folette, Jr., deputy sherff of the county of Washington, state of Oregon, to be returned to the state of Oregon.

We concur: BARNARD, J.; MARKS, J.

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100 Cal. App. 606

LATTA v. DA ROZA et ux. (Civ. 3694.)

District Court of Appeal, Third District, California. Oct. 17, 1929.

1. Husband and wife ⚷23¾, 25(6)—Authority to act for spouse may be established by circumstances, and less evidence is required to establish agency than is ordinarily required.

Authority of one spouse to act for another may be established by circumstances, and, as between husband and wife, much less evidence is required to establish agency than is ordinarily required.

2. Appeal and error ⚷719(6)—Appellants cannot question insufficiency of evidence to support judgment, where appeal is presented by bill of exceptions containing no specifications of error (Code Civ. Proc. § 648).

Under Code Civ. Proc. § 648, appellants may not question insufficiency of evidence to support judgment, where appeal is presented by means of bill of exceptions, which contains no specifications of error.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

On petition for rehearing. Petition denied. For former opinion, see 280 P. 711.

Walter F. Lynch and Ernest Spagnoli, both of San Francisco, for appellants.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Bradford, Cross & Prior, of Sacramento, for respondent.

PER CURIAM. [1] The petition for rehearing is denied. The evidence of the agency of the defendant Edw. L. da Roza is sufficient to bind his wife, Roma V. da Roza. The complaint was for a joint obligation against Edw. L. da Roza and Roma V. da Roza, his wife. Both defendants appeared jointly by general demurrer only and by an answer containing only a general denial. Neither the answer nor the evidence at the trial raises the question of agency, joint ownership of the real property, or the marriage relation existing between the defendants at the time of the execution of the contract. The liability of the wife was directly involved. The authority of one spouse to act for another may be established by circumstances, and as between husband and wife requires much less evidence to establish agency than is ordinarily required. 13 Cal. Jur. 844, § 43. In the absence of a special plea in behalf of the wife, in view of the entire state of the record which contains no intimation to the contrary, reason prompts us to assume that the defendant Edw. L. da Roza intended to admit his agency and his marriage at the time of the execution of the contract when he testified without explanation or modification: "My wife's name is Roma V. da Roza. She and I own the ranch upon which the work was done. I have charge of the operation of the ranch."

[2] Moreover, the appellants may not question the insufficiency of the evidence to support the judgment, for the appeal is presented by means of a bill of exceptions, which contains no specifications of error. Section 648, Code Civ. Proc.; 2 Cal. Jur. 708, § 407; Akley v. Bassett, 189 Cal. 625, 639, 209 P. 576; Winterburn v. Chambers, 91 Cal. 170, 27 P. 658; Weisshand v. Petaluma, 37 Cal. App. 296, 303, 174 P. 955.

The petition for a rehearing is denied.

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101 Cal. App. 328

GREY v. MILLIGAN et al. (Civ. 6247.)

District Court of Appeal, Second District, Division 2, California. Oct. 18, 1929.

1. Judgment ⚷139—Trial court must exercise sound judicial discretion upon motion to vacate default judgment.

Trial court, upon motion to vacate default judgment, is vested with power and duty to exercise sound judicial discretion.

2. Judgment ⚷146, 153(1)—Refusal to vacate default entered in replevin against one served as "John Doe" held not abuse of discretion, in view of delay in application and delivery to defendant of property claimed.

Refusal of trial court to set aside default judgment in replevin suit as against one served as "John Doe" *held* not abuse of discretion, where it appeared that defendant's father, to whom defendant delivered the summons and complaint, and who formerly had possession of the property, had delivered it to defendant and 3½ months had expired since entry of judgment.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Lina Elise Grey against Edwin S. Milligan and others. From an order denying the application of defendant named to set aside a default judgment, he appeals. Affirmed.

E. P. Peers and Alfred Kehde, both of Los Angeles, for appellant.

Rupert B. Turnbull, of Los Angeles, for respondent.

CRAIG, J. The plaintiff and respondent in the instant case filed a suit in replevin against J. T. Milligan, also including several fictitious names, and praying that upon discovery of the true names of other defendants they be substituted therefor. J. T. Milligan and the appellant Edwin S. Milligan were both served, the return of the sheriff showing that he had served John Doe, whose true name was Edwin S. Milligan. Upon his failure to make an appearance, default was entered against the latter, and upon the trial it appearing that he had previously acquired possession of the property in controversy, the plaintiff dismissed as to J. T. Milligan, and received a judgment against the appellant.

Twenty days after the trial, appellant moved to set aside the judgment and for leave to answer, which was denied. It was recited in affidavits accompanying the motion that, being served as "John Doe," he had no means of knowing that he had been made a party defendant, and that since his father, J. T. Milligan, had been interested in the subject-matter of the action, he immediately delivered the summons and complaint to him. It appears from the evidence, however, that one A. O. Eckman, claiming to be the owner of certain real property and the live stock and accessories thereon, which was conducted as a poultry ranch in which he had invested about $20,000, sold and agreed to deliver to the plaintiff an undivided one-half interest therein. Oral and written demand were made upon J. T. Milligan for possession. As testified by one witness, there were "many heated words," and he was ordered off the premises by the defendant last mentioned; that a representative of the plaintiff then said to him: "Now, you know, Milligan, that we bought this property, and that we have bought Eckman's interest in it, and we have got an order to get these chickens and the equipment, and we want you to deliver it." It appears that this defendant's son, E. S. Milligan, was present on May 29, 1926, when the foregoing demand was made, but said nothing. On June 4, 1926, when suit was filed, or less than a week later, his father did not have possession of the property here in dispute, but had delivered it to said son, who, as already observed, was properly served with a copy of the complaint, which he gave to the former and permitted a default to be entered as to himself.

[1, 2] A casual perusal of the complaint discloses that all of the property for which appellant heard demand made was described in detail therein. A trial court upon motion to vacate a default judgment is vested with the power and duty to exercise sound judicial discretion, and it may well have occurred to the court in this instance that under the existing circumstances the exchange of property and pleadings between father and son within a few days did not under such rule justify the vacation of judgment after the expiration of three and one-half months. Authorities cited by appellant are not in point, since good faith and the right of plaintiff to join defendants by fictitious names are the sole defects in the proceedings, according to his argument. In the respect last mentioned, it appears that appellant was not served until the day following the first visit of the process server, which may have been the first time that it became necessary to join him. We cannot say as a matter of law that the trial court abused its discretion in denying the motion.

The order denying the motion is affirmed.

We concur: WORKS, P. J.; BURNELL, Justice pro tem.

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101 Cal. App. 238

PEOPLE v. SLEPNIKOFF. (Cr. 1537.)

District Court of Appeal, First District, Division 1, California. Oct. 16, 1929.

1. Burglary 🔑41(1)—Evidence in burglary trial held to show night watchman's presence in building, and defendant's possession of deadly weapon, at time of entry.

Evidence *held* sufficient to sustain conviction of first degree burglary, as against contention that it did not show that night watchman was in building when defendant entered it or that defendant was armed with a deadly weapon at such time.

2. Burglary 🔑46(5)—Instruction defining first degree burglary held not erroneous because omitting words "inhabited dwelling house."

In trial for burglary, alleged to have been perpetrated in furniture company building, instruction defining first degree burglary *held* not erroneous because omitting words "an inhabited dwelling house," especially in view of evidence that building was inhabited and that defendant was armed with a deadly weapon.

3. Criminal law 🔑404(4)—Sledge-hammer, which defendant carried on entering building and threw away when discovered, held admissible in burglary trial, though not recovered until four days later.

In burglary trial, evidence that defendant carried a sledge-hammer on entering building and threw it in water tank when discovered *held* to warrant admission of such hammer in evidence, though it was not recovered until four days later.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Mike Slepnikoff was convicted of burglary, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellant, together with two codefendants, Nick Boreoff and William Durakoff, were charged in a joint information with the commission of the crime of burglary. The offense was alleged to have been perpetrated in a building located at 1161 Mission street, San Francisco, commonly known as the Beecher Furniture Company. Appellant, together with the other defendants, pleaded not guilty. After trial, the jury returned a verdict of guilty as to all the defendants. Appellant made a motion for a new trial, which was denied. The appeal is from the judgment and order.

It appeared in evidence that about 8:30 o'clock in the evening of December 9, 1928, a watchman employed in the building heard a sound, and upon investigation saw three persons, one of whom was appellant, make their way to the office where a vault and safe were located. He immediately left the establishment and telephoned the police. Two officers responded to his call. They examined the vault and noticed that the combination had been knocked off and the safe broken open. A noise was heard on the stairway leading to the roof. The police were again phoned to for assistance and other officers arrived and the building was surrounded. All three defendants were found hiding on the top of a water tank above the roof. A police officer asked appellant where the money was, and was informed by him that everything was on the top of the tank. An empty revolver was taken from appellant and another loaded revolver was found on the tank, together with a steel rod or driftpin used to drive back the combination of the vault. A bag containing the sum of $284.54, which had been taken from the safe, was also found, and appellant informed the officers that a sledge-hammer had been thrown into the tank, where it was discovered some four days later.

[1] As grounds for reversal, it is claimed the

evidence is insufficient to sustain the conviction of first degree burglary, as it does not show that the night watchman was in the building at the time appellant entered the same, or that he entered armed with a deadly weapon, or that any revolver was taken into the building.

[2, 3] The testimony of defendant himself shows that he entered the building after 7:30 o'clock in the evening and the watchman entered the premises previously, at 5:30 o'clock, and had remained on duty until the following morning. That appellant entered the building armed with a deadly weapon, there can be no question, for he directed the officers to the place where he had left the loaded revolver, together with the implements used to commit the crime. Nor is there any merit in the further claim that the court erroneously instructed the jury as to what constituted first degree burglary, for the reason that it omitted the words "an inhabited dwelling house." The facts as narrated show the building was inhabited. A dwelling house inhabited or uninhabited was not involved in the case, and an instruction upon this subject was unnecessary. Moreover, the facts also show that appellant was armed with a deadly weapon. Equally without merit is the claim that the sledge-hammer was improperly admitted in evidence. There was evidence to show that appellant on entering the building had carried the hammer in his trousers, and had thrown the same in the tank at the time he and his codefendants were discovered. The fact that the hammer was not recovered until four days later is of no consequence.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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101 Cal. App. 427

PENDELL v. WARREN. (Civ. 8.)

District Court of Appeal, Fourth District, California. Oct. 22, 1929.

1. Sales 🔑481—Purchaser of automobile under conditional contract on rescinding was entitled to relief only on offering to restore to seller automobile and everything of value received from it (Civ. Code, § 3408).

Under Civ. Code, § 3408, purchaser of automobile under conditional contract on rescission was entitled to relief from his contract only by offering to restore to seller the automobile and to account for everything of value he had received from it.

2. Sales 🔑481—In determining amount purchaser should restore to seller on rescission of conditional contract, court could consider circumstances under which truck was used, cost of operation, etc.

On purchaser's rescission of contract for conditional sale of automobile truck, before determining amount purchaser should restore, court could take into account the customary rental charges for use of trucks of similar character, and the circumstances under which it was used, cost of operation, repairs, etc., in estimating the net value accruing to purchaser from such use.

3. Sales 🔑481—Finding fixing value of use of truck to purchaser rescinding conditional contract at $100 held justified.

On purchaser's rescission of conditional contract for sale of truck, evidence *held* to justify trial court's finding in fixing the value of the use of the truck to purchaser at $100, which purchaser was required to restore.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by H. G. Pendell against Edwin M. Warren. From the judgment, plaintiff appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Swing & Wilson, of San Bernardino, for respondent.

SLOANE, P. J. The only issue on this, a second appeal from a judgment had in the superior court of the county of San Bernardino, is as to the amount, if any, the appellant is entitled to recover, on a rescission by the defendant, the vendee under a conditional contract of purchase and sale of an automobile truck, for benefits received by the vendee from use of the truck while in his possession.

The action was brought by the vendor, as the plaintiff, to recover from vendee, as defendant, the unpaid balance of the agreed purchase price. The defendant, after notice of rescission, sought by cross-complaint a rescission of the contract and recovery of installments paid thereunder. Plaintiff, by way of answer to the cross-complaint, pleaded, as set-off to any recovery that might be had by the defendant, the value to vendee of the use of the truck.

Judgment was for defendant on the cross-complaint, granting rescission, and recovery of installments paid, and for costs, but no finding was made on the issue raised for a set-off in favor of plaintiff, for vendee's use of the truck.

On appeal by plaintiff to the Second District Court of Appeal, the judgment was reversed for failure of the trial court to find on the demand of a credit for benefits defendant had received from use of the truck. The language of the judgment of reversal (76 Cal. App. 33, 243 P. 707, 709) is as follows: "Judgment reversed, with directions to the trial court to retry only the issues as to the reasonable rental value of the truck, and as to whether the defendant used it while it was in his possession; to determine and adjudge what, if any, amount plaintiff shall recover under those issues; and, if it shall be determined that plaintiff should recover thereunder, to reframe its entire judgment accordingly."

A retrial was had in the San Bernardino superior court upon the question of rental value under the pleadings as originally framed, and the court found for the plaintiff and cross-defendant on that issue in the sum of $100; the conclusion of law being:

"That plaintiff is entitled to judgment of rescission and cancellation of the said contract referred to in plaintiff's complaint herein, and that said contract be rescinded, canceled and annulled;

"That defendant is entitled to have and recover from plaintiff the sum of $385.00 less the sum of $100.00, on account of the reasonable rental value of the truck during the time it was in possession of defendant, and less the further sum of $144.10 on the judgment for costs heretofore awarded plaintiff on said appeal."

Judgment was given and entered accordingly, and the pending appeal was taken by the plaintiff from such judgment to the Second District Court of Appeal, and has been transferred to this court for decision.

The record before us does not contain the pleadings or any part of the record on the former appeal, but, as no question is raised as to the sufficiency of the pleadings to present the question to be decided here as to the value and extent of the use of the truck by defendant while it was in his possession, we cannot see that this omission prevents a decision of the issue on its merits.

The evidence adduced on the second trial is directed to the period and extent of the use made by defendant of the truck while it was in his possession after the purchase and before rescission, and as to the value of that use.

As to the grounds of rescission and the sufficiency of the notice thereof we are not here concerned; these matters having been concluded on the former appeal. All that now is involved in this case is the right of the plaintiff to a credit on the judgment against him in any amount in excess of the $100 allowed by the trial court for defendant's use of the truck.

[1] It does not appear from the record before us what sum the plaintiff was demanding under the pleadings as the reasonable value of such use. His appeal rests on the contention that the undisputed evidence shows a rental value of $5 per day for such time as the truck was used by the defendant. This may be conceded as established by the evidence, from the standpoint of a rental of the truck by the defendant from the plaintiff; but such is not the situation of the parties. The defendant, as the rescinding party, was entitled to relief from his contract only on an offer to restore to the plaintiff the machine in question, and to account for everything of value he had received from it. As provided by section 3408 of the Civil Code:

"On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

We are disposed to agree with the rule as stated by the respondent in his brief that "the amount to be credited to the guilty vendor is not, strictly speaking, rental, for obviously there is no contractual relation which imposes on the vendee the obligation to reimburse the vendor for rent; it is only to the extent that the vendee has profited by the undertaking that he is required in good conscience to restore to the vendor."

The rule is correctly stated in the quotation from Black on Rescission, § 634:

"With regard to personal property, where the purchaser rescinds the contract for fraud or other cause, he should tender a reasonable payment for any beneficial use to which he may have put the property while in his possession, beyond such use as was necessary to test and try it."

To a similar effect is the decision of Bray v. Lowery, 163 Cal. 256, 124 P. 1004.

[2] While the court had a right in this case to take into account the customary rental charges for the use of trucks of this character, it also properly could consider the circumstances under which it was used, the cost of operation, repairs, etc., in order to reach a just estimate of the net value accruing to the vendee from such use.

[3] If plaintiff's right of recovery was a straight rental at $5 per day, this would amount to approximately $200. But, while the time period is an element in fixing the amount of defendant's liability for benefits derived, it is not the only one. He testified that he calculated that he made a profit on each trip of about $10, and he also testified to various expenses incurred for repairs, labor, etc., including $5 a day for a man to operate the truck. In any event, it does not appear that the profit of $10 a trip is to be wholly credited to the use of the truck. There was no evidence produced as to the benefits to the defendant, excepting his own testimony, and we are of the opinion that from such evidence as appears in the record the trial court was justified in fixing the value of the use of the truck to defendant at $100.

The judgment is affirmed.

We concur: BARNARD, J.; MARKS, J.

101 Cal. App. 302

PEOPLE v. SEAMAN et al. (Cr. 1550.)

District Court of Appeal, First District, Division 2, California. Oct. 18, 1929.

1. Statutes ⚷206—Some force and effect must be given to every word when construing statute.

In construing statute, some force and effect must be given to every word.

2. Robbery ⚷11—Whether weapon is a dangerous one within statute defining robbery in first degree does not depend on how particular weapon is used (Pen. Code, § 211a).

Whether certain weapon is dangerous weapon under Pen. Code, § 211a, providing that all robbery which is perpetrated by person being armed with a dangerous or deadly weapon is robbery in first degree, does not depend on how particular weapon is used.

3. Robbery ⚷1—Taking of personal property in possession of another from his person or immediate presence by force or fear is gravamen of "robbery."

Gravamen of an alleged "robbery" is the taking by means of force or fear of personal property in possession of another from his person or immediate presence.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Robbery.]

4. Robbery ⚷11—Person going empty-handed and robbing another is guilty of robbery in second degree.

If person about to commit robbery goes empty-handed and succeeds in committing offense, he is guilty of robbery in the second degree.

5. Robbery ⚷26—Whether person armed with dangerous or deadly weapon while committing robbery is guilty of first or second degree robbery held for jury (Pen. Code, § 211a).

Whether one committing robbery and using a gun or other weapon mentioned in Pen. Code, § 211a, defining robbery in first degree, is guilty of first or second degree robbery, *held* for jury.

6. Criminal law ⚷829(21)—Refusing instruction to find defendants guilty of robbery in second degree if jury had reasonable doubt of degree of crime held not error, where court had fully instructed on reasonable doubt.

In prosecution for robbery, refusing requested instruction to find defendants guilty of robbery in second degree if there is any reasonable doubt as to degree of crime *held* not error, where court had fully instructed on reasonable doubt and one of defendants had admitted committing robbery.

7. Criminal law ⚷791—Refusing defendants' requested instruction in robbery prosecution, consisting of portion of concurring opinion in another case, held not error under circumstances.

In prosecution for robbery, refusing requested instruction consisting of portion of concurring opinion in another case *held* not error, especially where instruction was highly argumentative and contained, in short, a speech on subject of whether pistol used in robbery was loaded or unloaded.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Harold Seaman and two others were convicted of robbery in the first degree, and they appeal. Affirmed.

Milton T. U'Ren and Thomas M. Foley, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Waldemar Augustine, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendants charging them with robbery. The defendants appeared, and each pleaded not guilty. They were tried together before the trial court sitting with a jury. It returned separate verdicts finding each defendant guilty of robbery in the first degree. The defendants made a motion for a new trial. The motion was denied. From a judgment entered on the verdicts and from the order denying a new trial, the defendants have appealed.

The defendants contend that the evidence does not justify a judgment greater than that of second degree robbery. They call to our attention that the defendant John Nissrod was the active operator; that on the 9th day of March, 1929, he entered Compton's restaurant at No. 8 Kearny street, San Francisco, and went to the mezzanine floor where Edward Lessner was making up the cash. Nissrod entered the room where Lessner was, and, holding a pistol in one hand, he pointed it at Lessner and called upon him to throw up his hands, which Lessner did. Nissrod then approached Lessner, still holding the pistol pointed at him, and took out of Lessner's pocket Lessner's key. Lessner testified that he threw up his hands out of fear, and that the money, which approximated $1,000, was taken against his will and without his consent. A pistol was produced which Nissrod admitted was the weapon which he had used. When the pistol was produced in the courtroom, it was unloaded, and Nissrod testified that it was not loaded when he committed the robbery. There was no evidence Nissrod shot the pistol, and there was no evidence that he used it as a club with which to hammer or beat Lessner.

[1-5] Under this condition of the record, the defendants contend that the pistol was neither a "deadly weapon" nor a "dangerous weapon." They cite and rely on People v. Sylva, 143 Cal. 62, 76 P. 814; People v. Wells, 145 Cal. 138, 78 P. 470; People v. Bennett, 37 Cal. App. 324, 173 P. 1004; People v. Montgomery, 15 Cal. App. 315, 114 P. 792. Those authorities are not necessarily in point. Each

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

involved a consideration of the statute defining an assault with a deadly weapon. In the cases relied upon, the question arose as to whether the offense charged had been committed. In the instant case the commission of an offense is not even denied. The sole question is the degree. The contention made by the defendants cannot be sustained for several reasons. The statute (Pen. Code, § 245) defining an assault with a deadly weapon is worded as follows: "Every person who commits an assault upon the person of another with a *deadly* weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," etc. It will be noted that the statute does not even mention a dangerous weapon; whereas section 211a of the Penal Code is as follows: "All robbery which is perpetrated * * * by a person being armed with a dangerous or deadly weapon is robbery in the first degree." If we adopt the contention of the defendants, we give no force or effect to the word "dangerous." However, it is a fundamental rule that, in construing a statute, some force and effect must be given to every word. The defendants contend that whether a certain weapon is dangerous depends upon how it is used, not how it might have been used. C. J. 737. Conceding that to be the rule in assault cases, the same rule is not true, since the amendment of our statute as to robbery cases. The gravamen of an alleged assault is the attack. The authorities cited and relied on by the defendants are to the effect that in assault cases, if a pistol is not loaded and it is used merely as a firearm, there is wanting "a present ability" and therefore no attack. The gravamen of an alleged robbery is the taking, by means of force or fear, of personal property in the possession of another from his person or immediate presence. The taking and the appearances created by the perpetrator both being admitted, the offense is complete. If a person is about to commit a robbery, there are several courses open to him. If he goes empty-handed he may succeed or he may fail, and, in addition thereto, he may be killed. If he succeeds in committing the offense and is thereafter tried, he will have the benefit of claiming robbery in the second degree. On the other hand, if he uses a gun or other weapon mentioned in the statute and succeeds in committing the robbery and is put on trial, then it will be a question for the jury to decide whether the crime was first degree or second degree. The mere fact that on the trial the defendant testified that his gun was not loaded does not require the jury to believe such testimony. People v. Hall, 87 Cal. App. 634, 635, 262 P. 50.

[6] Still presenting the same theory, the defendants complain because the trial court refused to give an instruction worded as follows: "In this connection the court instructs you that if you have any reasonable doubt as to the degree of the crime then it is your duty to find that the robbery was robbery in the second degree." The court did not err. Speaking of the case generally, the court had fully instructed on reasonable doubt. It was not called upon to repeat itself nor to address a specific instruction to the specific item of evidence, "was the pistol loaded or unloaded." Moreover, as the defendant Nissrod had taken the stand and had admitted having committed robbery in the manner hereinabove delineated, there was no reasonable ground of doubt that the offense was perpetrated "* * * with a dangerous or deadly weapon."

[7] From People v. Seawright, 72 Cal. App. 414, 237 P. 796, the defendants copied from page 420, 237 P. 798, a part of the last paragraph on that page, and which is a portion of a concurring opinion only. Thereupon they presented the copy in the form of an instruction, which was refused, and at this time they complain of the refusal. The trial court did not err. It has frequently been said that instructions may not be made in that manner. The instant case is a striking illustration. The proposed instruction was highly argumentative. It was, in short, a speech on the subject of whether the pistol was loaded or unloaded. The trial court was not called upon to pick out that specific portion of the record and address an instruction thereto. If it had done so, its act would have been accepted by the jury as indicating how the evidence impressed the mind of the trial judge.

We find no error in the record. The judgment and order are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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101 Cal. App. 241

EASTERN HOTEL CO. v. MILLER BROS. 101 RANCH WILD WEST SHOW et al.★
(Civ. 7056.)

District Court of Appeal, First District, Division 2, California. Oct. 16, 1929.

Rehearing Denied Nov. 14, 1929. Hearing Denied by Supreme Court Dec. 9, 1929.

1. Principal and agent ⚿22(1)—In action against principal, based on declarations of alleged agent, agency could not be proven by extrajudicial statement of alleged agent.

In action against circus for reasonable value of building for displaying circus bills, evidence that alleged manager admitted he was manager of defendant circus, and that defendant caused circus bills to be posted in plaintiff's building, *held* properly excluded, since agency could not be proven by extrajudicial statement of agent.

2. Evidence ⚿317(12)—In action against principal and agent, agent's statements, showing agency, would not be hearsay as to agent.

In action against principal and agent for reasonable value of building for displaying cir-

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★Rehearing denied. Hearing denied by Supreme Court.

cus bills in building without permission, letter of party, declaring that he was manager of defendant circus and that defendant had caused such bills to be posted in building, would not be hearsay as to agent, although there was no preliminary proof of agency.

3. Use and occupation 🔑11—In action for reasonable value of building for displaying circus bills, nonsuit held proper, in absence of evidence of reasonable value of use and possession of building.

In action for reasonable value of building for displaying circus bills without permission, motion for nonsuit *held* properly granted, where there was no evidence of reasonable value of use and possession of building.

4. Appeal and error 🔑194(1)—Where trial proceeded on theory that certain issue had been made, defect in answer could not be raised for first time on appeal.

Appellant could not be permitted to take advantage of defect in answer in failing to make certain issue raised for first time on appeal, where trial proceeded on theory that such issue had been made.

5. Pleading 🔑236(3)—Discretion in denying motion, made during trial, to add prayer for exemplary damages, held not abused.

Court's discretion in denying motion, made during trial, for permission to amend complaint to ask for exemplary damages, in action for reasonable value of building used for displaying circus bills, *held* not abused.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Eastern Hotel Company against the Miller Bros. 101 Ranch Wild West Show and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Robert P. Troy, of San Francisco, for appellant.

R. F. Mogan, Leo A. Murasky, and E. R. Hoerchner, all of San Francisco, for respondents.

KOFORD, P. J. This is an appeal by plaintiff from a judgment of nonsuit. The complaint alleged that defendants took possession of certain vacant store buildings on Third street, of which plaintiff was lessee, and posted upon and inside of said stores and buildings circus bills, posters, and advertisements. It alleged that such possession and use was fraudulent and forcible; that it injured and disfigured the buildings; that it turned away prospective subtenants; and "that the reasonable value of the premises for said use and occupation thereof is $3,000." The prayer of the complaint was for $3,000. A writ of attachment was issued and levied in the case.

The complaint is so worded that despite the wide range and variety of its statements, it cannot be said to be anything else than an action for the reasonable value of the use and occupation of the buildings for the purposes of publicity. At the conclusion of plaintiff's testimony, the court granted defendants' motion for a nonsuit upon the grounds, first, that there was no evidence that the defendants in person or by agent entered into or posted any signs upon or in the said buildings; and, second, that there was no evidence of the reasonable value of such use and possession.

[1] The evidence introduced by plaintiff showed that circus bills and signs advertising the "101 Ranch" show or circus were displayed upon the inside of the said buildings without permission, but there was no evidence to show that the defendant corporations put the signs there. Plaintiff offered evidence of a conversation of its counsel with H. W. Seymour, and also offered a letter written by said Seymour, containing declarations by said Seymour that he was the manager of the defendant Wild West Show, and declarations that said defendant had caused the said bills and signs to be posted on the said buildings. Objection was made to this evidence as hearsay, and upon the ground that there had been no preliminary proof that said Seymour was the manager or an agent of the said defendants. This objection to the evidence was sustained. The ruling was correct. The agency could not be proven by the extrajudicial statement of the agent. 1 Cal. Jur. 698. There was no competent evidence, therefore, tending to prove that the said signs and bills had been posted by the defendant corporations. The motion for nonsuit was properly granted on that ground as to those defendants.

[2] It is contended by appellant that the testimony so stricken out as hearsay contained an admission of Seymour that he had caused the signs to be put up in plaintiff's buildings. This testimony would not be hearsay as to Seymour individually, because of the fact that Seymour was individually a defendant in the case. This point evidently did not occur to counsel for either party or to the court at the time of the trial. In fact, defendant Seymour had not then been formally made a party defendant in name, in place of a fictitious defendant. This was done at the end of the case. All seemed to regard the case as proceeding against the corporation defendants only, and this point is raised on appeal for the first time.

[3] But, if this ground of nonsuit was not well taken with respect to the defendant Seymour, the other ground of the motion is good as to him, as well as the corporation defendants. The evidence fails to show the reasonable value of the premises in which the signs were posted. Counsel for plaintiff attempted, without success, to qualify himself as an expert upon the reasonable value of the property, and upon the reasonable value of the use and occupation of the property, "produced

through force and fraud." This was not done until after the motion for nonsuit was made. Upon being informed that his qualification of himself as an expert was insufficient, he submitted the motion without further testimony. The nonsuit was therefore properly granted upon the second ground named as to all the defendants.

[4] The plaintiff, as appellant here, now contends for the first time that, owing to certain defective denials of the answer, the defendants admitted having taken possession and posted the bills and signs. Paragraph II of the answer makes a full and complete denial with respect to 604 and 606 Third street. The same paragraph undertakes to deny the same allegation with respect to 610–610a Third street, but is defective in failing to repeat "or at any other time" in the expression "deny that on the 28th of August, 1926, defendants took possession," etc. This point was not raised at the trial. The cause proceeded upon the theory that this was an issue, and the appellant is, therefore, not permitted to take advantage of this defect at this time. Etienne v. Kendall, 202 Cal. 251, 257, 259 P. 752.

[5] During the course of the trial, the court denied the appellant's motion for permission to amend the complaint in order to ask for exemplary damages. This was a matter within the discretion of the court, and it in no manner appears that such discretion was not soundly exercised in denying permission to add a prayer for exemplary damages.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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101 Cal. App. 310

STATE CREDIT CORPORATION v. RANGER et al. (Civ. 5574.)

District Court of Appeal, Second District, Division 2, California. Oct. 18, 1929.

1. Estoppel 🔑110—Facts giving rise to estoppel in pais must be pleaded to rely thereon.

A party who desires to rely upon an estoppel in pais must plead the facts giving rise thereto.

2. Estoppel 🔑110, 120—Admission of evidence and instruction on theory of estoppel was erroneous, in absence of pleading setting up defense.

Where defendant failed to plead defense of estoppel, evidence of facts tending to substantiate it was not within the issues, and admission thereof, together with instructions on such theory, was erroneous.

Appeal from Superior Court, Ventura County; G. R. Freeman, Judge.

Action by the State Credit Corporation against P. M. Ranger, H. E. Frost, and others, wherein all defendants except defendant Frost defaulted. From a judgment for defendant Frost, plaintiff appeals. Reversed and remanded, with directions.

Harry D. Parker, of Los Angeles, for appellant.

Hollingsworth & Henderson, of Ventura, for respondent.

BURNELL, Justice pro tem. Plaintiff corporation, the appellant here, brought this action in claim and delivery to recover an automobile. The complaint alleges that plaintiff and the defendants, other than defendant-respondent Frost, had, on January 27, 1926, entered into a written agreement for the purchase by said defendants from plaintiff of a Jordan sedan for the agreed price of $1,723.70, payable *in cash on January 27, 1926*, and that possession of the car was thereafter delivered to said defendants, who were doing business under the firm name Ventura Jordan Company. The contract, attached to the complaint as an exhibit and by reference made a part thereof, appears to be in the usual form of conditional sale contracts for the purchase of automobiles on the basis of installment payments, although it is to be observed that the blanks in the clause providing for amount and due date of installments are not filled in, but, on the contrary, the whole purchase price is made payable upon the very day of the execution of the contract. There are the usual provisions for interest "on deferred payments," payment of taxes by the purchaser, keeping up insurance, repairs, etc., and an agreement on the part of the purchaser that he will not permit the car to be removed from his possession nor "sell, attempt to sell, lease, mortgage, hypothecate or otherwise dispose of said personal property. * * *" It is further stipulated that: "In the event the purchaser fails or neglects to comply with any of the terms, covenants or conditions of the contract, or to make any of the several payments provided for herein, when due, * * * the seller, at his option, and without notice to the purchaser, may elect to declare the whole purchase price immediately due and payable, or the seller may, without notice to the purchaser, declare all the rights of the purchaser under this contract terminated, and without demand first made, and with or without legal process, immediately take possession of said personal property. * * *" The contract provides that: "Until the purchaser has fully complied with all the terms, covenants and conditions of this contract, and made all the payments as herein provided, said personal property * * * shall belong to, and the title of said personal property shall remain in the seller," and that "possession of said personal property shall give the purchaser no title or interest therein and no rights except as herein provided."

The complaint alleges that about February 12, 1926, the Ventura Jordan Company "attempted to sell," and "actually did transfer possession" of, the Jordan sedan in question to defendant Frost, "who now has the possession thereof and claims to be the owner." There are the usual allegations of demand for delivery, refusal to deliver, ownership and right of possession in plaintiff, value of property, etc., to be found in complaints in this type of action.

All defendants except Frost defaulted. The latter filed an answer which was merely a specific denial of the allegations of the complaint, and which set up no new matter. The trial was by jury, resulting in a verdict and judgment against plaintiff and in favor of defendant Frost as to ownership of the car. From this judgment plaintiff has appealed.

Respondent's theory of the case was and is that the automobile in question, together with other cars of the same make, was delivered to the Ventura Jordan Company, sales and service agents for Jordan cars at Santa Paula, for sale, and that the appellant corporation, which was financing the Ventura Jordan Company in the matter of acquiring cars from the Southern California distributors, caused the contract set forth in the complaint to be executed merely for its protection and under a verbal agreement whereby, upon a sale being made by the Ventura Jordan Company, that portion of the retail selling price of the car sold which represented the wholesale or dealer's price specified in the written contract was to be paid by the Ventura Jordan Company to appellant finance company, which would then deliver the "pink slip" indicative of legal ownership to the purchaser, and that both parties to the written contract understood and agreed that the car was to be offered for sale to the public, and that, in so delivering the car to the Ventura Jordan Company, appellant constituted the latter its agent or factor, clothed with ostensible authority to sell the car, and in the case of an innocent purchaser thereof was estopped to deny the fact of such authority; hence that respondent, purchasing the car from a Jordan dealer in the usual course of business, acquired a good title thereto.

In advancing this theory, respondent relies upon the principle laid down in such cases as Carter v. Rowley, 59 Cal. App. 486, 211 P. 267, Chucovich v. San Francisco Securities Co., 60 Cal. App. 700, 214 P. 263, Parke v. Franciscus, 194 Cal. 284, 228 P. 435, and Kenny v. Christianson, 200 Cal. 419, 253 P. 715, 716, 50 A. L. R. 1297, to the effect that, when the legal owner of an automobile delivers it to a dealer for the purpose of sale he thereby clothes the latter with ostensible authority to sell the car, and is estopped to deny the validity of the title thereto acquired by an innocent purchaser in due course of business.

Appellant, on the other hand, strenuously and, we feel constrained to say, somewhat intemperately contends that the question of the Ventura Jordan Company's agency was "falsely and illegally raised," and that the court in instructing the jury upon the issue of agency "illegally and wrongfully injected (that issue) into the trial of said cause without a proper plea of acts and facts constituting a waiver or raising an estoppel," and also that "the court illegally and wrongfully, in violation of well-known and well-established rules of pleading and procedure, (1) permitted defendant-respondent, over timely objection, to introduce evidence of facts, circumstances and matters claimed to be a waiver of rights and to raise an estoppel in pais against the plaintiff-appellant, notwithstanding the fact the same was not duly and regularly and fully pleaded specifically, as required by law to make those facts, circumstances and matters available at any stage in the trial of the cause."

Appellant urges other grounds for a reversal of the judgment, but we do not find it necessary to go into them, since the determination of this appeal must of necessity rest upon that of the question of whether or not the matters of ostensible agency and estoppel were property before the court and jury.

Upon the trial in the court below, the plaintiff vainly objected to all testimony tending to show the existence of "another agreement or understanding entirely collateral to and outside of the scope of this particular contract," as well as to all testimony tending to show that the Ventura Jordan Company was an agent of plaintiff corporation or was authorized by it to sell the car. One of the grounds stated for these objections was that the matters sought to be established were not within the issues involved in the case. At the close of the trial, counsel for plaintiff moved the court to strike out all of this testimony, basing his motion upon the same grounds. This motion was denied.

Respondent's contention that, notwithstanding appellant corporation's admitted, so far as the evidence was concerned, legal ownership of the car, he obtained good title from the Ventura Jordan Company, is and can be based upon the theory of estoppel only, the theory, as stated in Stoner v. Security Trust Co., 47 Cal. App. 216, 190 P. 500, 502, that the general rule that one in possession of personal property can transfer to another no greater interest in the property than he himself is subject to the exception that "where the owner of the property clothes another with the apparent title to, or power of disposition over, it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto; the true owner being in such case held estopped from afterward asserting his title."

[1] It is the firmly established rule in California that a party who desires to rely upon an estoppel in pais must plead the facts giving rise thereto. A few of the many cases in which this rule has been laid down, reiterated and followed are Clarke v. Huber, 25 Cal. 594; Chapman v. Hughes, 134 Cal. 641, 58 P. 298, 60 P. 974, 66 P. 982; Fair Oaks Bank v. Johnson, 198 Cal. 196, 244 P. 335; Producer's Holding Co. v. Hill, 201 Cal. 204, 256 P. 207; Frank v. Crescent Wharf, etc., Co., 50 Cal. App. 272, 195 P. 79; and see long list of cases in 10 Cal. Jur. 654. As said in Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157: "Equitable estoppels in pais, generally, if not universally, are applied to prevent injury which would ensue to one from the acts or declarations of another, were he permitted to gainsay the truth of such acts and declarations. The principle is invoked and applied for the prevention of fraud, or that which is tantamount thereto, on the one side, and injury on the other; and it is but just and is in accordance with the rules of pleading in equity cases, that the party relying upon an equitable estoppel in pais should inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet. To do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry, in suits of equity."

This principle is as applicable to actions in claim and delivery as to those of other character; thus in Chowchilla National Bank v. Nilmeier, 83 Cal. App. 18, 256 P. 298, 299, an action to recover possession of certain cows which had been mortgaged to the plaintiff bank by one C. H. Nilmeier, his widow had filed a cross-complaint alleging that the animals were her separate property and on this cross-complaint had been awarded judgment for their recovery or their value, together with damages for their detention. Appealing from this judgment, the bank contended that, by signing a prior mortgage of the same cows to another bank jointly with her husband, "and by making the affidavit jointly with him that the 'said mortgagor owns the absolute title' to the mortgaged property," Mrs. Nilmeier was "estopped to deny that her husband owned the cows, or to deny that he was authorized to later mortgage them to plaintiff." It was held that the plaintiff not having pleaded the alleged estoppel in its answer to the cross-complaint, the issue was not properly before the court. The court said: "In the first place, the issue of estoppel is not raised by the pleadings. Where the cause of action or defense of a party depends upon estoppel he must plead it." Again, in Lathrop v. Title Insurance & Trust Co., 73 Cal. App. 147, 238 P. 748, which was an action to recover certain bonds, a defense based upon estoppel in pais was held to be unavailable because not pleaded.

Examination of the records in the cases relied on by respondent discloses that, in Carter v. Rowley, supra, and Parke v. Franciscus, supra, the facts claimed to give rise to the estoppel were pleaded, while in Chucovich v. San Francisco Securities Corporation, supra, the question of pleading was not raised.

Respondent places great reliance upon Kenny v. Christianson, supra, as holding that a defendant who bases his defense and claim of right of possession upon an estoppel on the part of the plaintiff is not required to plead the same. The decision in that case does not so hold. There the action was in claim, and delivery for an automobile purchased by the defendant from a used car dealer with whom it had been placed for sale by the plaintiff. The dealer had embezzled the proceeds of the sale. In his answer the defendant, unlike the respondent in this case, had affirmatively "alleged that from a time prior to the commencement of the action and ever since said time he had been and continued to be the owner of and entitled to the possession" of the car. In its statement that the defendant was not required to plead estoppel, the court was not discussing the question of the necessity of pleading facts showing that plaintiff had, by delivering the car for sale to a dealer, clothed the latter with ostensible authority to dispose of it and was therefore estopped to deny his right to do so. The point under discussion was the plaintiff-appellant's contention that the defendant was not entitled to assert his ownership because there had never been issued to him the certificate of registration and ownership provided for by the Motor Vehicle Act of 1925 (St. 1925, p. 398), and his further contention "that defendant's claim that the plaintiff is not entitled to rely upon the aforesaid provisions of the Motor Vehicle Act to defeat the defendant's claim is a defense based upon estoppel, and that the defendant was not entitled to the benefit of such defense because of his failure to plead such estoppel." It was in answer to this contention that the court said: "In making this contention plaintiff relies upon the familiar rule that the defense of an equitable estoppel is one which must be pleaded. This rule, however, has only application to cases wherein the plaintiff bases his sole reliance for his recovery in said action upon a claim of title which he is estopped to urge. Where, however, a plaintiff, as in this case, bases her alleged right to recovery in the first instance upon the original claim of ownership of the property in question and upon her contention that the person through whom the defendant acquired title to said property had no authority from her to dispose of the same, the defendant is not required in his pleadings to anticipate such other contentions as the plaintiff may seek to rely upon when her main reliance for her right of recovery has failed her, and which do not appear, upon the face of her complaint. In such cases the defendant may await the assertion by the plaintiff in her proof of such additional foundation for her right of recovery and may then oppose the same with his evidence of an equitable estoppel."

We find nothing in this statement, or elsewhere in the opinion, to warrant the assumption that the Supreme Court intended to overrule an unbroken line of its own decisions, commencing with Lestrade v. Barth, 19 Cal. 660, decided in 1862, and continuing on to the present day, to the effect that an estoppel must be affirmatively plead.

[2] We hold, therefore, that the respondent, not having set up such a defense, evidence of the facts tending to substantiate it was not within the issues, and should not have been admitted, and that the learned trial court erred in instructing the jury upon the theory of agency. For these reasons the judgment must be reversed and the cause remanded. In taking this action, we feel constrained to observe that there seems to be sufficient evidence in the record before us to have brought the case within the doctrine of Carter v. Rowley, Chucovich v. San Francisco Securities Co., Parke v. Franciscus, and Kenny v. Christianson, supra, had estoppel been pleaded, and that on a retrial of the case respondent should be permitted to amend his answer so as to raise the issue of estoppel if he desires to do so.

Judgment reversed, and cause remanded, with directions to the trial court to permit respondent to amend his answer so as to allege an estoppel, if respondent shall request leave so to amend.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 306

PEOPLE v. HEWITT. (Cr. 1860.)

District Court of Appeal, Second District, Division 2, California. Oct. 18, 1929.

1. Rape 🔑54(1)—Conviction for rape may be had upon uncorroborated testimony of prosecutrix.

One may be convicted of rape even upon the uncorroborated testimony of prosecutrix, if the jury believes her testimony.

2. Criminal law 🔑1159(2)—Where testimony of prosecutrix in prosecution for statutory rape was corroborated in some particulars, judgment of conviction must be affirmed.

Judgment of conviction for statutory rape must be affirmed, where prosecutrix was corroborated in some particulars, since there was substantial evidence to support conviction.

3. Criminal law 🔑341—Defendant's attempt to show feelings of certain people towards him, who were not witnesses, to show that charge of prosecutrix in rape prosecution was a concocted story, held properly denied.

In prosecution for statutory rape, defendant's attempt to inject into case, during examination of witness, feelings of certain parties with reference to defendant, who were not witnesses, for the purpose of showing that prosecutrix's charge was a concocted story, *held* properly denied.

4. Criminal law 🔑938(1)—Denying new trial for newly discovered cumulative and impeaching evidence held not error.

In prosecution for statutory rape, denying new trial for newly discovered evidence which was cumulative and of an impeaching character *held* not error.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Claude N. Hewitt was convicted of statutory rape, and he appeals. Affirmed.

A. Perry Harris, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was charged by information filed by the district attorney of Los Angeles county with statutory rape, alleged to have been committed upon a female person of the age of 15 years, on or about December 1, 1928, December 15, 1928, and March 30, 1929. Having been convicted upon all three counts, a motion for a new trial was presented, which was denied, and the defendant appeals from the judgments and from the order last mentioned.

The principal ground assigned for reversal arises from conflicting evidence which appellant attempts to construe as rendering the evidence offered by the people so inconsistent and improbable as to have resulted in a miscarriage of justice. An exhaustive résumé of the details is not necessary. The prosecutrix testified that appellant, who is her father, had so conducted himself toward her that she feared him, and that on the first occasion he accomplished the act charged when she was about to take a bath; that he cautioned her to be quiet; that his revolver hung on the bedpost; and that she made no outcry. The second offense, according to her testimony, occurred as she lay on her bed, reading, when her mother had gone to the store; that she fought with her hands and made an outcry. She swore that upon the third occasion the defendant threatened her with a wrench while repairing his automobile, and said that should she refuse to comply with his demands when made he would kill her, and that she should not inform her

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

mother; that she accompanied him in the machine to a secluded place in a vacant street or alley, where he repeated the sexual offense charged in the information. The child further testified that during this latter debauchery appellant had his gun with him, and that he also told her to make no complaint lest there might be people around; that she pleaded with him, finally becoming hysterical. It appears from the testimony of the prosecutrix that upon her return home on March 30th other members of the family were preparing for a picnic luncheon on the following day, Easter Sunday, and that on the following Friday she related her experiences to an aunt, who, with the defendant's mother, accompanied her to the offices of the juvenile department. A county physician testified to the physical evidences tending to corroborate the fact of recent penetration.

The conflict in the evidence, if it was worthy of consideration by the jury, consisted merely of denials by certain witnesses as to minor details. The prosecutrix stated upon the stand that the defendant had not treated her with the respect and kindness due to a child until she began to grow older; that he prevented her from going out alone, but that he would take her to picture shows and call for her later. The defendant and his witnesses testified in part that he had not objected to the girl leaving home with others, whereas her sister swore that the prosecutrix and the defendant did disagree over the fact that she wished to remain out with boys after picture shows were attended by her. While the defendant's grandmother testified that there had been no preparation for a picnic, as related by the prosecutrix, her sister in turn stated that such preparations were in progress at the time mentioned. Appellant testified that the girl had threatened to leave home unless permitted to associate with boys, which testimony was denied by the prosecutrix, as well as testimony of another witness that she had been riding with boys, contrary to appellant's wishes.

[1, 2] It is admitted in the briefs of appellant that the evidence was carefully and exhaustively discussed in the trial court upon the motion for a new trial. The evidence adduced by the prosecution was not, because of any of the specified contradictions, so inherently improbable as to require or justify a different view upon appeal from that taken below. The appearance of the witnesses, their demeanor upon the stand, and the manner in which they testified, together with other considerations of which only the court and jury might avail themselves during the trial, though discussed here in the briefs, cannot be disregarded or construed in favor of the appellant. Family associations and resentment of the prosecutrix because of alleged social restraints, although possible causes of retaliation in seeking a shield for favorites, cannot as a mere theory be said to overcome positive evidence, and particularly so after having been twice reviewed in the tribunal of first instance. People v. Kruvosky, 53 Cal. App. 744, 200 P. 831; People v. Price, 26 Cal. App. 544, 147 P. 591. One may be convicted of rape even upon the uncorroborated testimony of the prosecutrix, if the jury believe her testimony. People v. Wademan, 38 Cal. App. 116, 175 P. 791; People v. Jones, 76 Cal. App. 144, 244 P. 101. It appears, as already noted, however, that the prosecutrix was corroborated, in some particulars, and the case is governed by the rule that her testimony must be accorded full credit, and the judgments be affirmed in this respect, since there is substantial evidence tending to support them. People v. Tom Woo, 181 Cal. 315, 184 P. 389; People v. Porter, 48 Cal. App. 237, 191 P. 951.

[3] The defendant attempted to inject into the case during direct examination of his mother "the feeling of Mrs. Anderson and Mrs. Hewitt and Mrs. Armstrong with reference to this defendant," who were not witnesses, for the purpose of showing that the charge of the prosecutrix was a "concocted story." It is contended that animosity had prompted threats to send the appellant to the penitentiary, but there is no evidence of such nature in the record, and the objection to the question embracing the language above quoted was properly sustained.

[4] Finally, it is insisted that the trial court erred in denying a new trial upon the presentation of an affidavit given by the sister of the prosecutrix wherein it was averred that the latter during confinement at juvenile hall, and after the trial, had stated that the defendant was not guilty, and that she had testified falsely against him. Her mother also gave an affidavit to the effect that she did not testify upon the trial, and was not called, but that she had been at home during all of the times alleged in the information and knew that the immoral acts charged by her daughter did not and could not have occurred. The purported evidence presented to the court in this manner was properly for the jury, and was cumulative and of an impeaching character which under previous rulings has been held not requiring a new trial. People v. Tallmadge, 114 Cal. 427, 46 P. 282; People v. Brittan, 118 Cal. 409, 50 P. 664; People v. Van Perhacs, 20 Cal. App. 48, 127 P. 1048; People v. Garvey (Cal. App.) 269 P. 702.

The judgments and order denying a new trial are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

101 Cal. App. 300

ROBBINS v. MULCREVY, County Clerk.★
(Civ. 7179.)

District Court of Appeal, First District, Division 1, California. Oct. 18, 1929.

Rehearing Denied Nov. 15, 1929. Hearing Denied by Supreme Court Dec. 16, 1929.

1. Mandamus ⇨4(3)—Mandamus requiring clerk to expunge from record order requiring petitioner to pay alimony and attorney's fees held properly denied, since order constituted final judgment from which an appeal would lie.

Mandamus to require clerk to expunge order from judgment book, requiring petitioner to pay alimony pendente lite and attorneys' fees, *held* properly denied, since a decree for temporary alimony as to all matters upon which it takes effect constitutes a final judgment from which a direct appeal may be taken before determination of the issues in the action.

2. Mandamus ⇨14(1)—Application to expunge order from judgment book should be first made to trial court.

Application to expunge from judgment book order requiring petitioner for mandamus to pay wife, in action for divorce, alimony pendente lite and attorneys' fees, should have been made to trial court in the first instance.

Application for writ of mandate by Julius Robbins against H. I. Mulcrevy, County Clerk of the City and County of San Francisco. Writ denied.

Max Schleimer, of Los Angeles, for petitioner.

TYLER, P. J. Mandamus to compel respondent to expunge the entry of an order with reference to the payment of alimony pendente lite from the "Judgment Docket Book."

[1, 2] The facts show that on November 16, 1922, petitioner filed a complaint in an action for divorce; on February 14, 1923, defendant therein filed a demurrer to the complaint. On November 1, 1923, the court made an order directing petitioner to pay his wife $75 per month alimony pendente lite, and $150 attorney fees. Thereafter the attorney for defendant caused said order to be entered in the "Judgment Book" and in the "Judgment Docket Book." On October 3, 1929, petitioner dismissed his action without prejudice to the bringing of a new one. Thereafter he demanded that the clerk expunge the entries from the books referred to, on the ground that he transcended his authority in making the entries, as the order for the payment of alimony and attorney's fees was not a judgment, and had no place therein. Upon refusal of the clerk to comply with the request, this proceeding was instituted.

The petition is without merit. A decree for temporary alimony in a matrimonial cause is, to all legal intents and purposes, a judgment, and not only a judgment, but, as to all matters upon which it takes effect, a final judgment. Clopton v. Clopton, 161 Cal. 481, 119 P. 651; 1 Cal. Jur. p. 960. Although such an application is not a separate suit, it is a proceeding for separate judgment, independent of the final judgment in the action. The application is heard and determined upon a record of its own, and the decision thereon may be made and may be the subject of a direct appeal before the determination of the issues in the action. Estate of Smith, 122 Cal. 462, 55 P. 249; Hite v. Hite, 124 Cal. 389, 398, 57 P. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82; 1 Cal. Jur. p. 966. Moreover, the application should have been made in the court below, in the first instance.

The application for the writ is denied.

We concur: KNIGHT, J.; CASHIN, J.

101 Cal. App. 334

WITHEROW v. UNITED AMERICAN INS. CO. OF PENNSYLVANIA. (Civ. 7.)★

District Court of Appeal, Fourth District, California. Oct. 18, 1929.

As Modified on Denial of Rehearing, Nov. 13, 1929. Hearing Denied by Supreme Court Dec. 16, 1929.

1. Insurance ⇨646(2)—Insurer has burden of proving facts showing alleged breach of condition in fire policy by preponderance of evidence.

Burden is on fire insurance company, seeking to avoid payment of loss because of breach of proviso or condition in policy, such as provision requiring mortgagee to disclose to insurer any change in ownership coming to his knowledge, to prove facts necessary to bring case within terms thereof by preponderance of evidence.

2. Insurance ⇨665(3)—Evidence held to support court's finding that mortgagee did not know of transfers of title to insured property.

In action on fire insurance policy containing mortgage clause requiring mortgagee to disclose to insurer any change of ownership "which shall come to the knowledge of said mortgagee," evidence *held* sufficient to support trial court's finding that mortgagee did not have knowledge of transfers of title subsequent to his transfer thereof and execution of trust deed by transferee.

3. Insurance ⇨146(3)—Forfeiture provisions must be strictly construed against insurer and interpretation most favorable to insured or other claimant adopted in case of ambiguity.

Conditions of insurance policy, providing for forfeiture of interest of insured or others claiming thereunder, are to be strictly construed against insurer, and, if there is any ambiguity, which may reasonably be solved by either of two constructions, the interpretation most favorable to insured or other claimant must be adopted.

★Rehearing denied. Hearing denied by Supreme Court.

4. Insurance ⇨311(3)—Mortgage clause requiring mortgagee to disclose any change of ownership coming to his "knowledge" did not require him to seek information.

Mortgage clause, imposing on mortgagee duty to disclose to insurer any change of ownership, "which shall come to the knowledge of said mortgagee," did not require him to seek after information, but only to give such information as came to his knowledge; "knowledge" meaning actual knowledge of fact as distinguished from constructive knowledge or notice (citing Words and Phrases; "Knowledge").

5. Insurance ⇨311(3)—Insured may lose right to recover on policy without affecting mortgagee's rights under mortgage clause.

Where clause providing for payment of loss to mortgagee as his interest may appear is attached to insurance policy, there are, in effect, two separate contracts, and insured may lose his right to recover on policy without affecting mortgagee's rights thereunder.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Roland S. Witherow, as administrator of the estate of W. L. Witherow, deceased, against the United American Insurance Company of Pennsylvania, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Harold C. Morton, of Los Angeles, for appellant.

Charles D. Swanner, of Santa Ana, for respondent.

MARKS, J. This action was brought by plaintiff against defendant to recover the sum of $800, on an insurance policy written by defendant on the property described therein. Plaintiff recovered judgment for $746.91, and defendant appealed.

It appears from the record before us that on April 11, 1923, appellant issued its policy of insurance in the sum of $800 on the building involved, for the term of three years in favor of F. S. McClain, the then owner. The title to the property passed by various conveyances to Carl Marr. It bears the usual indorsements carrying the consent of appellant to these changes of ownership and a mortgage clause dated December 20, 1923, in favor of W. L. Witherow, plaintiff's decedent. On March 13, 1924, Marr conveyed the property to L. A. McCain and W. B. Scott. On June 21, 1924, McCain and Scott conveyed the property to Oscar Cochems and wife. On September 24, 1924, Cochems and wife conveyed the property to G. W. Purkey and wife. On March 20, 1925, Purkey and wife conveyed the property to H. L. Clark, where title remained until November 25, 1925, when the buildings were destroyed by fire. At the time there was $1,336.44 unpaid on decedent's note, which was secured by a deed of trust on the insured premises. Appellant did not consent to any change of ownership after title vested in Marr and the mortgage clause attached to the policy. W. L. Witherow died June 10, 1928, and plaintiff was appointed as administrator of his estate.

Appellant's answer interposed several defenses, which were all abandoned at the trial except one, which asserted the avoidance of the policy by the changes of ownership by Marr and by his successors in interest without the knowledge and consent of the insurance carrier. This is the sole question presented on appeal, as all other facts, including the amount of the loss in the sum of $746.91, were stipulated by the parties at the time of trial.

The trial court found: "That the said W. L. Witherow did not have knowledge of the transfer of said real property subsequent to the transfer from W. L. Witherow to Carl Marr and the execution of said trust deed by Carl Marr in favor of W. L. Witherow." Appellant contends that this finding is unsupported by the evidence and is contrary to the evidence, and therefore that the judgment must be reversed.

[1] The rule governing the burden of proof in cases of this kind has been laid down by the Supreme Court, as follows: That where the plaintiff proves the existence of a contract of insurance, a fire which results in a loss to the insured with due notice or proof of loss, where necessary, to the insurer, and the insurance company seeks to avoid payment by reason of the breach of a proviso or condition contained in the policy, the burden rests upon the insurance company to prove, by a preponderance of the evidence, the facts necessary to bring the case within the terms of the proviso or condition under which it seeks to escape liability. Rossini v. Saint Paul Fire & Marine Insurance Co., 182 Cal. 415, 188 P. 564; Mah See v. North American Accident Insurance Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123; Postler v. Travelers' Insurance Co., 173 Cal. 1, 158 P. 1022.

[2] Four witnesses were produced by the insurance company in its effort to prove that W. L. Witherow had knowledge of the transfers of title subsequent to ownership by Marr. They were G. W. Purkey and Oscar Cochems, two of the later owners, Dean Collver, collection teller of the Farmers' & Merchants' Savings Bank of Santa Ana, and Frank L. Weaver, an insurance adjuster who acted for appellant in investigating the loss. F. D. Drake, at one time local agent for appellant, was called, but was not able to remember any facts material to either side. The record shows that L. A. McCain, one of the owners subsequent to Marr, was present in court, but was not called as a witness.

G. W. Purkey testified that he was the owner of the property, having purchased it from Cochems; that he knew Witherow, but did not remember discussing the property, or its ownership with him; that he made his payments to the bank and supposed Witherow knew he (Purkey) owned the property, because he so made the payments.

Oscar Cochems testified that he knew Witherow; that he owned the property; that he never at any time discussed the property with Witherow and did not remember making any payments to the bank.

Dean Collver's testimony, viewed from the point of view most favorable to appellant, may be summarized as follows: That he was collection teller of the Farmers' & Merchants' Savings Bank of Santa Ana; that he knew W. L. Witherow very well during his lifetime; that Witherow was a customer of the bank; that he left the note with Collver as an employee of the bank for collection with instructions to collect the installments of $15 per month and deposit them to Witherow's account; that Collver personally made all but a very few of the collections and indorsed the payments on the back of the note when received by him; that the payments were made by different persons from time to time; that he believed that different people owned the property and that his recollection was that Mr. Witherow told him of a Mr. Purkey owning it; that he had difficulty in making the collections at times and sometimes would go to W. L. Witherow and sometimes to others to ascertain who owned the property; that when payments would become delinquent witness would send a notice to the last party he had knowledge of holding it and sometimes would get a notice turned back with the statement, "I don't own that property now. I just sold it to somebody else"; that there was a memorandum written on the envelope containing the note, "Musselman Lumber Company, G. W. Purkey and H. L. Clark", which was a memorandum of names of persons "who were said to own the property at the time; a memorandum of different people we tried to get money out of as the owner of the property"; that those names were furnished as the names of the supposed owners of the property; that on two or three occasions an agent handling the property for Mr. Witherow might have brought the payments in; that it was witness' impression that Mr. Purkey, a real estate agent who handled some of the transfers of the property, often brought in the money; that it was witness' impression that Purkey owned the property at one time; that when a payment was made it was deposited to the account of W. L. Witherow and a duplicate deposit slip mailed him with the name of the depositor written thereon; that witness could not give the names of any of the depositors which were written upon the slips; that it was the custom of the bank to write the name of the depositor on the duplicate slip mailed to the customer; and that he believed the custom had been followed in this case.

Frank L. Weaver testified that he was a fire insurance adjuster and investigated this loss for appellant; that on December 5, 1925, he talked with W. L. Witherow and that Witherow told him that the property had been transferred twice or more after the policy had been written and the mortgage clause attached.

In addition to certified copies of the four deeds effecting the change of title, hereinbefore referred to, we believe that the foregoing presents a fair summary of the testimony offered by appellant upon which it must rely to maintain its contention that the finding of the trial court to the effect that W. L. Witherow had no knowledge of the transfers of the property subsequent to the date of the mortgage clause in his favor was not supported by the evidence and was contrary to the evidence.

It is to be noted that Weaver's conversation with Witherow occurred on December 5th, 10 days after the fire. All that Weaver attempted to state in his testimony was Witherow's admission of knowledge of the transfers of title upon that date. He did not attempt to state when Witherow gained that information. From the testimony of this witness there is nothing to prevent the trial court from concluding that Witherow had first learned of the transfers on the day of his conversation with Weaver.

From the testimony of Collver it is clear that he entertained the fixed opinion that the title to the property had changed several times during the interval between the date of the mortgage clause and the fire, and while he was making the collections for Witherow, and that he believed Witherow had the same information. Many of the questions put to Collver by counsel for appellant put the desired answer in his mouth, and many more called for his opinions and conclusions, which he gave. It is also clear that part of his testimony was based on a custom of the bank rather than a recollection of the particular transaction. He was not once asked for the substance of any conversation he might have had with Witherow concerning the change of ownership of the property.

[3] The mortgage clause imposed upon Witherow the duty of disclosing to appellant "any change of ownership * * * which shall come to the knowledge of said mortgagee," if any duty was imposed upon him. We are considering an instrument which we are justified in assuming was prepared by the insurance carrier and under which it is attempting to escape liability under its insurance policy and work a forfeiture of the same. "It is well established that conditions which provide for a forfeiture of the interest of the assured, or those claiming under the policy, are to be strictly construed against the insurance company, and, if there is any ambiguity in a policy which may reasonably be solved by either one of two constructions, the interpretation shall be adopted which is the most fa-

vorable to the assured, or, in this particular case, to the beneficiary in the deed of trust." Welch v. British American Assurance Co., 148 Cal. 223, 82 P. 964, 965, 113 Am. St. Rep. 223, 7 Ann. Cas. 396. In the case before us the court is not required to give any more liberal interpretation to the language of the mortgage clause than its strict construction requires.

[4] Witherow did not have to be a seeker after information. He was required to give such information as came to his knowledge. In cases of this kind, knowledge has been held to be actual information of a fact, and not mere speculation or opinion or constructive notice. "Webster's Dictionary defines 'knowledge' as: 'The act or state of knowing; clear perception of fact, truth, or duty.' In the Century Dictionary we find this definition: 'The state of being or having become aware of fact or truth; intellectual recognition of or acquaintance with fact or truth.' Knowledge, then, is information, * * * as to a fact. Viewing the word 'knowledge' in the clause in the insurance policy in question in light of these definitions, the clause applies where the insured has actual knowledge of the foreclosure proceedings having been commenced, or notice given of the sale of the property insured under a deed of trust." Brown v. Connecticut Fire Ins. Co., 197 Mo. App. 317, 195 S. W. 62, 65. "It will be noted that the provision of the policy relied upon is that it shall be void in the event that foreclosure proceedings are commenced, or notice of sale given, with the knowledge of the insured. * * * Defendant, having prepared this policy and these conditions upon which a right to forfeiture is predicated, must be held to have chosen the words advisedly, and must be held to have used the word 'knowledge,' as distinguished from constructive notice, advisedly, with the intent to limit the right of forfeiture to those cases in which the insured had knowledge of the commencement of the foreclosure proceedings, or what has been sometimes held equivalent, actual notice. That the word 'knowledge,' as used in the contract, means actual knowledge, as distinguished from constructive knowledge, or constructive notice, see Fidelity & Casualty Co. v. Gate Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440. That knowledge and notice are not synonymous or interchangeable, see Words and Phrases, vol. 5, page 3941." Funk v. Anchor Fire Ins. Co., 171 Iowa, 331, 153 N. W. 1048, 1052.

[5] Where an insurance policy is written in favor of an insured and has attached to it a mortgage clause providing that the loss be payable to the mortgagee as his interest may appear, there are, in effect, two separate contracts, one between the insurer and the mortgagor or owner of the property, and the other between the insurer and the mortgagee. The mortgagor may lose his right of recovery on the policy without affecting the mortgagee's rights. Seccombe v. Glens Falls Insurance Co., 45 Cal. App. 611, 188 P. 305; Welch v. British American Assurance Co., supra.

In the instant case the court must look to the contract between the insurer and the mortgagee to determine their mutual rights, duties, obligations, and liabilities.

In the first paragraph of the mortgage clause it is provided that the interest of the mortgagee "shall not be invalidated by any act or neglect of the mortgagor or owners * * * nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy." It will be noted that in the foregoing the insurance carrier agreed with the mortgagee that change of ownership would not bar the right of the mortgagee to recover in case of loss.

In the third paragraph of the mortgage clause denominated therein as "Condition Two," we find the following: "The mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void."

We assume that this paragraph seems to place on the mortgagee the duty of reporting a change of ownership coming to his knowledge. There follows the phrase, "and unless permitted by this policy it shall be noted thereon," which evidently refers to a change of ownership coming to the knowledge of the mortgagee or trustee. Then follows a provision requiring the mortgagee or trustee to pay the premium for such increased hazard, followed by the words of forfeiture. As we have seen, paragraph 1 of the mortgage clause directly provides that a change of title or ownership shall not affect the right of the mortgagee to recover in case of loss. While we do not find it necessary to so hold, it might be urged with considerable force that, in so far as the mortgagee is concerned, the covenant in paragraph 1 of the mortgage clause against forfeiture in the event of change of title or ownership is controlling over the rather ambiguous language in "Condition Two" under the terms of which the forfeiture is urged in this case, especially in view of the well-settled rule that all ambiguities in a policy must be resolved in favor of the insured and against the insurer.

We have now to determine what reasonable deductions the trial court could make from the evidence before it upon the question of whether or not W. L. Witherow had knowledge of the change of title of the insured property after his mortgage clause was issued by the insurance company. Dean Collver was collection teller of the bank with which the note was left for collection. If support of appellant's contention is found, it must be in the testimony of this witness. The trial was had two years and two months after the date of the fire and about four years after the note was first left with the bank for collection. While the witness was evidently doing his best to recall the incidents of the transaction, his memory was not very clear on many of its phases. The custom of the bank was relied upon by him to supplement his memory in at least part of his testimony. Collver's primary duty was to receive payments on the note, credit them on the back thereof, and deposit the money to Witherow's account. The trial court evidently concluded that the witness confused the making of payments by different persons with the matter of ownership of the property. He testified that the Musselman Lumber Company was said to own the property at one time and that he tried to get money out of it as an owner, while the record shows that it was not one of the owners. In the absence of any direct evidence of actual knowledge on the part of either Collver or Witherow of change of title, we cannot say that the conclusion of the trial court was contrary to the evidence or not supported by the evidence, as the burden of proving this actual knowledge by a preponderance of the evidence was on appellant.

The Supreme Court in the case of Mah See v. North American Accident Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A. L. R. 123, in discussing the weight to be given the findings of the trial court, held as follows: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deducted from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. (Anderson v. L. A. Transfer Co., 170 Cal. 66 [148 P. 212]). In so far as the evidence is subject to opposing inference, it must upon review thereof, be regarded in the light most favorable to the support of the judgment (Woodward [Woodard] v. Glenwood Lumber Co., 171 Cal. 513, 519, 520 [153 P. 951]; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800.) 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff [the prevailing party] must be indulged by this court.'"

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

On Rehearing.

MARKS, J. As herein modified and amended, said opinion correctly states the conclusions of this court. No new question having been presented in appellant's motion for rehearing, it is denied.

We concur: SLOANE, P. J.; BARNARD, J.

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101 Cal. App. 423

MacDONALD v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 7085.)★

District Court of Appeal, First District, Division 1, California. Oct. 23, 1929.

Rehearing Denied Nov. 22, 1929.

1. Justices of the peace ⚷160(1)—Service of notice of appeal from justice's court on adverse party is jurisdictional.

Compliance with statute requiring service of notice of appeal from justice's court on adverse party, is necessary to jurisdiction of appellate court, except in certain special cases.

2. Justices of the peace ⚷160(4)—"Adverse party," to be served with notice of appeal from justice's court, is party to record, whose interest will be affected by reversal or modification of judgment.

An "adverse party," within statute requiring service of notice of appeal from justice's court on such party, is party to record, whose interest in subject-matter of appeal is adverse to, or will be affected by, reversal or modification of judgment or order appealed from, whether he appears on face of record as plaintiff, defendant, or intervener.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Adverse Party.]

3. Justices of the peace ⚷160(4)—Nonappealing coparty of appellant is adverse party, to be served with notice of appeal from justice's court, if his interest may be affected by reversal or modification of judgment.

A nonappealing coparty of one appealing from judgment of justice's court is an adverse party, on whom notice of appeal must be served, under the statute, if his interest may be affected by reversal or modification of judgment.

4. Justices of the peace ⚷160(4)—Successful defendants in justice's court held adverse parties, to be served with notice of appeal from judgment against codefendant.

Defendants, in whose favor judgment was rendered in justice's court, *held* adverse parties, on whom notice of appeal from judgment against codefendant must be served, under the statute since perfection of appeal would require them to appear and prepare defense in superior court, and might result in entirely different judgment.

★Rehearing denied.

Certiorari to Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Application by F. L. W. MacDonald for a writ of certiorari to review an order of the Superior Court in and for the City and County of San Francisco, dismissing an appeal from a judgment of the justice's court. Writ denied.

Raymond Perry, of San Francisco, for petitioner.

J. A. Mueller, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review the action of the superior court in dismissing an appeal taken from a judgment rendered in the justice's court.

In substance the petition recites that on the 28th day of July, 1928, the Golden West Credit & Adjustment Company, a corporation, commenced an action in the justice's court of the city and county of San Francisco, against J. D. Small and F. L. W. MacDonald, individually and as copartners doing business under the firm name of MacDonald & Co., and Arthur A. Goepp and F. J. Fuller, individually and as copartners doing business under the name of Fuller & Goepp. Defendants Small, MacDonald, and Goepp appeared separately in propria persona and filed their respective denials. Trial was had, and judgment was rendered against MacDonald, in favor of plaintiff and all other defendants. MacDonald filed his notice of appeal from the judgment, and served the same upon the attorney for plaintiff. Motion to dismiss the appeal was filed, upon the ground that the court had no jurisdiction to hear and determine the same, for the reason that no notice of the appeal was ever served upon the defendants in whose favor judgment was rendered; it being claimed that they were adverse parties by reason of the character of the judgment rendered, and should therefore have been served.

[1-4] The statute requires that notice of appeal must be served upon the adverse party, and compliance therewith is necessary to the jurisdiction of the appellate court, except in certain special cases, of which this is not one. Broadly stated, an "adverse party," within the meaning of the provisions of the Code of Civil Procedure, is defined to be a party to the record whose interest in the subject-matter of an appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, and this, irrespective of the question of whether he appears upon the face of the record in the attitude of plaintiff, or defendant, or intervener. Fearon v. Fodera, 169 Cal. 370, 148 P. 200, Ann. Cas. 1916D, 312; Bowering v. Adams, 126 Cal. 653, 59 P. 134; 2 Cal. Jur., p. 334. He is one whose interest in relation to the subject of the appeal is in conflict with a reversal of the order or decree appealed from, or a modification thereof. Mannix v. Tryon, 152 Cal. 31, 91 P. 994.

The question is whether the judgment gives a party something which will be taken away by a reversal. If it does so, he is an adverse party. Johnson v. Phenix Insurance Co., 146 Cal. 571, 80 P. 719. A nonappealing coparty is an adverse party, if his interest may be affected by a reversal or modification of the judgment appealed from. So here the codefendants are adverse parties for the reasons given. They were successful in the justice's court, and a different judgment might take away the fruits of their judgment. If the appeal were properly perfected, they would be required to appear and prepare their defense, as the hearing in the superior court would be a trial de novo, and might result in an entirely different judgment. Terry v. Superior Court, 110 Cal. 85, 42 P. 464; Ford & Sanborn Co. v. Braslan Seed Growers' Co., 10 Cal. App. 762, 103 P. 946.

Counsel for petitioner has cited us to Jackson v. Brown, 82 Cal. 275, 23 P. 142, Randall v. Hunter, 69 Cal. 82, 10 P. 130, and other cases, as opposing this rule. An examination of these cases will show that the codefendants had defaulted, or consented to the judgment rendered against them, or the action as to them had been dismissed. Under such circumstances they were not adverse parties, as they could not possibly be affected by a reversal of the judgment. A defendant against whom a default is entered is not an adverse party to an appeal from a judgment against other defendants, which cannot affect his interests. Fearon v. Fodera, 169 Cal. 370, 148 P. 200, Ann. Cas. 1916D, 312. A default suffered on the part of a defendant is an admission, and a reversal would not do away with such default, and as long as it stands any judgment rendered on appeal would not affect the judgment against such defaulting defendant. Randall v. Hunter, 69 Cal. 80, 10 P. 130. Section 650 of the Code of Civil Procedure in express terms provides that no notice of appeal need be served upon any party whose default has been duly entered, or who has not appeared in the action or proceeding.

Petitioners, codefendants having an interest in relation to the subject of the appeal, should have been served with notice of the appeal. Not having been served, the superior court was without jurisdiction to hear the appeal.

The writ is denied.

We concur: KNIGHT, J.; CASHIN, J.

101 Cal. App. 440

SWENSON v. SWENSON. (Civ. 5896.)

District Court of Appeal, First District, Division 1, California. Oct. 25, 1929.

1. Divorce 🔑296, 312—Trial court has wide discretion in determining custody of children, and reviewing court is powerless to interfere except in clear cases of abuse of discretion.

In dealing with questions relating to care, custody, and education of minor children of discordant parents, trial court has wide discretion with view to serving the best interests of the children, and reviewing court cannot interfere except in clearest cases of abuse of discretion.

2. Divorce 🔑303(1)—Court may modify divorce decree as to children's custody.

Trial court retains full jurisdiction to modify its decree of divorce as to custody of children when such modification is rendered expedient because of subsequent circumstances vitally affecting children's welfare.

3. Divorce 🔑303(1)—That children are first awarded mother by divorce decree does not prevent court from afterwards awarding them to father.

Fact that children are first awarded to mother by divorce decree does not preclude court from afterwards awarding them to father upon a proper showing being made, though naturally and presumptively mother is entitled to custody of children of tender years.

4. Divorce 🔑303(3)—Modification of divorce decree by awarding father custody of children, after mother contrived to prevent father from visiting children and attempted to ruin father's character, held not abuse of discretion.

Where original divorce decree awarded custody of minor children to mother subject to right of father, who was a lieutenant in the navy, to see and have possession of them when present, and where it appeared that mother had contrived to prevent father from seeing the children in the manner provided and was promoting charges to ruin father's character and thus destroy love and affection of children for him, trial court's modification of decree to award custody of children to father was not an abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Milo Abercrombie Swenson recovered a decree of divorce against Lyman K. Swenson, and from an order granting defendant's petition for modification of the decree as regards the custody and maintenance of the minor children, plaintiff appeals. Affirmed.

C. D. Dudley, of San Francisco, for appellant.

Kenneth C. Gillis and Gillis & Edwards, all of Oakland, and Letitia R. Farber, of San Francisco, for respondent.

PER CURIAM. This is an appeal by plaintiff from an order modifying a final decree of divorce in so far as its provisions relate to the custody and maintenance of two minor children, a girl and a boy, aged 6½ and 4 years, respectively, at the time the order in question was made.

The interlocutory decree was granted to appellant in May, 1925, upon the ground of extreme cruelty, and in accordance with the terms of a written stipulation theretofore entered into between the parties the decree awarded the custody of the children to appellant subject to the conditions hereinafter mentioned, and provided for the payment by respondent of a monthly allowance for their maintenance and education. Respondent is a lieutenant in the United States Navy, and at all the times herein mentioned was assigned to duty on one of the battleships attached to the Pacific fleet; and in accordance with said stipulation the provision in the decree awarding appellant the custody of the children was made subject to the condition that respondent "have the right to see and have the possession and custody of both of said minor children whenever he shall be present in the port of San Francisco, providing always that said children, and each of them, be returned to the care and custody of the plaintiff at night." In January, 1926, respondent complained in a petition filed with the court that appellant was denying him the right to see the children at the times and in the manner provided in the decree, and he therefore asked to have a provision inserted in the decree requiring appellant "to keep her attorney informed at all times where she lives in order that defendant may know where to secure the custody of the children upon his visits to San Francisco," or in default of her doing so that the custody of the children be awarded to him. Said petition was not brought on for hearing, however, owing to the fact that respondent's ship was at sea continuously for a long period following the filing of the petition. In September, 1926, the final decree of divorce was entered. It contained all of the provisions embodied in the interlocutory decree, and in November, 1926, respondent again petitioned for a modification of the provisions relating to the custody and maintenance of the children, this time asking that the same be vacated and that their sole custody be awarded to him. The application was based upon the same acts and omissions charged in the first petition, and in addition thereto it was alleged that on various occasions since the filing of the former petition he had been "frustrated in his efforts to see said minor children because of the efforts of the plaintiff above named and her mother." Furthermore it was alleged in substance that appellant was instilling into the minds of the children a feeling of unfriendliness and resentment toward him; that she had "made charges and statements against (him) of a serious and derogatory nature, all of which were untrue and made without any foundation and for no cause whatsoever"; and in this connection it was averred that if the children were allowed to remain with appellant she would continue to educate them to the end that eventually they would be completely estranged from him. For the reasons stated, respondent alleged, appellant was no longer a fit custodian of the children. Answering the petition, appellant denied its essential allegations and filed a counter petition asking that the decree be modified so as to award her the sole custody of the children "without right whatsoever in the defendant either to visit or see the children." Her petition was based upon the general allegation that respondent "is such an unfit and improper person as should be excluded from the right of visiting and seeing said children." The petitions were heard together and on the afternoon on which the hearing concluded, and before the court announced its decision on the merits of either petition, the court directed that respondent be allowed to see the children the following day; but, in disobedience of the court's direction, appellant fled to Oregon, taking the children with her; whereupon, and on January 6, 1927, the court made its order granting respondent's petition, and on the following day adjudged appellant guilty of contempt of court and issued a bench warrant directing that appellant and the children be brought forthwith before the court. On January 17, 1927, appellant took this appeal, and on April 6, 1927, an order was made staying the service of the bench warrant.

[1] It has been uniformly held that in dealing with questions relating to the care, custody, and education of minor children of discordant parents there is confided to the trial court a very extensive discretion in adapting its orders to varying circumstances and conditions with the view always to conserving the highest and best interests of the children; and that a reviewing court has not the power to interfere with the exercise of such discretion except in the clearest instance of its manifest abuse. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Simmons v. Simmons, 22 Cal. App. 448, 134 P. 791; Jones v. Jones, 49 Cal. App. 165, 192 P. 867; Black v. Black, 149 Cal. 224, 86 P. 505; Van Der Vliet v. Van Der Vliet, 200 Cal. 721, 254 P. 945. Appellant frankly concedes the existence of the foregoing legal principles, but she contends that in the present situation there was a total absence of evidence to show that the modification of the decree was made necessary by any change of circumstances of the parties, or that the best interests of the children would be subserved thereby, or that for any reason she had become unfit to continue as their custodian; and she argues, therefore, that in granting such modification the trial court contravened well-established legal rules governing matters of this kind.

A very broad field of investigation was opened by the numerous accusations made by the respective parties against each other, much evidence being introduced on both sides. After having examined the entire record carefully and given full consideration to all of the points urged by appellant for reversal, we are convinced that the evidence adduced in support of respondent's demand for a change in the custody of the children is legally sufficient to sustain the order made in that behalf. True, as appellant contends, no charges were made or proved reflecting upon her personal conduct, nor was any proof introduced to show that she had been neglectful of the physical well-being of the children; but evidence was adduced which tended strongly to prove that owing to a feeling of intense bitterness appellant entertained toward respondent, which antedated the granting of the interlocutory decree, she studiously and repeatedly violated the plain terms of her stipulation and the provisions of the decree, by resorting to various excuses and subterfuges in order to prevent respondent from seeing or having the children at the times and in the manner therein provided; and that eventually, in furtherance of a manifest determination to prevent him from ever seeing the children again, under any circumstances, she was instrumental in inspiring and promoting a scheme directly involving one of the children which had for its obvious purpose the ruination of respondent's character as a man, the bringing about of his complete disgrace as a naval officer, and the destruction of the love and affection which his children had theretofore manifested toward him. As stated by the trial court preliminary to the reception of the testimony, it was certain that if the charges made against respondent were true, they "would show absolute and positive unfitness of the father" to see the children at all, and if the charges were found to be false, such fact "would disclose the unfitness of the mother" to continue as the custodian. The circumstances under which these charges originated and the manner in which appellant exploited them are fully described in the record, and are of such a nature that we can conceive of no good or useful purpose in elaborating upon them here or in reviewing the testimony bearing upon the same. Suffice it to say that the trial court in unmistakable language declared the charges to be utterly groundless, and a careful analysis of the testimony has convinced us that no fair-minded person could have reached a conclusion any different. In this respect the trial court stated: "* * * I was satisfied yesterday afternoon and I am satisfied today that wherever it may be, some pernicious influence has been at work on the child. I feel without hesitation as a man and a member of a decent civilized society very little hesitation in saying to the husband that I don't think there is a particle of truth in these charges."

As to appellant's activities in exploiting said charges, evidence was introduced to show that shortly after respondent had departed upon the high seas and while he was thus absent appellant laid the charges before a bureau of the department of justice, the federal district attorney's office, and the official head of the naval district, and that after investigations were made, no action was taken, by any of these governmental agencies. She also brought them to the attention of a lawyer, a doctor, and the editor of a San Francisco daily newspaper; and finally she laid them before the judge of the superior court whose jurisdiction respondent had previously invoked in his attempt to compel appellant to comply with the terms of said decree, and upon the strength of such charges sought to have the judge enter an order depriving respondent of any further right to see the children. She was advised that such an order could be made only after a hearing in court, based upon a petition alleging the facts, but she took no steps toward that end until after respondent had instituted the present proceeding to vindicate his good name and secure the custody of the children.

[2, 3] There is no disputing the soundness of appellant's contention that naturally and presumptively the mother is entitled to the care and custody of children of tender years, but it is also the law that the trial court retains full jurisdiction to modify its decree when, as here, such modification is rendered expedient because of circumstances arising since the rendition of the decree, which vitally affect the welfare of the children. Crater v. Crater, 135 Cal. 633, 67 P. 1049; Bancroft v. Bancroft, supra. And it is also held that the fact that the children were first awarded to the mother does not preclude the trial court from afterwards awarding them to the father upon a proper showing being made. Crater v. Crater, supra.

[4] In the present case the record further discloses that the trial court's findings that said charges were wholly without foundation, and that under existing circumstances it would be detrimental to the best interests of the children to allow them to remain in appellant's custody, were based not alone upon the testimony appearing in the transcript, but also upon private interviews in chambers with one of the children in the presence and with the consent of the parties. The trial court had abundant opportunity, therefore, to observe the character and qualities of the respective parties in determining the fitness of each to have the custody of their offspring and to pass upon the other matters relating to the welfare of the children; and we have been unable to find any substantial ground upon which it could be fairly held that the wide discretion invested in the trial court has been abused in awarding the custody of the children to respondent or that any error was committed in so doing. Its order made in that behalf is therefore affirmed.

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101 Cal. App. 547

PIERCE et al. v. HILL et al. (Civ. 6756.)★

District Court of Appeal, Second District, Division 1, California. Oct. 29, 1929.

Rehearing Denied Nov. 14, 1929.

Mandamus ⚷187(6)—Petition for supersedeas to prevent enforcement of writ of mandate pending appeal, held insufficient as not stating facts showing intent to injure.

Petition for supersedeas to prevent enforcement of writ of mandate pending appeal *held* insufficient, where no facts were set forth to show intent to injure; nothing but conclusions having been set forth.

Petition for writ of mandate by Charles C. Pierce and others against Frank C. Hill and another. The writ was issued as prayed for, and defendants appealed, and a petition for a writ of supersedeas was filed prayed to be directed to the superior court of Los Angeles county, Leon Yankwich, judge, to prevent enforcement of the writ of mandate pending appeal. Writ of supersedeas denied.

Lillick, Olson & Graham, Frank C. Hill, and George S. Hupp, all of Los Angeles, for appellants.

Sawyer & Cluff and Wilbur Bassett, all of Los Angeles, for respondents.

YORK, J. This matter comes up on a petition by appellants for a writ of supersedeas. The matter before the court was originally initiated in the superior court on petition for a writ of mandate. The writ of mandate was issued as prayed for in the said petition, and an appeal was taken from the judgment to the Supreme Court. Thereafter a petition for a writ of supersedeas was filed in the Supreme Court, but that court transferred the cause to this court. The object of the petition is to prevent the superior court from enforcing, pending appeal, its writ of mandate commanding the defendants, as president and secretary, respectively, of the California & Eastern Steamship Company, to permit the plaintiffs, by their accountants and attorneys, to inspect and examine all the books and accounts of the said California & Eastern Steamship Company.

An objection to the petition for the writ of supersedeas is filed herein on several counts; the first being that the petition does not set forth facts sufficient to entitle petitioners to the writ of supersedeas.

There are no facts set forth in the petition to show that the stockholders seek such in-

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★Rehearing denied.

spection with intent to use it to the injury of the corporation; nothing but conclusions having been set forth in the petition for supersedeas in reference to such matters.

The objections to the sufficiency of the petition for the writ of supersedeas are therefore well taken, and the petition is denied.

We concur: CONREY, P. J.; HOUSER, J.

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101 Cal. App. 318

SWEATMAN et al. v. LOS ANGELES GAS & ELECTRIC CORPORATION.

(Civ. 6241.)

District Court of Appeal, Second District, Division 2, California. Oct. 18, 1929.

1. Electricity 🔑16(7)—Death of workman on fifth floor of building under construction, when rod pushed through window touched electric wire, held not consequence of position of wire or lack of insulation.

In action for death of workman on fifth floor of building under construction, caused by his moving metal rod out of window, bringing it into contact with uninsulated high-voltage electric wire, workman's death *held* not natural consequence of position of wire or its lack of insulation.

2. Electricity 🔑14(1)—Reasonable care is measure of liability of one maintaining highly charged electric wire.

Law does not require one who maintains even so dangerous an instrumentality as highly charged electric wire to anticipate at his peril every possible circumstance under which some person might make contact with such wire resulting in injury or death; reasonable care, not insurance against every possible accident, being measure of liability.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Charline Sweatman and another, by Georgia Sweatman, their guardian ad litem, and said Georgia Sweatman personally, against the Los Angeles Gas & Electric Corporation. Judgment for defendant, and plaintiffs appeal. Affirmed.

Afue McDowell, of Los Angeles, for appellants.

S. W. Guthrie, Samuel Poorman, Jr., Paul Overton, and Douglas Van Dyke, all of Los Angeles, for respondent.

BURNELL, Justice pro tem. Plaintiffs, who are the surviving widow and minor children of one Robert Fulton Sweatman, appeal from a judgment rendered in favor of respondent corporation upon the sustaining of its demurrer to the second amended complaint without leave to amend. Respondent was the sole defendant upon whom process was served. The action was to recover damages for the death of Sweatman resulting from an electric shock received by him from respondent's high-voltage wires. The facts set forth in the pleading under discussion, so far as they appear material to the points involved on this appeal, are as follows:

On the 10th of October, 1923, a five-story reinforced concrete building was under construction at the southwest corner of East Eighth and Santee streets, in the city of Los Angeles. Construction of this building had been begun about July 25th of the same year. Sweatman, on the day he met his death, was working on the fifth floor of this structure, and, while moving a metal rod "into and out of" one of the windows, brought it into contact with an uninsulated high-voltage wire "then being, by defendants, placed, maintained, and operated, above a public sidewalk, and about seven feet away from the north side of said building." The complaint further alleges that the work being done by Sweatman and other laborers employed in and about the building was of a character similar to that usually performed by workmen in the construction of buildings in the vicinity "where defendants maintained similarly charged wires at like distances from other concrete buildings," and that "the probability and danger of electrical contact between such workmen and such uninsulated high-voltage electric wires were then and long before then well known to defendants, and unknown to said decedent."

Urging that, contrary to the opinion of the learned court below as expressed by its ruling on the demurrer, the complaint set up a cause of action as against respondent, appellants make the following points: First, that respondent was obliged so to arrange its wires as to safeguard the workmen employed in the erection of adjacent buildings under the circumstances presented in the complaint; second, that, under such circumstances, the wire in question constituted a dangerous instrumentality which was operated at the risk of respondent; and, third, that respondent had no exclusive use of the space above the sidewalk, and hence cannot avoid liability on the theory that Sweatman "should not have gone there or placed the rod there."

To these contentions the respondent replies: First, that there is no duty devolving upon an electric company to insulate electric wires suspended from poles in a public street in such a position that it could not reasonably be anticipated that persons would come in contact with them; and, second, that it appears from the pleading itself that any danger from the location or uninsulated condition of respondent's wire was patent to Sweatman, and that therefore his heedlessness in making contact therewith by means of an electrical conductor constituted contributory negligence.

The question, therefore, which we are called upon to determine on this appeal, has to do with the duty of one maintaining high-voltage electric wires along and over a public highway. That duty is thus defined in Fairbairn v. American River Electric Co., 170 Cal. 115, 148 P. 788, 789: "Owing to the highly destructive power of electricity when carried in quantities sufficient for power purposes, and to the fact that it is not visible to the eye or apparent to the other senses, a person or company maintaining an electric power transmission line along or over a public or private road is required to exercise a high degree of care in placing the wires so as not to interfere with traffic on the ordinary highway and so as to avoid contact with and injury to any person or object which may reasonably be expected to pass under the wires. Giraudi v. Electric I. Co., 107 Cal. 124, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; Perham v. Portland E. Co., 33 Or. 478, 53 P. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; Fitzgerald v. Edison, etc., Co., 200 Pa. 543, 50 A. 161, 86 Am. St. Rep. 732; Crosswell on Electricity, § 234. 'The companies are not insurers of the safety of the public against all dangers arising from the lawful placing in the street of appliances pertaining to the business carried on by them, but they are bound to know the danger which may naturally be caused by such use of the streets, and to guard against them by the exercise of all the foresight and caution which can be reasonably expected of prudent men, under the circumstances.' 1 Joyce on Electricity, § 438; Denver v. Sherret, 88 F. 233, 31 C. C. A. 499. 'The degree of care required of such companies, under the rule that they must exercise reasonable care, varies according to the facts and circumstances of the case, having in view the serious results which may ensue as a consequence of negligence.' 1 Joyce on Electricity, § 438a. The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it."

In the Fairbairn Case, again quoting from the opinion, "the alleged negligence of the defendant was the maintaining of a power line carrying a heavy current of electricity along a public road with the wires too close to the surface of the ground, and without covering the wires with insulating material, in consequence whereof the boom of a hay derrick, which the plaintiffs and others were passing under said wires to enter said road from a lane leading into it, came into close proximity to the wires and electricity therefrom passed down the boom cable into the body of the plaintiff, causing the injuries complained of." Reversing a judgment for the plaintiff, the Supreme Court noted that "the wires were in plain sight, the plaintiff and those with him at the time saw them, guessed at their height above ground, and were endeavoring to bring the top of the derrick boom under the wires without coming in contact with them." The lowest of these wires was 27 feet 8¾ inches above the surface of the ground. The court said that the defendant could not be charged with negligence unless, under the circumstances, the placing or maintaining of its wires at that height was negligence, and that it was apparent from all the facts in the case that the defendant had no reasonable cause to apprehend that the objects passing along, into, or crossing the road would be high enough to come into dangerous proximity to its wires.

[1] The complaint in the instant case does not disclose the height above the street of the wire, contact with which caused the untimely death of Sweatman, but it may be fairly assumed, from the fact that he was working on the fifth story at the time of the fatal accident and that the wire is alleged to have been "about seven feet away from the north side of said building, and within such short distance from herein mentioned windows then in said building that said wire obstructed the moving into and out of said building and windows, of metal rods," etc.; that the wire was a considerable distance from the surface of the street, so far above it, in fact, that no danger was to be apprehended by reason of "contact with and injury to any person or object which (might) reasonably be expected to pass under the wire." The law does not require one who maintains even so dangerous an instrumentality as a highly charged electric wire to anticipate, at his peril, every possible fortuitous circumstance under which some person might make a contact with such wire, resulting in injury or even death. Reasonable care, not insurance against every possible accident, is the measure of his liability. Thus, in Minter v. San Diego Consolidated Gas, etc., Co., 180 Cal. 723, 182 P. 749, 750, it is said: "If, guided by those considerations which ordinarily regulate the conduct of human affairs, an ordinarily prudent person would have had reasonable ground to suspect that the wires so placed would cause injury, the plaintiff can be said to have proved a breach of duty." We do not think that the respondent here can be said to have had reasonable ground to suspect that some one would be apt to make contact with its wire by means of a metal bar extended from a fifth-story window of a neighboring building. To employ the language used by the court in the case last cited: "We are of the opinion, * * * that it could not be fairly and reasonably found that an ordinarily prudent person would have considered additional precautions necessary under the circumstances."

The facts in the Minter Case bear some

analogy to those set forth in the complaint here. The deceased, a boy 16 years of age, was killed by coming in contact with the defendant's wires while climbing a tree growing on the highway immediately in front of his father's premises. His death was alleged to have been caused by the negligence of the defendant in maintaining imperfectly protected wires at a improper distance from the tree. This tree was a eucalyptus, about 2½ feet in diameter near the ground and about 10 inches in diameter at a height of 35 feet. The defendant maintained power wires strung on wooden poles set along the highway on the plaintiff's side of the road. One of these wires, carrying 2,300 volts, was strung at a height of about 27 feet above the ground and at a distance from the tree of from 14 to 16 inches. It was insulated, but the insulation did not make it safe to touch, "and was particularly inefficacious when it was wet." Another wire was strung 6 or 8 feet higher and at a distance of about 3 feet from the tree. This wire carried 11,000 volts, and was not insulated. There was a crotch in the tree between the two sets of wires. Reversing a judgment in the plaintiff's favor, the court referred with approval to the rule laid down in Fairbairn v. American River Electric Co., supra, and said: "The plaintiff appears to maintain the proposition that, because a person might climb the tree without committing a trespass, it was incumbent upon the defendant to assume the burden of keeping its wires so protected that a climber would not be subjected to risk. That, however, is not the test. The question is, not what a person might lawfully do, but what the defendant was bound, in the exercise of reasonable prudence, to assume that a person would be likely to do."

In Curtis on Electricity, § 510, it is said: "* * * It is not necessary to insulate wires which are so placed that no one could reasonably be expected to come in proximity to them. * * * Insufficient or worn insulation is worse than none, for sometimes it gives the appearance of security, when, in fact, it is as dangerous as a bare wire." And the same author, in section 511, says: "It is to be noted that the duty of insulation is not absolute under all circumstances. The imposition of the duty as to places where it reasonably may be anticipated that persons will come in contact with the deadly wire naturally implies that there is no such duty of insulation at other places. Thus it follows that the obligation of the electric company is alternative in its nature. Either the wire must be insulated, or it must be so located as to be, comparatively speaking, harmless."

In Wetherby v. Twin State Gas & Electric Co., 83 Vt. 189, 75 A. 8, 10, 25 L. R. A. (N. S.) 1220, 21 Ann. Cas. 1092, the decedent met his death as the result of coming in contact with a high-voltage electric wire maintained by defendant across a bridge 2 feet 3 inches out and away from any part of the bridge structure, and a little further than that from the outside of the bridge trusses which extended up and constituted a side of the bridge. Decedent, a boy of 13, was sitting upon a guard rail 8 inches in width that ran along the bridge just inside the trusses opposite a cross-arm carrying electric wires, which guard rail rested on the railroad ties of the bridge and constituted the footwalk thereon. Decedent, in changing his position, in some way came in contact with the nearest wire. In holding that plaintiff could not recover, the court ruled that the "duty of providing insulation, where it exists, is limited to the insulation of wires at points where there is reason to apprehend that a person may come in contact with the wires, and the place of contact under consideration was not such a point."

In New Omaha, etc., Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89, 96, 9 Am. Elec. Cas. 306, action was brought for damages for the death of a fireman as the result of an electric shock which he received while lowering a ladder in a public alley at the scene of a fire, by reason of such ladder coming in contact with defendant's electric wires. In reversing judgment in plaintiff's favor, the court said: "If the injury to this fireman had arisen when he was engaged merely in working upon the surface of the street, instead of raising a ladder in the air to touch these wires, another question would be presented. The defendant was only authorized to make such use of the alley as would not interfere with its use as a highway. It must put no dangerous constructions near enough to the highway to imperil those rightfully passing. Danger to firemen pushing a metallic bound ladder against the wires, it had no duty to provide for, except by furnishing a lineman to disconnect them if deemed necessary by those in charge of the fire extinguishing operations."

In Geroski v. Allegheny County Light Co., 247 Pa. 304, 93 A. 338, 339, L. R. A. 1915D, 560, action was brought by a widow to recover damages for the death of her husband, the janitor of a hall. The hall fronted on a public street, and upon the front of its roof there was a flagpole. Defendant's 10,000-volt electric wires were strung upon poles along the side of the street in front of the hall, 12 or 13 feet horizontally from the building and about 29 feet above the ground. The flagpole extended 8 or 10 feet higher than the wires. There was a narrow board walk in front of the hall, and defendant's poles were placed between it and the roadway. The decedent was about to raise the flag on the pole. A rope had previously been used for that purpose, but decedent attempted to remove it and replace it with a piece of copperplated wire. He attached an end of the wire to the rope and began to pull it up. When the wire reached the top of the pole it became entangled, and in trying to loosen it decedent stepped backward from the porch of the hall, where he had been standing, to the board walk and thence into the roadway, pulling and shaking the wire and rope. While so engaged, he received the fatal shock as a result of the wire which he was hoisting coming in contact with defendant's electric wires, which, it was alleged, were not properly insulated. In reversing the judgment in favor of plaintiff, the court said in part: "Can it be said in the present case that appellant ought to have reasonably anticipated that any person upon the ground would come in contact with its electric wires carried at a height of 29 feet in the air, and 12 feet distant from the building? * * * If not, then it follows, under what may properly be regarded as the well-settled doctrine of our cases, that there can be no recovery by plaintiff, and that judgment should have been entered for the defendant. Thus in Trout v. Electric Co., 236 Pa. 506, 509, 84 A. 967, 968 (42 L. R. A. [N. S.] 713), it appeared that a 13 year old boy was endeavoring to detach a kite from an electric wire on which it had been caught, when he received a shock which resulted in his death. The wire was stretched upon poles, at a distance of about 4 feet 6 inches from the outside edge of the cornice of the house. The boy lay down on the cornice and threw a corncob tied to the end of a string over the electric wire and pulled it toward him. When the wire came within reach he touched it, and immediately received the electric shock. This court, speaking through Mr. Justice Moschzisker, said [p. 509 of 236 Pa., 84 A. 968]: 'The act of the boy in getting hold of the wire was wholly unrelated to any act of the defendant in connection therewith. Had the wire been so close to the house that the boy might naturally have come in contact with it while playing about the roof, it might be contended that its condition was the proximate cause of his death. But such was not the case; all of the defendant's wires were so far out from the house that they could not possibly have been reached by a full-grown man, much less a boy of 13. The boy could have run and played all over the roof without the possibility of his coming in contact with these wires. It was an original independent act of the deceased which could not reasonably have been anticipated that brought about this most sad accident, and this act was not induced by, or did not follow as a natural sequence to, any negligence of the defendant in connection with its wires. Under such circumstances there could be no recovery, and the defendant was entitled to binding instructions, as requested.'"

[2] It cannot be said that the death of Sweatman was the natural consequence of the position of respondent's wire with respect either to the surface of the street or the building under process of erection, or to its lack of insulation. Obviously, he could not have touched the wire with his hand while standing on the fifth floor of the building. In other words, the position of the wire rendered it safe in its uninsulated condition under all ordinary circumstances. It was only when decedent interposed a new, independent cause, by swinging out from the wall of the building a metal rod which he was handling therein or drawing in through the window, that he was able to make contact with defendant's electric wire. The interposition of this new and independent cause could not have been anticipated by defendant. It does not occur, in the natural order of things, that workmen engaged in building operations in cities, adjacent to electric wires maintained in the streets by public service companies, are electrocuted by coming in contact therewith. The complaint sets forth that it is the usual thing for such building operations to be conducted in Los Angeles in like proximity to similarly charged electric wires in the streets, but there is no allegation that any similar injury has ever resulted therefrom, and therefore no such injury was reasonably to be anticipated. As said in Oakland Bank of Savings v. Murfey, 68 Cal. 455, 9 P. 843, 847: "If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action." And as stated in Polloni v. Ryland, 28 Cal. App. 51, 151 P. 296, 298: "'An injury that is not the natural consequence of the negligence complained of, and that would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated,' is not actionable."

We have carefully examined the authorities cited and relied on by appellants; they are all distinguishable from the case at bar, and none of them is in conflict with the principles hereinabove discussed. Thus in Wales v. Pacific Electric Motor Co., 130 Cal. 521, 62 P. 932, 1120, the wire which caused the injury was being maintained in violation of an ordinance; in Citizens' Electric, etc., Co. v. Bell, 70 Ohio St. 482, 72 N. E. 1155, a broken feed wire, connected at one end with the defendant's main wire, had been negligently left hanging down a pole with its exposed end lying in the grass of the parking in the sidewalk, where a 7-year old child came in contact with it; in Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, the fatal wire was, at the point where the accident occurred, but 2 feet above the roof of a hotel building, where the plaintiff came in contact with it while securing his employer's signs at night and during a heavy storm; and in Commonwealth Electric Co. v. Rose, 114 Ill. App. 181, affirmed in 214 Ill. 545, 73 N. E. 780, electric light wires were maintained in a manner contrary to an ordinance of the city, resulting in the death of a telephone lineman by reason of the telephone wire on which he was working coming in contact therewith. While all of these cases are decided, at least in part, upon the theory that it is the duty of one maintaining electric wires to insulate or otherwise protect them from contact at places where others may reasonably be expected to go, none of them enunciates a rule that such duty extends to an insurance against all risk, whether reasonably to be expected or not.

The learned trial court did not err in its ruling on the demurrer, and the judgment must be affirmed.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 218

HOFFMAN v. SOUTHERN PAC. CO. et al.★

(Civ. 3815.)

District Court of Appeal, Third District, California. Oct. 15, 1929.

Rehearing Denied Nov. 14, 1929. Hearing Denied by Supreme Court Dec. 9, 1929.

1. Railroads ⇨327(7)—Vehicle driver need not actually stop under any and all circumstances before crossing railway track.

Driver of vehicle is not required under any and all circumstances to actually stop before crossing railway track.

2. Railroads ⇨333(1)—Whether one crossing railroad track ahead of approaching train is contributorily negligent depends on whether under circumstances reasonably prudent person would have done so.

Test to determine contributory negligence of one attempting to cross railroad track ahead of approaching train is question whether under such circumstances a reasonably prudent person would have undertaken to do so.

3. Railroads ⇨350(30)—Contributory negligence of person attempting to cross railroad track ahead of approaching train, where different conclusions may reasonably be drawn from circumstances, held for jury.

Where circumstances of particular case are of such a nature that different conclusions may reasonably be drawn as to prudence of person in attempting to cross railroad track, question of contributory negligence is for determination of jury.

4. Railroads ⇨327(7)—Vehicle driver, where nothing obstructs view at railroad crossing for distance amply sufficient to allow time to cross, held not required to stop before crossing.

Where there is nothing to obstruct one's view of railroad track for distance from proposed crossing amply sufficient to preclude possibility of train arriving before one could cross track with reasonable safety, driver of vehicle need not stop machine before crossing track.

5. Railroads ⇨328(8)—Greater caution should be observed in crossing railway track when dense fog obscures view.

When dense fog obscures view, greater caution should be observed in crossing railway track than might suffice at time atmosphere is clear.

6. Railroads ⇨350(26)—Contributory negligence of automobile driver in failing to stop machine or engine before crossing railroad track in fog held for jury.

Where, on morning that train and automobile collided at crossing, dense fog prevailed and train was late and driver of automobile had knowledge of customary time that train approached crossing, contributory negligence of driver in failing to stop automobile or engine before attempting to cross track *held* for jury.

7. Railroads ⇨327(7)—That stopping automobile before reaching crossing would have prevented collision with train held not conclusive of driver's negligence.

Fact that, if automobile had been stopped just before reaching railroad crossing, collision with train would not have occurred, *held* in itself not conclusive of automobile driver's negligence.

8. Railroads ⇨348(4)—Evidence held to sustain implied finding that train did not give statutory signals before collision with plaintiff's automobile at crossing (Civ. Code, § 486).

In action to recover for injuries sustained when plaintiff's automobile was struck by train at crossing, evidence *held* sufficient to support implied finding of failure to blow whistle or ring bell of train before accident, as required by Civ. Code, § 486.

9. Pleading ⇨245(3)—Permitting trial amendment of complaint to include demand for damages for necessary medical aid held not error, where original complaint alleged severe, permanent injuries.

Permitting amendment to complaint during process of trial, in action for injury sustained when train collided with plaintiff's automobile at crossing, so as to include demand for damages for medical aid in performance of a necessary surgical operation resulting from injury sustained, *held* not abuse of discretion, since under original complaint alleging plaintiff was severely and permanently injured evidence of permanent injuries was admissible.

10. Damages ⇨160—Amendment to complaint for injuries sustained when plaintiff's automobile was struck by train held sufficient to admit testimony regarding necessary cost of future medical services (Civ. Code, § 3283).

Amendment to complaint, in action for injuries sustained when train struck plaintiff's automobile at crossing, demanding damages for medical aid in performance of necessary surgical operation resulting from injury sustained, *held* sufficient upon which to admit testimony regarding necessary cost of future medical services, in view of Civ. Code, § 3283, authorizing recovery of damages reasonably certain to occur in future.

★Rehearing denied. Hearing denied by Supreme Court.

11. Damages 🔑191—Evidence held to support judgment for necessary future expenses reasonably certain to accrue as result of injuries sustained when train struck automobile at crossing.

In action for injuries resulting when train struck plaintiff's automobile at railroad crossing, evidence *held* to support judgment with respect to necessary future expense reasonably certain to accrue as result of accident.

12. Appeal and error 🔑1048(3)—Permitting physician to testify that plaintiff's condition resulted from accident held not erroneous under circumstances, though hypothetical question did not fully state facts.

Permitting physician to testify, in response to hypothetical question, that plaintiff's present condition and injuries resulted from accident, though hypothetical question did not fully state facts involved upon which opinion was necessarily based, where all remaining necessary facts had been previously testified to by witness and it was apparent that opinion was based also upon physician's personal examination, treatment, and knowledge of patient's condition, *held* not erroneous.

13. Appeal and error 🔑662(1)—Court minutes control controversy regarding demand for jury on certain date.

Court minutes must control where there is controversy regarding demand for jury on certain date.

14. Jury 🔑25(9)—Jury having been properly demanded for first trial, demand was not required to be renewed at subsequent trial (Code Civ. Proc. § 631).

Where proper demand for jury was made at first trial of action for personal injuries, it was not necessary to repeat demand at time case was finally set for trial, since original demand was continuing in effect, and Code Civ. Proc. § 631, providing that constitutional right to jury trial is waived where proper demand is not made at time cause is first set upon trial calendar, was inapplicable.

15. Jury 🔑70(2)—It is preferable to order trial jury drawn from regular panel.

It is custom and preferable practice to order trial jury to be drawn from regular panel.

16. Appeal and error 🔑922—Absent formal showing that special venire was not necessarily drawn, it must be assumed trial court correctly denied defendant's motion for jury from regular panel (Code Civ. Proc. §§ 214, 226).

In absence of formal showing that special venire was not necessarily drawn pursuant to specific authorization of Code Civ. Proc. § 226, it must be assumed trial court did not abuse discretion in ordering special venire instead of jury from regular panel pursuant to section 214, and that denial of defendant's motion for jury drawn from general panel was not prejudicial or erroneous.

17. Jury 🔑85—Refusing to discharge juror shown to be aunt of clerk employed by plaintiff's counsel held not error, where no prejudice was shown and juror was qualified on voir dire.

Refusing to discharge juror on motion to that effect after jury had been impaneled and trial commenced, on ground juror was aunt of clerk employed in office of one of plaintiff's attorneys, where jury had been qualified on voir dire and no prejudice was shown, *held* not abuse of discretion.

18. Jury 🔑97(2)—Presumption of bias and prejudice as matter of law does not arise from fact juror's niece is employed by litigant's counsel.

Merely because juror's niece is employed in office of litigant's counsel does not raise presumption as matter of law that juror is biased and prejudiced in favor of such litigant.

19. Appeal and error 🔑207—Defendants failing to request instruction to disregard alleged misconduct of plaintiff's counsel could not complain of such misconduct on appeal.

Where defendants in action for injuries failed to request court to instruct jury to disregard expositions of counsel for plaintiff consisting of interruptions on cross-examination and court instructed that judgment must be rendered solely upon evidence at trial, defendants on appeal could not complain of counsel's misconduct.

20. Appeal and error 🔑1050(1)—Permitting witness to say that, if headlight of locomotive during fog had cast rays along track, witness could have seen it, held not prejudicial error.

In action for injuries sustained when plaintiff's automobile was struck by train at railroad crossing on foggy morning, permitting witness to say that, if headlight of engine had cast rays of light along track in front of automobile, he could have seen it, though possibly stating a conclusion, *held* not prejudicial error.

21. Damages 🔑166(1)—Evidence showing nature of soil at crossing where train struck automobile held admissible, where gravel and dirt found in plaintiff's wounds tended to show seriousness of injuries.

Permitting plaintiff, in action for injuries sustained when automobile was struck by train at crossing, to show nature of soil at crossing, *held* not error, since gravel and dirt found in plaintiff's wounds tended to show seriousness of injuries.

22. Damages 🔑172(1)—Nature of plaintiff's employment and cost of hiring substitute during incapacity held admissible as tending to establish measure of damages.

In action for injuries sustained when train struck plaintiff's automobile at crossing, evidence showing nature of plaintiff's employment as well digger and cost of hiring man to take his place while incapacitated from injuries *held* admissible as tending to establish measure of damages.

23. Appeal and error 🔑1050(1)—Evidence of subsequent injury from blow on head where plaintiff sustained fractured skull in railroad crossing accident, though incompetent, held not prejudicial.

In action for injuries sustained when automobile was struck by train at crossing, evidence of plaintiff's subsequent injury from blow on head, though it may not have been competent unless tending to show plaintiff was more susceptible to injury on account of sensitive condition of head owing to fracture of skull, *held* not prejudicial error.

24. Appeal and error 🔑1050(1)—Permitting witness to describe position and condition of automobile in ditch 24 hours after collision with train held not prejudicial error under circumstances.

In action to recover for injury sustained when plaintiff's automobile was struck by train at crossing, permitting witness to describe position and condition of automobile as it lay in ditch at crossing 24 hours after accident, without showing that no substantial change occurred in the meantime, though erroneous, *held* not prejudicial error, where automobile was completely demolished by collision and reasonable value was stipulated.

25. Railroads 🔑348(1)—Testimony showing automobile after collision with train was in second gearing held properly admitted as corroborating driver's statement that he so shifted before collision.

In action for injuries sustained when automobile was struck by train at crossing, testimony that machine after accident was found to be in second gear *held* competent as tending to corroborate plaintiff's statement that he shifted to that gearing immediately before collision.

26. Railroads 🔑351(2)—Instruction in effect telling jury judgment for plaintiff might be based alone upon finding of excessive speed of train colliding with automobile held error under circumstances.

In action for injuries sustained when automobile was struck by train at railroad crossing, instruction in effect telling jury that judgment for plaintiff might be based alone upon finding that train was running at excessive rate of speed at time of accident, even though jury determined that whistle was blown or bell rung as required by law, where there were no facts or circumstances warranting finding of negligence in running at excessive rate of speed, *held* prejudicial error.

27. Railroads 🔑327(2)—Careless inattention of automobile driver approaching railroad crossing held not legal excuse for failure to hear statutory signals.

Fact that occupants of automobile struck by train at railroad crossing were carelessly inattentive *held* no legal excuse for not hearing whistle or bell of train before approaching crossing.

28. Railroads 🔑328(2)—Driver of automobile making noise sufficient to impair hearing of statutory signals at railroad crossing held required to stop machine and engine to purge himself of contributory negligence.

If noise of automobile approaching railroad crossing impaired hearing of driver or occupants so that they could not hear statutory signals required to be given by train when approaching crossing, driver would be required to stop automobile and engine before crossing track to purge himself of charge of contributory negligence.

29. Railroads 🔑312(3)—Statute requiring giving of signals by locomotive when approaching railroad crossing held not to require both blowing of whistle and ringing of bell (Civ. Code, § 486).

Civ. Code, § 486, requiring locomotives to be equipped with bell and whistle and requiring such bell or whistle to be sounded when locomotive approaches within certain distance of crossing, *held* not to require both blowing of whistle and ringing of bell.

30. Railroads 🔑316(3)—Mere rapid speed of train traveling through open country unobstructed by physical objects notwithstanding fog held not negligence.

In absence of ordinance or statute to contrary, and physical objects obstructing hearing or crowd of people or thickly populated portion of city, mere rapid speed of train traveling through open country unobstructed by physical objects regardless of presence of fog *held* not negligence.

31. Railroads 🔑316(2)—Railroad company held not required to slacken speed of trains at country crossings.

Railroad company *held* under no legal obligation to slacken speed of its trains at country crossings.

32. Railroads 🔑316(3)—Train held not required to stop or slacken speed at country crossing merely because of presence of fog.

Though presence of fog or unusual climatic conditions which obscure view or impede hearing make it more important that locomotive approaching crossing blow whistle or ring bell as warning, such warning signals are ordinarily deemed adequate notice, and train is not required to stop or slacken speed at country crossings merely because of presence of fog.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by R. A. Hoffman against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Hearing denied by Supreme Court; LANGDON, J., voting for a transfer.

Superseding opinion in 279 P. 474.

Levinsky & Jones, of Stockton, and Devlin & Devlin and A. I. Diepenbrock, all of Sacramento, for appellants.

W. R. Dunn, of Sacramento, amicus curiæ.

F. M. Ostrander, Philip M. Carey, and W. F. Ostrander, all of Oakland, for respondent.

ROLFE L. THOMPSON, J. This is a rehearing from an opinion (279 P. 474) rendered in an appeal from a judgment for damages for injuries which were sustained in a railroad crossing casualty. The facts are related in greater detail in the opinion which was rendered in an appeal from a former judgment in the same case reported in 84 Cal. App. 337, 258 P. 397.

The defendant Southern Pacific Company's Oakdale branch of its railway system extends from Merced to Stockton through an open flat country. According to schedule the regular passenger train left Merced daily at 7 o'clock a. m., but on the morning of the accident this train was about 25 minutes late in leaving Merced. The plaintiff resided on the Cox Ferry highway, three miles from Merced, for more than a year prior to the accident and was therefore familiar with the train schedule. In the locality of plaintiff's home this highway paralleled the railway track at a distance of 50 feet therefrom. On the morning of the accident a dense fog prevailed, obscuring the landscape so that it was difficult to discern an object more than a hundred feet distant. At 7:30 o'clock the plaintiff in his Buick automobile accompanied by a companion by the name of Hawkins, who sat upon the front seat by his side, left home and drove along the Cox Ferry road at a speed of 25 or 30 miles an hour, to a crossroad about a mile distant, where he turned abruptly to his left up a slight ascent and across the railroad track. The automobile was an open car. The train was approaching from their rear. Neither of the occupants of the machine heard a crossing whistle or bell or the rumbling of the train. They were not expecting it at that time. Both of them, however, claim to have carefully listened for a train as they approached the track, and assert that they looked down the track in the direction of Merced and saw no train. Except for the dense fog there was no obstacle to obscure a clear view of the track for the distance of more than a mile. Before reaching the track the speed of the automobile was reduced to six or eight miles an hour. When the front wheels of the machine reached a point five or six feet from the nearest rail, suddenly the headlight of the approaching engine appeared through the fog about 100 feet away. The train was rapidly bearing down upon them. At about the same time both occupants of the machine saw this light and had a glimpse of the engine upon their left. Both exclaimed with surprise. Doubtful of his ability to stop the machine in time to avoid a collision, and fearing that an attempt to increase the speed of the car would kill the engine, in the emergency, the plaintiff promptly shifted the clutch into the intermediate gearing and accelerated his speed. At the same time Hawkins opened the door at his right and jumped from the machine. As the car crossed the track, the pilot of the engine struck the rear end of the automobile and hurled it into the ditch. The plaintiff was seriously injured. Chief among his injuries was a triangular facture of the frontal bone of the skull penetrating to the brain, exposing the cerebrum, and requiring the trephining of the skull. Upon the trial the jury rendered judgment for the plaintiff.

The appellant seriously contends that the record will not support the implied finding of the jury to the effect that the defendant was guilty of negligence in failing to ring a bell or blow a whistle as required by section 486 of the Civil Code. It is also contended that the court erred in permitting the amendment of the complaint; in issuing a special venire for trial jurors; in admission of evidence, and in giving, refusing to give, and modifying instructions. The chief contention and the serious question is whether the plaintiff was guilty of contributory negligence in failing to stop his machine before attempting to cross the railroad track in a dense fog.

[1] The law does not require the driver of a vehicle to actually stop under any and all circumstances, before crossing a railway track. There is no absolute duty on the part of one to first stop before he attempts to cross the track. In 33 Cyc. 1010 it is said: "By the weight of authority it is not necessarily negligence on the part of one about to cross a railroad track to fail to stop in addition to looking and listening for trains, unless under the existing circumstances he cannot listen without stopping; but whether such a traveler must stop in addition to looking and listening depends upon the facts and circumstances of each particular case and so is usually a question for the jury. So it is held that a person need not stop before going on the track if he can look and listen effectively without doing so."

[2-6] The test as to the existence of contributory negligence on the part of one who attempts to cross a railroad track ahead of an approaching train is the question as to whether under such circumstances a reasonably prudent person would have undertaken to do so. When the circumstances of a particular case are of such a nature that different conclusions may reasonably be drawn as to the prudence of a person in attempting to cross a railroad track, the question of contributory negligence becomes one for the determination of the jury. Murray v. So. Pac. Co., 177 Cal. 1, 169 P. 675; Whitney v. N. W. Pac. Ry. Co., 39 Cal. App. 139, 178 P. 326; Firth v. So. Pac. Co., 44 Cal. App. 511, 186 P. 815; 41 A. L. R. 420, 424 [note]; 22 R. C. L. 1034, § 267; 3 Elliott on Railroads, 358, § 1167. Where there is nothing to obstruct one's view of a railroad track for a distance from a proposed crossing amply sufficient to preclude the possibility of a train arriving before one could cross the track with reasonable safety, there is no reason for the driver of a vehicle to stop the machine before crossing the track. 22 R. C. L. 1034, supra. But when one's view is obstructed by buildings or other obstacles, or one's hearing is impaired by the noise of the operating of the machine which is being driven, it may be negligence for the driver not to stop so as to enable him to secure reasonably safe vision and hearing of an approaching train. Barnett v. A., T. & S. F. Ry. (Cal. App.) 278 P. 443; Stephenson v. N. W. Pac. Ry. (Cal. App.) 278 P. 263; 22 R. C. L. 1030, § 262; 3 Elliott on Railroads, 358, § 1167; 33 Cyc. 1019; Koster v.

So. Pac. Co. (Cal. Sup.) 279 P. 788. When a dense fog obscures one's view, greater caution should be observed in crossing a railway track than might suffice at a time when the atmosphere is clear. Hoffman v. Southern Pac. Ry. Co., 84 Cal. App. 337, 258 P. 397; 19 A. L. R. 872, note. Under the circumstances of the present case, however, we are inclined to think it may not be said as a matter of law that the plaintiff was guilty of contributory negligence in failing to stop his machine or his engine before attempting to cross the track. In other words, this case appears to present a situation which properly requires the question of contributory negligence to be presented to the jury for its determination. It is self-evident that the the plaintiff's vision down the track would be neither improved nor impaired by the mere stopping of his machine. His vision could penetrate the fog no farther from a stationary machine than from one which was in motion.

The case of Koster v. So. Pac. Co. (Cal. Sup.) 279 P. 788, determined that the driver of an automobile who lost his life in a railroad crossing collision was guilty of contributory negligence as a matter of law. The facts of that case may, however, be distinguished from those of the present case. The accident occurred in the city of San Jose. The deceased had made daily trips in his automobile over this crossing and was familiar with its dangers as well as the train schedule. The four corners of the street which was intersected by the track at this point were occupied by factory buildings, two of which were in active operation at that time and were creating considerable noise by the running of the machinery and the exhausting of steam. There was evidence that the noise from these factories was so great as to prevent one who was riding in a closed car at this crossing from hearing the sound of the whistle or the bell. The approach to the crossing from the direction in which the deceased was driving was hidden by a building and a high board fence for the distance of a full block. There were three parallel tracks at this crossing, on one of which a box car was stationed. From a point 243 feet north of the crossing, a view of the track in the direction from which the train was approaching was obstructed until a machine reached a point some 12 to 20 feet from the track. In violation of an ordinance limiting the speed of a motor vehicle to 15 miles an hour at crossings within the city, the deceased was said to have driven his car on to the track ahead of the approaching train at from 30 to 40 miles an hour, without attempting to stop. With knowledge of the presence of these obstructions to both the sight and the sound of an approaching train and that a train was then about due to arrive, it was clearly contributory negligence on the part of the deceased to have attempted to cross the track without stopping. No such condition of obstruction to sound, at least, existed in the present case.

[7] In this case while it might be a question ordinarily open to doubt, there is substantial evidence upon which the jury was warranted in concluding the plaintiff's engine made less noise while the automobile was running than it would have made while merely idling with the machine stationary. We are of the opinion that the evidence may be said to reasonably support the implied conclusion of the jury that the engine of the automobile while it was in motion was so noiseless as to impair the hearing of its occupants only slightly, and to therefore make it unreasonable to hold as a matter of law that it was negligence not to have actually shut off the gas and stopped the engine entirely before attempting to cross the track. The appellant argues that if the machine had been stopped just before reaching the crossing, the accident would not have occurred. But this is not conclusive of negligence. It is equally true that if the train had been on time the morning of the accident, or ten seconds later than it was, the accident would not have occurred. The real question to determine is whether the plaintiff could have seen or heard the approaching train to better advantage if he had stopped his machine; and whether a reasonably prudent person would under such circumstances have stopped his engine or his machine before attempting to cross the track. We are inclined to think that reasonable minds might differ as to whether one should or should not have stopped the machine under such circumstances and that the question of contributory negligence was therefore a question for the jury.

[8] The chief element of negligence on the part of the defendant railroad company which is relied upon is the charge that the whistle was not blown and the bell was not rung before reaching the crossing. There was a serious conflict on this subject. The plaintiff testified that up to the time of the crash "there was no whistle blown or bell rang." He claimed to have been carefully watching and listening for the train; that before reaching the crossing he looked "back down the track towards Merced to see if the train was coming."

"Q. Did you see any? A. No, sir. * * *

"Q. State what observation you made in going up the grade? * * * A. I was looking for the train all the time.

"Q. When for the first time did you see any train, if you did see any? A. Not until I got on the track, or almost on it.

"Q. Then to your best knowledge, where was the train? A. About 80 or 100 feet down the track. * * * I saw the headlight, is the first thing I saw. * * * I shifted the gears to second as soon as I saw the headlight. * * * I stepped on the gas with my foot, just as quick as I shifted. * * * I turned the wheel as far as I could * * * to the right."

The plaintiff testified that if he had suddenly stepped on the accelerator while the machine was slowly going up grade it would have killed the engine. Mr. Hawkins, the companion of plaintiff, testified that both he and the plaintiff looked and listened for the train, and although the machine made no unusual noise, he heard no whistle or bell until immediately preceding the crash. Mr. Walker lived 200 yards from the crossing, and at the time of the accident was preparing to drive his own car out of his yard on his way to work. He was listening for the train and said he heard "a very indistinct whistle which I presume was about the cement plant," one mile distant. He had driven out toward the crossing, but did not see the train until it was about 80 feet away. In response to the question, "Why didn't you see it before?" he replied, "Because it was too foggy." He also testified that except for the faint sound of the whistle at the cement plant one mile away, he heard no other whistle or bell until just at the time of the crash. Both Ernest and John Campodonica, father and son, who lived only 25 or 30 yards from the scene of the accident, the father being engaged in the yard, and the son looking out of the window toward the crossing, heard neither whistle nor bell until immediately prior to the accident. Arthur, the son of plaintiff, and his wife, Josie, who were at their home, half a mile from the crossing and within 100 feet of the track where the train passed, testified that while they usually heard the morning train, they heard no whistle or bell on this occasion. Mr. Dysart, who also lived in the same vicinity, was working about his stable 200 feet from the track at the time the train passed, and testified to substantially the same thing. Since the fog was so dense on the morning of the accident, the jury may have assumed the engineer did not see the whistling post, and therefore may have omitted to give the usual crossing warnings. The foregoing testimony furnishes sufficient evidence to support the implied finding of a failure to blow the whistle or ring the bell.

[9-11] During the process of the trial, on motion, the plaintiff was permitted to amend his complaint to include a demand for damages in the sum of $1,500 for medical aid in the performance of a necessary surgical operation resulting from the injuries sustained. The original complaint alleged that the plaintiff was "severely and permanently injured." There was no abuse of discretion in permitting this amendment. The language of the original complaint was adequate upon which to admit evidence of permanent injuries. 7 Thompson's Comm. on Neg. 1009, § 7602. The amendment was sufficient upon which to admit testimony to include the necessary cost of future medical services. 8 Thompson's Comm. on Neg. 956, § 7327. In 3 Sutherland on Damages, 2781, § 944, it is said: "In estimating the pecuniary loss in such cases all the consequences of the injury, future as well as past, are to be taken into consideration. * * * These are presumed to embrace indemnity for actual nursing and medical expenses." Section 3283 of the Civil Code authorizes the recovery of damages which are reasonably "certain to result in the future." 8 Cal. Jur. 754, § 22. Dr. Parker testified that the fracture of the plaintiff's skull required the operation of trephining. He said this operation left a "depressed area in his skull and * * * a hard scar tissue formation there, which is deep in, and it has been producing a pressure on his cerebrum," together with frequent severe shooting pains in the head, and that epilepsy would probably result unless another operation were performed to relieve the pressure on the brain; that this operation would reasonably cost about $1,500. The evidence amply supports the judgment with respect to the injuries and the necessary future expense which would be reasonably certain to accrue as a result of the accident.

[12] Over the objection of defendants, Dr. Parker, who treated the plaintiff for his injuries, and who subsequently examined him a short time before the last trial to ascertain his physical condition, was permitted to testify in response to a hypothetical question that the plaintiff's present condition as above stated was the result of the injuries sustained in the railroad crossing accident. The hypothetical question did not fully state the facts involved upon which his opinion was necessarily based. But the ruling was not erroneous, since all of the remaining necessary facts had been previously testified to by this witness, and it is apparent that his opinion was based not only upon the hypothetical question which was propounded, but also upon his personal examination, treatment and knowledge of the patient's condition.

[13, 14] October 24, 1927, this case was set for trial, at which time the plaintiff demanded a jury, according to the amended court minutes as shown under the date of the court proceedings of March 12, 1928. There is some controversy regarding the demand for a jury on this date. The court minutes, however, must control in this regard. But the case was formerly tried before a jury and reversed on appeal. It seems to be conceded a proper demand for a jury was made for the first trial. It was not necessary to repeat the demand for a jury at the time the case was finally set for trial. The original demand was continuing in its effect. Section 631 of the Code of Civil Procedure provides that the constitutional right to a trial by jury is waived under such circumstances as are here involved "by failing to announce that a jury is required, *at the*

*time the cause is first set upon the trial calendar. * * *"* In the case of Wendling Lumber Co. v. Glenwood Lumber Co., 19 Cal. App. 1, 6, 124 P. 734, 735, it is said: "It was not necessary to formally renew them (the demand for a jury and payment of fees), since it appears that plaintiff was still relying upon them. The demand must be considered as a continuous refusal to waive the right to a jury. It was not necessary to repeat the demand."

[15, 16] However, the demand for a jury appears to have been formally repeated on October 24, 1927, when the case was reset for trial. Instead of ordering a jury from the regular panel pursuant to section 214 of the Code of Civil Procedure, the court ordered a special venire under section 226 of the same Code. At the time of trial the defendants informally objected to the special venire and requested the court to draw a jury from the general panel, which was denied. The record contains no showing as to the existence or absence of names in the trial jury box, except that in the colloquy between counsel and the court, it was stated that it was the custom of the court to issue a special venire. The panel was not formally challenged. No evidence was adduced in support of defendants' objections to the special venire. There is no attempt to show that the defendants were prejudiced by the trial by jurors drawn by means of a special venire. It is the custom and preferable practice to order a trial jury to be drawn from the regular panel. Amos v. Superior Court, 196 Cal. 677, 682, 239 P. 317. In the absence of a formal showing that a special venire was not necessarily drawn pursuant to the specific authorization of section 226 of the Code of Civil Procedure, it must be assumed there was no abuse of discretion on the part of the court and that the denial of defendants' motion was not prejudicial or erroneous. Estate of Wall, 187 Cal. 50, 54, 200 P. 929.

[17, 18] After the jury had been impaneled and during the process of the trial, the defendants moved the court to discharge one juror by the name of Mary Hayes on the sole ground that she was the aunt of a clerk who was employed in the office of one of the attorneys for plaintiff. This juror was qualified on the voir dire. There is no abuse of discretion on the part of the court in refusing to discharge a juror in the midst of a trial where no prejudice is shown on the part of the juror. It cannot be presumed as a matter of law that a juror is biased and prejudiced in favor of a plaintiff merely because her niece is employed in the office of the litigant's counsel.

The appellants have cited 53 assignments of alleged misconduct of counsel for plaintiff in the process of trial. Most of them consist of interruptions of counsel on cross-examination with the evident purpose of correcting what was assumed to have been misstatements or misinterpretations of the evidence of a witness; some of them do contain suggestions as to the answers of witnesses under examination. It must be conceded some of these assignments of misconduct do illustrate the prevailing practice of interrupting the orderly trial of a case, frequently resulting in distracting contests of wits or zeal between counsel and an ignoring of the authority of the trial judge, to whom all such conflicts should be addressed. Probably the most flagrant transgression occurred in the examination of prospective jurors on the voir dire. Several jurors were asked if they would become prejudiced if it should appear that a verdict was secured by the plaintiff on a previous trial, and that the judgment was reversed on appeal. The purpose of these questions is apparent. It is a common fault to permit counsel in the examination of jurors to resort to argument, prejudicial inferences, and theoretical application of the law. However, the jury were subsequently furnished complete knowledge of the previous trial by the abundant use of the transcript of the former trial, on the part of respective counsel, for impeachment purposes. Moreover, upon objection, the court instructed the jury as follows: "The jury are here for the purpose of trying this case right now, the same as if it never had been tried at all, that is their province and their duty to regard it in that way, and you are to act upon the evidence as it comes in here."

[19] Also, in the court's charge to the jury, they were instructed to the effect that the judgment must be rendered solely upon the evidence adduced at the trial. Finally, the defendants failed to request the court to instruct the jury to disregard these expositions of counsel, and may ordinarily, therefore, not complain. Scott v. Times-Mirror Co., 181 Cal. 345, 368, 184 P. 672, 12 A. L. R. 1007; People v. Simon, 80 Cal. App. 675, 678, 252 P. 758.

[20-25] The appellant has assigned some 65 specifications of alleged errors in the course of the trial, most of which are addressed to the admission of evidence. After an examination of the record as to each assignment, while it appears that liberal latitude was allowed the plaintiff in examination of witnesses and some technical errors in ruling exist, we are of the opinion there is nothing so prejudicial as to require a reversal of the judgment on this ground. Regarding the second assignment, it may have been a conclusion for Hawkins to say that if the headlight of the engine had cast rays of light along the track in front of the automobile, he could have seen them. There was no harm in permitting the answer. At most, it was only a question of how far the rays from the headlight of an engine would act as a warning in a dense fog. This would depend on the intensity of the light and the density of the fog. The common judgment of jurors must make allowance for such uncertainties in view of the physical conditions which appear to exist under the circumstances. There was no error in permitting the plaintiff to show the nature of the soil at the crossing. Since gravel and dirt were found in his wounds, it tended to show the seriousness of his injuries. The nature of plaintiff's employment as a well digger, and the cost of hiring a man to take his place while he was incapacitated from his injuries, tended to establish the measure of his damages. The evidence of plaintiff's subsequent injury from a blow on the head was not competent, unless it may have tended to show he was more susceptible to injury on account of the sensitive condition of his head owing to the fracture of his skull. It was, however, not prejudicial. Before permitting a witness to describe the position and condition of the automobile as it lay in the ditch at the crossing 24 hours after the accident, it should have been shown that no substantial change occurred in the meantime. But the machine was completely demolished by the collision. There was no contention to the contrary. It was stipulated that the reasonable value of the machine was $200. There was therefore no prejudicial error in this ruling. The fact that the machine was found after the accident to be in the second gearing merely tended to corroborate the plaintiff's statement that he shifted to that gearing immediately before the collision. This ruling was harmless. No substantial error exists in these rulings of the court.

The defendants have challenged the giving, refusing and modifying of numerous instructions. To review each of these instructions would extend this opinion to unwarranted length. The objections to several of these instructions are covered by the principles of law heretofore announced.

We find no prejudicial error in the charge to the jury, with the exception of one instruction which was given at the request of the plaintiff, as follows: "It is not necessary that plaintiff prove all the allegations of negligence set forth in his complaint in order to recover. The proof of any one is sufficient. Therefore, even if you may find that the whistle was blown or the bell rung, as required by law, still, if you find that the train was being operated at a dangerous and excessive rate of speed, and that by reason thereof the accident occurred, and that the injuries of the plaintiff were the proximate result thereof, such proof is sufficient to entitle plaintiff to recover damages in this action, providing that the plaintiff himself did not proximately cause or contribute to said injuries by any negligent act of his own."

[26-31] We are convinced that the giving of this instruction constituted prejudicial error which requires the reversal of the judgment. The chief assignment of negligence, and the only one that finds support in the record sufficient upon which to uphold the judgment even upon the principle governing the existence of a conflict of evidence, is the claim that the whistle was not blown and the bell was not rung as required by law when the train was approaching the crossing. By means of the foregoing instruction the jury was charged that a judgment for plaintiff might be based alone upon a finding that the train was running at an excessive rate of speed at the time of the accident, even though the jury determined that the whistle was blown or the bell rung as required by law. There are no facts or circumstances in the present case which will warrant this finding of negligence, unless it may be said that the operator of a passenger train running over a country crossing on a straight track across a level country at a speed not to exceed 40 miles an hour, with no artificial or natural physical obstructions to sight or sound, is guilty of negligence for failure to slacken its speed on account of the presence of a dense fog which obscures the view and confines the vision of the engineer to the radius of his headlight a distance of only 80 to 120 feet ahead of the tender. The fact that the train was 25 minutes late in leaving Merced and that it rolled 500 feet after the emergency brakes had been applied before it was brought to a stop only tend to show a rapid rate of speed rather than an excessive velocity. Considering the facts in this case in the light of the above challenged instruction, and assuming that the whistle was blown as required by law, at intervals for a distance of 80 rods before reaching the crossing, or that the bell was rung constantly while the train was covering that interval of space, there is no rational way of accounting for a failure to hear the approaching train, unless the occupants of the automobile were deaf or carelessly inattentive or the noise of their machine impaired their hearing. The first is not claimed to have been true, the second is no legal excuse, and the third would require the stopping of their machine and engine to purge them of the charge of contributory negligence. The statute does not require both the blowing of the whistle and the ringing of the bell. Either is deemed to be a sufficient warning under ordinary circumstances. It is true that a dense fog would obstruct the view, but not the hearing. Where physical objects like buildings, embankments, or dense growth of trees, or when the din and commotion of a storm prevent one from hearing to good advantage the approach of a train, these may be taken into account, together with the rapid speed of the train, in determining whether it was negligently traveling at an excessive rate of speed under the circumstances. So also excessive speed of a train traveling through a crowd of people or in a thickly populated portion of a city may constitute negligence. Under such circumstances, it becomes a question for the jury to determine whether the operation of the train under such condition and circumstances amounts to negligence. Bilton v. So. Pac. Co., 148 Cal. 443, 447, 83 P. 440; Tousley

v. Pac. Elec. Ry. Co., 166 Cal. 457, 137 P. 31; Badostain v. Pac. Elec. Ry. Co., 83 Cal. App. 290, 295, 256 P. 576; 3 Elliott on Railroads, 337, § 1160; 22 R. C. L. 1011, § 242; 33 Cyc. 791. No such conditions, however, existed in the present case. In the absence of an ordinance or statute to the contrary and in the absence of such conditions or circumstances, the mere rapid speed of a train traveling through an open country unobstructed by physical objects, regardless of the presence of fog, will not amount to negligence. There is no legal obligation on the part of a railroad company to slacken the speed of its trains at country crossings. Larrabee v. Western Pac. Ry. Co., 173 Cal. 743, 161 P. 750; 3 Elliott on Railroads (2d Ed.) 337, § 1160; 22 R. C. L. 1011, § 242; 33 Cyc. 791. Dense fogs frequently prevail on the coast and in the tule lands of California. To require a railroad train to retard its speed and abandon its time schedule traveling through an open country merely because of the presence of fog would be destructive of the efficiency of this necessary means of transportation.

In the case of Henry v. Boston & Maine R. R. Co., 125 Me. 366, 134 A. 193, it was held that a passenger train which was running at a speed of 40 miles an hour on a foggy day, and sounding the statutory signals at a crossing in a country district, was not guilty of negligence for failure to slacken its speed. In that opinion it was said: " 'The railroad is chartered to carry passengers at a high rate of speed. Unless it did so carry them, it probably would not carry them at all.' " It is further said the presence of fog "should admonish the traveler upon the highway to exercise greater vigilance and caution in approaching a railway crossing."

[32] It is true that the presence of fog or unusual climatic conditions which obscure the view or impede the hearing makes it more important to blow the whistle or ring the bell of an engine as a warning upon approaching a country crossing. Such warning signals are ordinarily deemed to be adequate notice, and a train is not required to stop or slacken its speed at country crossings merely because of the presence of fog.

In the case of Pennsylvania Ry. Co. v. Stegaman (C. C. A.) 22 F.(2d) 69, 70, it was also said that when statutory signals were given at country crossings the operator of a railway train is not guilty of negligence for running at its usual rate of speed notwithstanding the presence of fog. It was said: "As there are road crossings in the country every few miles, it is inconsistent with proper speed of transportation that trains should slack up for such crossings. Safety is secured to persons at such crossings by the observance of the statutory signals, * * * The impairing of visibility by fog or snow is a common condition. * * * If it were in the discretion of a jury to say that it is negligence to maintain regular ordinary speed, within any reasonable limits, through the open country in a fog, it would be necessary, under such a condition, to abandon all time schedules."

There are a few cases reported in the southern states wherein it has been held that the speed of a railway train must be so regulated when traveling in a fog as to enable it to be stopped within the radius of its headlight. These cases are usually accompanied by facts indicating that the location of the crossings where the accidents occurred were particularly dangerous on account of heavy traffic, dense population, or the presence of physical obstructions to sight or sound. Except for such modifying dangerous conditions, we would not be able to subscribe to such a doctrine. It would seem absurd and destructive of the usefulness of railroads as common carriers to hold that trains must poke along in an open unobstructed country through a fog or snowstorm at a rate of speed which would permit the stopping of a heavy passenger train within the distance that the rays of its headlight were projected. This would often be a physical impossibility, as is demonstrated by the evidence in the present case. The plaintiff said he first saw the headlight when the train was but 80 to 100 feet away. The engineer admitted that his headlight disclosed a view of the track only 120 feet ahead of the tender. The emergency brakes were immediately applied and the train rolled 500 feet before it was brought to a stop.

While it is true that facts and conditions may exist which will warrant the submission to the jury of the question of negligence which is associated with excessive speed regardless of the sounding of the whistle or bell, no such circumstances appear in the present case. Since the jury were told that their verdict might be based upon a theory of excessive speed alone, we are unable to say their verdict was not the result of this erroneous instruction, and it therefore becomes necessary to reverse the judgment.

Accordingly, the judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

101 Cal. App. 388

LAMBERT v. KAMP et al. (Civ. 6947.)★

District Court of Appeal, First District, Division 2, California. Oct. 22, 1929.

Rehearing Denied Nov. 21, 1929.

1. **Appeal and error 🔑870(6)—Propriety of action in refusing new trial is reviewable on appeal from judgment (Code Civ. Proc. § 956).**

Where appellant applied for new trial below, propriety of trial court's action in refusing new trial is properly reviewable on appeal from the judgment under Code Civ. Proc. § 956.

2. **New trial 🔑75(1), 77(4)—Inadequate verdict may be set aside on ground evidence does not justify verdict, but not on ground of jury's prejudice.**

There is no justification in law for disturbing a verdict or finding because of passion or prejudice of jury in giving inadequate or insufficient damages, but inadequate recovery may be set aside and new trial granted on ground that evidence does not justify verdict.

3. **Appeal and error 🔑979(1)—Order granting or refusing new trial, sought for insufficiency of evidence, will not be disturbed on appeal except for abuse of discretion.**

Insufficiency of evidence to justify verdict is a ground for new trial appealing peculiarly to the discretion of trial court, and its order granting or refusing new trial sought on that ground will not be disturbed on appeal in absence of abuse of discretion.

4. **New trial 🔑159—Trial court on plaintiff's motion for new trial to set aside verdict as inadequate should first determine whether plaintiff was entitled to any recovery.**

In action for death, in which plaintiff after recovering verdict, which he thought inadequate, moved for new trial on ground of insufficiency of evidence, trial court in considering the merits of the motion should first determine from examination of evidence whether plaintiff was entitled to recover anything at all.

5. **New trial 🔑140(3)—Undisputed evidence of deceased child's having run across street into truck warranted trial court in denying plaintiff's motion for new trial sought on ground of inadequacy of verdict for death.**

In action for death of boy shown by undisputed evidence to have run across street and into fender of Ford truck driven by defendant, trial court was warranted, on plaintiff's motion for new trial on ground of inadequacy of verdict and insufficiency of evidence to sustain it, in holding that defendant was free from negligence, and refusal of plaintiff's motion for new trial was therefore not abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by W. H. Lambert against C. M. Kamp, Sr., doing business under the firm name of C. M. Kamp Coal & Express, and another. From a judgment for plaintiff claimed to be insufficient, plaintiff appeals. Affirmed.

Robert E. Hatch, of San Francisco, and Lynch & Morrissey, for appellant.

Daniel W. Burbank and Cyril Appel, both of San Francisco, for respondents.

LUCAS, Justice pro tem. Appellant, who as plaintiff in the court below recovered judgment on a verdict for $300 as damages for the death of a son eight years and eight months old, appeals from said judgment on the sole ground that the recovery is inadequate. It is contended that, since the special damages for hospital, medical, and funeral expenses total $235, the balance of the judgment, or $65, as general damages for the deprivation of the society, comfort, and protection of the minor is so palpably inadequate as to render the verdict grossly absurd.

Appellant asks that the case be remanded for a new trial on the issue of damages alone, if that be held proper, and, if not, then on all of the issues. It is earnestly urged, however, that the issues of negligence on respondents' part and of contributory negligence on the part of appellant were effectually and finally removed from consideration by reason of the jury's verdict for appellant and the implied findings on those issues in his favor.

[1] This is not the first time since the rendition of the verdict and the entry of judgment that a request for a new trial has been made. The question of appellant's right to a new trial was passed upon by the lower court, and the propriety of that court's action in refusing a new trial is properly reviewable herein. Section 956, Code Civ. Proc.; Wilcox v. Hardisty, 177 Cal. 752, 171 P. 947; Hughes v. De Mund, 195 Cal. 242, 233 P. 94.

The question before this court, therefore, is not whether the judgment is so inadequate as to warrant this court in sending the cause back for a new trial, but, rather, did the trial court err in denying appellant's motion for a new trial?

[2] In his notice of intention to move for a new trial appellant specified all of the grounds permitted by the statute, but, since only the amount of the judgment is under attack, it will be necessary to refer to but two of them, namely, "excessive damages appearing to have been given under the influence of passion or prejudice," and "insufficiency of the evidence to justify the verdict." The latter ground is really the only one to which serious consideration need be given, for, while a new trial may be granted in the case of excessive damages appearing to have been given under the influence of passion or prejudice, there is no justification in law for disturbing a verdict or finding because of passion or prejudice of a jury in giving insufficient or inadequate damages. 8 Cal. Jur. 833; Benjamin v. Stewart, 61 Cal. 605. On the other hand, it is well settled that an inadequate recovery may be set aside and a new

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★Rehearing denied.

trial granted on the ground that the evidence does not justify the verdict. (See 8 Cal. Jur. 833, and supporting authorities.)

An examination of the record shows the following facts to be undisputed: On the afternoon the accident occurred Douglas Lambert, appellant's son, and another small boy were riding on and operating vehicles known as "home made box scooters" and were proceeding in a northerly direction along Third avenue in San Francisco, Cal., north of Anza street. The scooter operated by Douglas Lambert was traveling approximately along the center of the street, and the one used and operated by the other boy was traveling parallel with it between the center of the street and the east curb thereof. At the same time defendant and respondent Carl Kamp, Jr., was driving a Ford truck in the same direction along Third avenue, in the same block, behind the scooters operated by the two boys. The district was a residential district, and at no time or place was the said respondent exceeding the 20-mile speed limit. At a considerable distance behind the boys said respondent sounded his horn and continued to sound it until and including the time he attempted to pass the Lambert boy.

In addition to the foregoing undisputed facts, the following facts may fairly be said to have been established by a great preponderance of the evidence: When at a point between 20 and 25 feet behind the Lambert boy, Kamp, Jr., turned to the left and attempted to pass, at the same time slowing down to a speed variously estimated to be from 10 to 15 miles per hour. When he reached a point just abreast of the Lambert boy and 4 or 5 feet westerly of him, the Lambert boy jumped off his scooter and ran directly across the street and into the right fender of the Ford truck driven by said respondent, receiving the injuries from which he subsequently died. The said Kamp made a quick turn to the left and stopped his truck.

Appellant's sole eyewitness to the accident gave testimony somewhat contradictory of the above, stating, among other things, that at the time the Lambert boy jumped off his scooter and started to run the Ford truck was directly behind him.

Such, in brief, were the facts and the evidence presented to the jury and to the trial judge who heard the case and to whom appellant presented his motion for a new trial.

[3] As to the law, it is well established that insufficiency of the evidence to justify the verdict, is a ground for a new trial appealing peculiarly to the discretion of the trial court, and its order either granting or refusing a new trial will not be disturbed on appeal, in the absence of a showing of abuse of discretion. 2 Cal. Jur. 908; Donnatin v. Union Hardware & Metal Co., 38 Cal. App. 8, 175 P. 26, 27, 177 P. 845.

With the foregoing facts and the abovementioned rule of law in mind, can it be said that the court abused its discretion in refusing to grant a new trial? We think not.

[4] Appellant's right to recover anything at all from respondents depended primarily upon his being able to prove by a preponderance of the evidence that respondent Carl Kamp, Jr., was guilty of some negligent act or omission proximately causing or contributing to the injury complained of. The amount of damages resulting from the injury is a secondary matter and need not be considered at all unless negligence be proven. Therefore, in considering the merits of a motion for a new trial based upon insufficiency of the evidence, in order to determine whether or not the moving party has just cause to complain of having received too little at the hands of a jury, the trial court should first determine from an examination of the evidence whether the complaining party was entitled to recover anything at all.

[5] If the record is such, and we believe it to be so here, as to justify the trial court in concluding that the party asking for a new trial had totally failed in his primary proof of negligence and was therefore entitled to nothing, clearly there could be no abuse of discretion should the court deny such party a second attempt to recover something to which he was not entitled.

The real aggrieved party in such a case is the party against whom the verdict, even though small, was rendered. If he makes no complaint, certainly the prevailing party cannot be heard to complain.

As was said by Mr. Justice Shaw in the case of Donnatin v. Union Hardware & Metal Co., supra: "Every intendment must be indulged in support of the ruling made by the trial court. If in its opinion the evidence, considered as a whole, was of a character to clearly establish the fact that defendant was not guilty of negligence, and hence not liable for any damage (and in the absence from the record of all evidence touching the question of defendant's negligence, we must so assume), then it constituted no abuse of discretion for the court to deny plaintiff's motion for a new trial, made upon the ground of inadequacy of the amount awarded."

That was a case where the jury rendered a verdict of $1 for the plaintiff in a personal injury suit, and judgment was entered accordingly. Plaintiff moved to vacate that part of the verdict only wherein the jury fixed the amount of damage at $1, and asked for a new trial on the issue of damages alone. For that reason the evidence on the question of negligence was omitted from the record. The motion was denied, and on appeal the action of the trial court was upheld. Here all of the evidence touching upon appellant's negligence is before the court, and since we feel from an examination thereof, as heretofore pointed out, that the evidence was such as to warrant the trial court in holding respondent Kamp, Jr., free from negligence, it constituted no abuse of discretion for the court to deny the motion for a new trial. The motion for a new trial being properly denied, the question of the right to a new trial on one issue alone becomes immaterial.

Judgment affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

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101 Cal. App. 436

MORGANTHALER v. KRIEG et al.
(Civ. 3900.)

District Court of Appeal, Third District, California. Oct. 24, 1929.

1. Contracts ⇨250—Plaintiff could cancel contract only at expiration of 3 months under provision for cancellation at such time.

Under clause of contract permitting cancellation at expiration of 3 months, with further provision that failure to cancel then reverts to original term, plaintiff could cancel contract only at expiration of 3 months, and, if not canceled at that time, contract would continue in force for full term.

2. Appeal and error ⇨1071(1)—Erroneous findings as to cancellation of contract after 3 months held harmless, where another finding showed cancellation within prescribed time.

Findings regarding termination of contract after expiration of 3 months, erroneous because under contract there could be no cancellation except at expiration of 3 months, *held* harmless, where prior finding was to effect that contract was in fact canceled at expiration of three months.

3. Contracts ⇨217—Notice of cancellation given prior to date of cancellation held sufficient under contract providing for cancellation at end of 3 months.

Where defendants commenced to perform advertising contract during first week of June, plaintiff's notice about July 10th that "advertising service would not be wanted after the period of 3 months from the commencement of the advertising" constituted due notice of cancellation at expiration of 3-month term, as required by contract, since notice was not ineffective because actually given prior to date of cancellation.

4. Appeal and error ⇨931(1)—Conflict in evidence must be resolved in favor of judgment.

Where evidence was controverted, such conflict must be resolved in favor of judgment.

5. Contracts ⇨217—Payment of fourth month's advertising service held not waiver of notice to cancel contract at end of 3 months.

Where notice was given to defendant of cancellation of advertising contract at termination of 3 months, payment for fourth month's service did not constitute waiver of notice of cancellation.

6. Trial ⇨395(3)—Findings of cancellation of contract and that plaintiff was not indebted to defendants held sufficiently specific to refute defendants' allegations of plaintiff's failure to pay installments.

Finding that plaintiff was not indebted to defendants in any sum whatever, and finding of cancellation of contract, *held* sufficient to refute affirmative allegations of defendants' cross-complaint charging breach of contract by failure to pay installments, and more specific findings relative thereto were not required.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action for declaratory relief and for the reformation of a contract by Albert M. Morganthaler, doing business under the fictitious firm name of the Pioneer Wall Paper Company, against E. T. Krieg and another, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellants.

John C. Miles, of Los Angeles, for respondent.

THOMPSON, J. This is an appeal from a judgment in favor of plaintiff in an action for declaratory relief and for the reformation of a contract.

The plaintiff was engaged in business at Los Angeles under the firm name of Pioneer Wall Paper Company. The defendants were conducting an advertising business by means of the use of an automatic electric picture projecting machine. May 14, 1924, the respective parties executed a written contract by the terms of which the defendants agreed to advertise plaintiff's business for a term of 3 years for a consideration of $6.25 a week, payable on the 10th day of each month. The agreement provided that "this contract shall be irrevocable," and that: "After a payment is thirty days over due, all subsequent payments hereto shall and thereby do become due and payable hereunder." The following condition was, however, annexed thereto: "It is mutually agreed that in the event advertiser wishes to cancel contract * * * he may do so at any time after the expiration of three months. Failure to cancel at that time reverts to the original term as specified in said contract."

The complaint alleges that this last-mentioned clause was inadvertently signed through the mutual mistake of the parties; that it was specifically agreed, and by the terms of said clause it was mutually intended that said contract for advertising might be canceled by the plaintiff "*at any time* after the expiration of three months" from the inception thereof. The answer acknowledged the execution of the contract in the form alleged, but denied that the clause last mentioned was signed by mistake or that it was intended thereby to permit the cancellation of the document "at any time," or later than three months from the execution thereof. A cross-complaint was filed setting up the contract and the performance of its covenants on the part of the defendants. A breach of the contract by the plaintiff was also charged, consisting of his failure to pay installments which were deferred for more than 30 days. Pursuant to the terms of the contract, the defendants thereupon declared the entire consideration to be due, and alleged that no part of this sum had been paid, except the first 4 monthly installments. The cross-complaint then prayed for judgment for the sum of $868.75, together with costs and counsel fees.

The court found that the defendants commenced to perform under the contract during the first week in June, 1924, and that the plaintiff notified defendants about the 10th day of July, 1924, "that their advertising service would not be wanted after the period of three months from the commencement of the advertisement"; that the contract was duly canceled; and that the plaintiff was not indebted to the defendants in any sum.

[1] The clause of the contract with respect to its cancellation seems too clear to leave room for controversy. It is provided that the advertiser (plaintiff) may cancel it "at the expiration of three months." This language may not be construed to permit its cancellation at a later date. To preclude the possibility of a misunderstanding in this regard, the contract further provided "failure to cancel at that time (the expiration of three months) reverts to the original term" (of 36 months). The meaning of this clause is that the defendants were to be assured of at least a three-month contract, at which time it might be terminated at the option of the plaintiff, but, if not so canceled at that time, it would continue in force for the full term of 36 months.

[2, 3] The court not only found that the plaintiff notified the defendants on July 10th to cancel the contract and discontinue the service at the expiration of 3 months, but it also found that it was the understanding of the parties that the contract could be terminated *at any time;* that it was subject to cancellation on October 2d, at which time notice of cancellation was also given. These latter findings regarding the termination of the contract subsequent to 3 months from its inception were erroneous, but harmless, for the reason that the prior finding that it was in fact canceled at the expiration of 3 months according to the undisputed authorization of the contract is amply supported by the record in spite of the existence of a conflict of evidence in that regard. To hold that the contract could be canceled at any time would necessitate a reformation of this clause on the ground of fraud or mutual mistake. Fraud was not charged, and the record contains no evidence of mutual mistake. The finding that the plaintiff notified the defendants about July 10, 1924, that "the advertising service would not be wanted after the period of three months from the commencement of the advertising" constituted due notice of the cancellation of the contract at the expiration of the 3-month term. The fact that the notice was actually given prior to the date of cancellation made it none the less effective.

[4, 5] It is true that the plaintiff paid for 4 months' service. This was explained by Mrs. Morganthaler, who said they were not aware of the fact that the defendants failed to discontinue the advertising as requested at the end of the 3 months' service; that, when they were sent a bill on October 1st for services for the month of September, she called up the defendant Schultz, who explained that the service had been continued through the mistake of their bookkeeper, but that they would discontinue it at once; that Mr. Morganthaler, had said with reference to this bill "he didn't want anything for nothing—if they ran it (the advertising) and would discontinue it, we would send them a check"; that therefore upon defendants' promise to promptly discontinue the service they forwarded a check in payment of this bill for September service. This evidence was controverted. The conflict, however, must be resolved in favor of the judgment. This payment did not constitute a waiver of the former notice of cancellation.

[6] The finding that the plaintiff was not indebted to the defendants in any sum whatever, together with the further finding of a cancellation of the contract at the end of 3 months, was sufficient to refute the affirmative allegations of the cross-complaint, and more specific findings with relation thereto were not required.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

101 Cal. App. 399

BLODGETT v. GREENFIELD. (Civ. 3894.)

District Court of Appeal, Third District, California. Oct. 22, 1929.

1. Libel and slander 🔑72—Cause of action for libel does not survive death of party charged, and action abates on death of either party.

Cause of action for libel or slander does not survive death of party charged therewith, but abates in case of death of either party before judgment becomes final, and may not be continued against deceased's representative.

2. Libel and slander 🔑72—Any party to action for libel may suggest death of party at any stage, and court must thereupon dismiss action.

When death of party to action for libel or slander occurs pending litigation, death may be suggested to court by any party at any stage of the proceeding by means of affidavit or verified pleading, and thereupon court should dismiss action, when death is not controverted.

3. Abatement and revival 🔑83, 84—Plea in abatement on account of death of party charged with tort against complainant's person is not waived by demurrer or answer.

Plea in abatement on account of death of party charged with tort against person of complainant is not a dilatory plea but a plea in bar, and is not waived by demurrer or answer.

4. Libel and slander 🔑72—Appearance of defendant's executrix by demurrer and supplemental answer, after death of defendant in action for libel, held not waiver of right to plead in abatement.

Right of executrix of defendant in libel action to plead in abatement on account of defendant's death *held* not waived by voluntary appearance by means of supplemental answer and filing of demurrer to complaint on ground of misjoinder, since executrix could not bind estate by inadvertent answer to charge against deceased which did not survive.

Appeal from Superior Court, Santa Barbara County; T. A. Norton, Judge.

Action by D. T. Blodgett against George H. Greenfield. On death of defendant, Eva K. Greenfield, executrix of the estate of George H. Greenfield, was substituted as party defendant. From a judgment of dismissal, plaintiff appeals. Affirmed.

D. T. Blodgett, in pro. per.

W. C. Gammill and Atwell Westwick, both of Santa Barbara, for respondent.

ROLFE L. THOMPSON, J. This is an appeal from a judgment of dismissal of an action for libel, which was rendered upon motion at the death of the accused.

The appellant commenced an action for libel against George H. Greenfield. His answer was filed controverting the essential allegations of the complaint. The defendant then died. Upon proceedings duly had, his widow, Eva K. Greenfield, was appointed and qualified as executrix of his estate. Subsequently, on June 27, 1927, on ex parte motion of the plaintiff, upon suggestion to the court of the death of the defendant the executrix in her representative capacity was substituted as a party defendant. July 7th the respondent filed a supplemental answer setting up only the death of her husband, her appointment as executrix of his estate, and the substitution as defendant, praying for the abatement of the action. At the same time she filed a demurrer on the ground of her misjoinder as a party defendant, together with a formal written motion for dismissal of the action with costs, supported by an adequate affidavit of the death of her husband. Notice of this motion was duly served, and upon hearing thereof on July 13th, despite the opposition of plaintiff, the demurrer was sustained without leave to amend and the action was dismissed on the ground that the cause failed to survive the death of the alleged tort-feasor. No order was made with respect to costs. From this judgment the plaintiff has appealed.

It is contended that the cause did not abate at the death of the defendant charged with the libel, and that the respondent waived her right to a plea in abatement by voluntarily appearing and filing a demurrer and supplemental answer. There is no merit in these contentions.

[1] A cause of action for libel or slander does not survive the death of the party charged therewith. An action of this nature which is pending, abates when the death of either party occurs before the judgment becomes final. 18 Standard Enc. of Proc. p. 891; 1 R. C. L. 48, § 47; Newell on Slander and Libel (2d Ed.) p. 375, § 30; 1 Cal. Jur. 71, § 41; De La Torre v. Johnson, 200 Cal. 754, 757, 254 P. 1105. Such an action may not be continued against the representative of the deceased.

[2] When the death of a party to an action occurs pending the litigation, the death may be suggested to the court by any party to the action, at any stage of the proceeding, by means of an affidavit or verified pleading. Upon such notice when the death is not controverted it becomes the duty of the court to dismiss the action and to proceed no further against the deceased. Judson v. Love, 35 Cal. 463, 469; Munchiando v. Bach. 203 Cal. 457, 264 P. 762.

[3, 4] It is true that pleas in abatement which are merely dilatory in their nature are not favored in law (1 Cal. Jur. 80, § 49), and may be waived by pleading to the merits of a cause. A plea in abatement on account of the death of a party charged with a tort against the person of the complainant is, however, not a dilatory plea, but rather it is a plea in bar, and is therefore not waived by demurring or answering. An executrix in her

representative capacity could not bind the estate which she represents by inadvertently answering to a charge against the deceased which does not survive and which is barred by the event of his death. In the present case the demurrer became functus officio upon the filing of the motion to dismiss the action. The ruling upon this demurrer was harmless and useless. The appearance of the executrix of the estate by means of a supplemental answer may have been unnecessary, since the death of the defendant had been called to the attention of the court by the plaintiff and the court then had no authority to proceed further against the deceased. Except for this fact, however, neither the executrix nor the attorneys for the deceased, whose authority ceased at the death of their client, had any standing to move for a dismissal of the action. The filing of the supplemental answer was not a waiver of the plea in abatement. It was an appropriate means of securing legal standing upon which to move the court for a dismissal of the action.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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101 Cal. App. 295

KLEVER v. HEWINS et al. (Civ. 6.)

District Court of Appeal, Fourth District, California. Oct. 17, 1929.

1. Appeal and error 🔑1011(1)—Judgment for plaintiff will not be reversed, on ground that he violated agreement, where evidence was conflicting.

Judgment for amount paid defendants by plaintiff to become manager of their branch store, less amounts held by plaintiff, will not be reversed on ground that he violated agreement faithfully to manage business, by failing to notify defendants of impending tax sale, at which fixtures were sold for less than their value, where the evidence on such point was conflicting.

2. Principal and agent 🔑77½—Judgment for amount paid to become manager of defendant's store held not subject to reversal on ground that plaintiff took stock to cover amount before accounting.

Judgment for plaintiff in action to recover amount paid defendants for privilege of becoming manager of their branch store will not be reversed, on ground that he violated agreement by taking and removing stock before accounting, where contract gave him a lien on all goods in store pending accounting, if such amount were not paid, and he continued to sell goods with defendants' approval after giving required notice of termination of contract; right given to take sufficient stock to cover such amount after accounting being additional right by way of security, which was not acted on.

3. Pledges 🔑55—Pledgee may recover amount of debt without foreclosing pledge.

A pledgee may recover the amount of his debt without foreclosing the pledge.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by George F. Klever against C. M. Hewins and another, a copartnership doing business under the firm name and style of the Hewins Rubber Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Grant Holcomb, of San Bernardino, for appellants.

E. G. Wenzlaff, of Los Angeles, for respondent.

BARNARD, J. Defendants were engaged in manufacturing, rebuilding, and retreading automobile tires at Colton, Cal., with various branch stores. The plaintiff paid to the defendants $1,500 in cash for the privilege of becoming the manager of their branch store at Santa Ana, Cal. He entered upon his duties as such branch manager, under a written agreement which provided, among other things, that defendants would furnish and pay the rental for a storeroom, and maintain a stock of goods, and that, for a fixed salary, plaintiff would faithfully manage said store and account to defendants, at any time, for all money or property then in his possession. The agreement also contained the following:

"(b) Said second party shall have the right to terminate this agreement by giving unto the said first parties a ninety-days notice of intention to cancel said agreement and upon the expiration of said ninety days, the said first parties, the said Hewins Rubber Company, shall pay to the second party the sum of fifteen hundred ($1,500.00) dollars without interest, less, however, any money due or owing from the second party to the first parties, and thereupon said agreement shall finally cease and determine, and be of no force and effect; provided, however, that if the said Hewins Rubber Company shall not upon the expiration of said ninety days notice so given by the second party pay said sum of fifteen hundred ($1,500.00) dollars as herein in paragraph lettered (b) provided, then the said second party shall have a lien upon any and all goods and equipment then in said branch store which lien shall exist until an accounting shall have been had between the parties hereto, and the exact amount due the second party shall have been determined or agreed upon, and thereupon said second party shall have the right to take equivalent in value from said stock or equipment so found to be due, provided said first party shall not theretofore pay such amount found due. The right to take and remove said goods and equipment hereinabove provided for in this paragraph shall not accrue, however, until said account has been settled either by agreement or proper action of a proper court."

On March 22, 1926, plaintiff gave to defendants a 90-day notice of intention to terminate said contract, as therein provided. The evidence shows that after the expiration of the 90 days, and while waiting for an accounting which was promised from time to time by the defendants, the plaintiff continued to sell goods, and all proceeds were deposited in the bank to the account of the defendants until July 6, 1926. On July 1, 1926, defendants wired to plaintiff: "You are hereby authorized to take ownership of Santa Ana store subject to selling franchise agreement." On the same day they wrote their landlord at Santa Ana that they had sold the store to plaintiff and would no longer be responsible for rent, but that they would pay the back rent in a few days. At this time the rent was two months in arrears. The court found, upon sufficient evidence, that the plaintiff at no time became the owner of the store.

Plaintiff had received written instructions to return to defendants all tires in stock not fit for sale, and on July 1, 1926, he returned 52 tires which he considered unfit for sale. On July 9, 1926, he sold and delivered the entire remaining stock of tires and tubes to one man, receiving for them $797.25, which amount he retained. These goods were sold at the regular wholesale prices, for which he was authorized to sell. On July 12, 1926, the landlord, because of the nonpayment of the rent, locked the doors and took possession of the store; and on the same date a deputy assessor posted a notice of sale for personal property taxes, by virtue of which the remaining equipment of the store was later sold for taxes.

Plaintiff brought this action for the balance of the $1,500 above mentioned, less the amounts already held by him. In addition to the denials in their answer, defendants set up the affirmative defense that the stock of goods and fixtures in plaintiff's possession were worth more than $1,500, and that plaintiff, in violation of the agreement, "took and removed" the same, and that he had failed to account for the proceeds of sales of merchandise, and an accounting was prayed for. The trial court proceeded on the theory that the action included an accounting, and this appeal is from a judgment in favor of the plaintiff for $682.15.

[1] It is first urged, as a ground for reversal, that respondent violated his agreement to faithfully manage the business, by failing to notify appellants of the impending tax sale, and thus caused the fixtures to be sold for less than their value. Assuming that respondent owed such a duty under the circumstances outlined, no more than a conflict in the evidence is raised by this point. Respondent testified that he did notify appellants; a tax official testified that at least three notices had been sent to them; and appellants' bookkeeper admitted he had received a tax statement prior to July 1.

[2, 3] As a second ground for reversal, it is contended that under section (b) of the contract, as above quoted, respondent's only remedy was "to take equivalent in value from said stock and equipment," which right could only be exercised *after* an accounting had been had and that it was therefore not in the power of the court to enter a money judgment. In this connection it is urged that, at the expiration of the 90-day period, respondent had sufficient goods on hand to more than compensate himself, but that he violated the agreement by prematurely taking and removing the stock before an accounting was had, and by returning a portion of the stock to appellants.

Examining the portion of the contract involved, it is clear that appellants agreed, after notice given, to repay to respondent the sum of $1,500 less any existing offset. It is provided that in the event the amount due is not paid as agreed, then respondent shall have, pending an accounting, a lien on all goods in the store. It is further agreed that, after such accounting, whether by agreement or by court action, the respondent shall have the right to take and remove sufficient of the stock to cover the amount due.

It will be noted that the primary agreement and obligation was to pay a sum of money, less existing offsets. The further lien and right to take specific goods was an additional right, by way of security, under certain circumstances. Meanwhile this lien constituted no more than a pledge. Even a pledgee may recover the amount of his debt without foreclosing the pledge. Commercial Savings Bank v. Hornberger, 140 Cal. 16, 73 P. 625. Respondent was not limited to proceeding against the property on which he had a lien; and the evidence does not show that he acted on his additional right to take specific goods. It does show that, after the expiration of the required notice, respondent, while attempting to get an accounting with appellants, continued to sell goods, with their approval; that all receipts until the last sale were deposited to their account in the bank; that certain of the tires were returned in accordance with written instructions; and that the final sale of tires was made at prices fixed by appellants, and at which respondent was authorized to sell. No goods were taken or removed in pursuance of the lien right given, either prematurely, as argued by appellants, or at all. The only departure from the usual procedure was that the last payment for tires was retained by respondent. This was not an attempt to exercise the lien right, but was simply an item for which he must and did account. The trial court has ascertained the amount due, upon sufficient evidence, and the agreement of the parties and the facts amply support the judgment.

The judgment is therefore affirmed.

We concur: SLOANE, P. J.; MARKS, J.

101 Cal. App. 394

PEOPLE v. ALEXANDER. (Cr. 1615.)

District Court of Appeal, Second District, Division 2, California. Oct. 22, 1929.

Criminal law ⚷1070—Prosecution will be abated, where defendant dies pending appeal from conviction (St. 1917, p. 673, as amended).

Where defendant dies pending appeal from conviction of violating Corporate Securities Act (St. 1917, p. 673, as amended), proceeding will be abated.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Jesse Alexander was convicted of violating the Corporate Securities Act (St. 1917, p. 673, as amended), and he appeals. Proceeding abated.

William C. Ring, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J. Since the appeal from the judgment and an order denying defendant's motion for a new trial was perfected, the appellant has died. The question now under consideration is: What is or should be the effect of his death upon the proceedings? Counsel for appellant argues that this court should proceed to a determination of the merits of the appeal in order that the reputation of the deceased may not be wrongfully assailed, assuming, of course, as he does, that such a consideration would result in a reversal. The argument we think proceeds from a wrong premise. What difference can it possibly make whether the proceeding be abated at this stage, or, assuming the event of a reversal, when it shall have reached the trial court? At the present time there is no final judgment, and, if the action abate, there never will be. It is not now determined that the defendant was guilty, and, in the event of an abatement, never will be so determined. In fact, the presumption of innocence, which follows the accused until final judgment is entered, would seem to conclusively refute counsel's argument. If we should remand the case for a new trial, it would then necessarily have to be abated without a determination of the guilt or innocence of the accused. Therefore the result would be substantially the same in either event.

Aside from what has been said from the standpoint of principle and logic, however, the question is disposed of by precedent. In People v. St. Maurice, 166 Cal. 201, 135 P. 952, the appellant, who had been found guilty and ordered to pay a fine by the trial court, died pending the appeal. Some doubt was cast upon the question of abatement by reason of the provisions of the Penal Code that, where the judgment is a fine, execution may be issued thereon as on a judgment in a civil action. Nevertheless the court held that the proceeding abated by the death, expressing itself upon the problem in this language: "There can be but one answer to the question, and that is that, in the absence of a statute expressing the contrary, all proceedings in the matter incurably abate. We need not amplify this plain proposition. It will be found fully supported by the following authorities, * * * identical with those of the case at bar: U. S. v. Dunne, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145; U. S. v. Pomeroy (C. C.) 152 Fed. 279; U. S. v. Mitchell (C. C.) 163 Fed. 1014; Town of Carrollton v. Rhomberg, 78 Mo. 547; Willis v. Byrne, Adm'r, 106 Ala. 425, 17 South. 332; March v. State, 5 Tex. App. 450; Overland, etc., Co. v. People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; Boyd v. State, 3 Okl. Cr. 684, 108 Pac. 431."

That counsel misconceives the reason for the doubt in cases where the judgment is a fine is made clear by a short quotation from U. S. v. Pomeroy, supra, which reads: "It is well settled that all prosecutions for crimes before judgment are abated by the death of the party charged. When the punishment for a crime is imprisonment, the death of the convict, of course, puts an end to the punishment; but, upon the question whether a judgment in a criminal prosecution imposing a fine as a punishment is abrogated by the defendant's death, there appears to be very little authority." We entertain no doubt but that the proceeding is abated.

It is therefore adjudged that all proceedings in the above-entitled cause have permanently abated, and that the trial court enter its appropriate order to that effect.

We concur: WORKS, P. J.; CRAIG, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

101 Cal. App. 402

CROZIER et ux. v. SOQUEL. (Civ. 3905.)

District Court of Appeal, Third District, California. Oct. 22, 1929.

1. Trusts 🔑89(1)—Evidence supported findings that defendant held lands purchased in trust for plaintiffs.

Evidence *held* to support findings that defendant acted as agent for plaintiffs in purchasing land and that defendant held lands purchased in trust for plaintiffs, and that reasonable value of land, which defendant sold to third party, was $1,200.

2. Trusts 🔑371(2)—Complaint to compel defendant to convey property or for reasonable value of property which defendant agreed to purchase for plaintiffs held one to enforce trust.

Complaint alleging that defendant agreed to purchase for plaintiffs certain land and pay purchase price for plaintiffs, that defendant did purchase property and obtained without plaintiffs' consent deed granting property to herself, and seeking judgment compelling defendant to convey property to plaintiffs or for reasonable value thereof, *held* one to enforce trust and not one for specific performance of contract.

3. Trusts 🔑365(4)—Plaintiffs held not guilty of laches in suing May 1, 1925, to enforce trust in land purchased by defendant, where defendant wrongfully sold land May 7, 1923.

Where defendant, who had agreed to purchase property for plaintiffs, purchased it, and property was conveyed to defendant on March 30, 1923, and sold by her on May 7, 1923, to another, plaintiffs were not guilty of laches in commencing action May 1, 1925, to compel conveyance to plaintiffs or for reasonable value, where it did not appear delay resulted in injury or prejudice to defendant.

4. Trusts 🔑339—Defendant wrongfully selling property purchased for plaintiffs held liable for value thereof.

Defendant wrongfully selling property a few weeks after it was conveyed to her, where she had agreed to purchase it for plaintiffs, *held* liable for value thereof.

5. Trusts 🔑361—Defendant selling land purchased for plaintiffs became liable for money demand, making unnecessary plaintiffs' tender of amount expended for title in order to enforce trust.

Defendant, by wrongfully selling property which she had agreed to purchase for plaintiffs became liable for mere money demand as difference between value of property and amount expended by her, so that plaintiffs were not required to tender amount expended by defendant in obtaining title in order to enforce trust.

6. Trusts 🔑359(3), 372(1)—Plaintiffs suing to compel defendant to convey land or for reasonable value need not show adequacy of consideration or inadequate remedy at law.

It was not necessary for plaintiffs suing to compel defendant to convey property to them which she had agreed to purchase for plaintiffs or for reasonable value of property to show adequacy of consideration or inadequacy of remedy at law.

7. Trusts 🔑361—Demand by plaintiffs for property purchased by defendant for plaintiffs was unnecessary, where defendant would not have complied.

Where defendant's answer and her testimony showed that she would not have complied with demand of plaintiffs to convey property to them which she had agreed to purchase for plaintiffs, no demand by plaintiffs was required.

Appeal from Superior Court, Los Angeles County; E. C. Robinson, Judge.

Action by W. H. Crozier and wife against Flora Soquel. Judgment for plaintiffs, and defendant appeals. Affirmed.

D. Joseph Coyne, of Los Angeles, for appellant.

Morfoot & White, of Los Angeles, for respondents.

FINCH, P. J. The complaint alleges that, for a valuable consideration, the defendant agreed to purchase for the plaintiffs the land described in the complaint and to pay the purchase price thereof "for and on behalf of said plaintiffs"; that thereafter, "without the knowledge or consent of said plaintiffs, the said defendant did procure and purchase said property and * * * obtained, without the knowledge or consent of said plaintiffs, or without at any time informing said plaintiffs of said procurance, a deed, * * * granting and conveying all right, title and interest in and to said property to herself, said defendant"; and "that said property is now of the value of $3,000." The prayer is for a judgment compelling the defendant to convey the property to the plaintiffs, "or in lieu thereof give plaintiffs judgment for the reasonable value of said property."

The defendant did not demur to the complaint, but answered, denying that she agreed to purchase the property for the plaintiffs, alleging that she purchased it for herself, and admitting that it is of the reasonable value of $1,200.

The court found the foregoing allegations of the complaint, except as to value, to be true; that the plaintiffs agreed to pay and the defendant to accept $50 for her services in the transaction; that the defendant had sold the land "to innocent third parties for the sum of $1,000, and thereby placed it out of her power to convey to plaintiffs said lands"; that the reasonable value of the land is $1,200; and "that said defendant in said transactions was acting as the agent for plaintiffs, and that defendant became and was a resulting trustee or trustee by operation of law, holding said lands in trust for plaintiffs." Judgment was entered in favor of the plaintiffs for the difference between the reasonable value of the land, as found by the court, and the amount which the defendant had expended in the purchase thereof. The defendant has appealed from the judgment.

[1] The findings of the court are amply supported by the evidence. Both of the plaintiffs testified that the defendant had agreed to purchase the property for them, and their testimony was corroborated by that of several other witnesses. The defendant's testimony to the contrary is not corroborated. The testimony in support of the findings is too long to be given in detail, but the parts thereof hereinafter quoted show the nature of the transactions between the parties.

Mrs. Crozier testified: "My husband came home and he said, 'I see the lot back of us is for sale.' Mrs. Soquel was at my house at the time, and we walked down and talked about it. I says, 'Mrs. Soquel, do you want this lot?' She says, 'No, you couldn't give me any more.' * * * I says, 'I think I will buy this lot. * * * I will go to Mr. Jones and borrow the money.' She says 'No, Mrs. Crozier, let me let you have the money, and I will let you have it for $50.' I says, 'All right, Mrs. Soquel' * * * (The next day) I talked to Mr. Reynolds (an agent authorized to sell the lot) and told him she was coming down with the money and I would take the lot, and as I came out the door I met Mrs. Ballinger. * * * Mrs. Ballinger and I went up to Mrs. Soquel's house. * * * Mrs. Ballinger said, 'Mrs. Soquel, Mrs. Crozier can have that lot for $450 and why should you pay Mr. Reynolds $500?' * * * Mrs. Soquel said, 'I will go down and see Mr. Reynolds, and see if he will agree to take the $450, the same as the other agent,' and she went down. * * * After she came out of Mr. Reynolds' office, * * * Mrs. Soquel stated that Mr. Reynolds wanted $500. * * * Mrs. Ballinger said, 'Well, we will go in and see Mr. Phelps' (another agent), and they went in to see Phelps. He wanted so much money and she purchased the lot." The witness further testified that the original agreement was that the defendant would "loan me the money to buy the lot." The court asked her, "Was there any understanding that she would go down and buy it for you?" The witness answered, "There was later when she started as my agent to town." This answer evidently relates to the time when the defendant, according to the testimony of the witness, said, "I will go down and see Mr. Reynolds and see if he will take the $450."

Mr. Crozier testified: "My wife and I both agreed that we would give her (defendant) $50 for the use of that money until such time as this deed passed through escrow. As soon as the title had been cleared up by the title company, then we could go to Mr. Jones and present this deed and also our other lot and be ample security to get a loan. * * * After Mrs. Ballinger and her had been to the city, * * * (the latter) told my wife, 'Well, you got the lot.'"

There is other testimony to the effect that the defendant stated that she had purchased the property for the plaintiffs and that she was to receive $50 for the use of her money "until the papers came through escrow." William Jones testified that, prior to the transactions stated, he had promised Mrs. Crozier to loan her the money to buy the lot in question, that "sometime later * * * she came in and she said that she had got the money from Mrs. Soquel, and I told her whenever their escrow was finished * * * I would give them the money. * * * Mrs. Crozier and Mrs. Soquel came in some time later and I told them that when they were ready to make their deed, bring it up to the office and I would pay them $500.00." The defendant testified that the property "was worth $1,200 when I bought it."

The facts proved and found are such as clearly to show a resulting trust. The following language of a recent decision is particularly applicable to such facts: "Testing the sufficiency of the transaction as one creating a resulting trust and, therefore, one which need not be in writing, we are able to appeal to a long line of decisions in this state to the effect that a transaction such as the one here under consideration will be properly denominated a loan by defendant to plaintiff, and a taking by defendant of the legal title to the property in controversy as security for repayment thereof, and the repudiation of this relation by the defendant a legal fraud giving rise to a resulting trust in the property." Webb v. Vercoe, 201 Cal. 754, 760, 258 P. 1099, 1101, 54 A. L. R. 1200; O'Rourke v. Skellenger, 169 Cal. 270, 146 P. 633; Brown v. Spencer, 163 Cal. 589, 126 P. 493.

[2] Much of appellant's argument is built upon the theory that this is an action for specific performance of a contract to sell real estate. It seems clear, however, that the action is one to enforce a trust. 25 Cal. Jur. 234; Bacon v. Grosse, 165 Cal. 481, 492, 132 P. 1027. It is contended that the complaint does not state a cause of action, that the plaintiffs were guilty of laches, and that the defendant's promise was not in writing and is therefore invalid. The contention last mentioned and the further one that the evidence is insufficient to warrant the findings and judgment are disposed of by what has already been said. As said by the trial court, "the complaint is inartificially drawn, but there is sufficient stated therein to apprise the defendant of the nature of the action." 25 Cal. Jur. 232 and 242. It not only appears that there has not been a miscarriage of justice (Const. art. 6, § 4½), but that the judgment rendered does exact justice between the parties.

[3, 4] It appears that the property was conveyed to the defendant about March 30, 1923. She sold it on May 7, 1923, for $1,000. This

action was commenced May 1, 1925. It does not appear that the delay of the plaintiffs in bringing suit has in any manner resulted in injury or prejudice to the defendant. She wrongfully sold the property in a few weeks after it was conveyed to her, and the court properly held her liable for the value thereof admitted by the answer and which the defendant testified was its value when it was conveyed to her. Price v. Reeves, 38 Cal. 457, 461; Clapp v. Vatcher, 9 Cal. App. 462, 467, 99 P. 549. "There is no basis for a contention that the plaintiff has been guilty of laches where the rights of third persons are not involved, and the situation of the defendant has not been materially changed by reason of the plaintiff's delay in asserting his rights." 25 Cal. Jur. 264.

[5-7] Since the defendant had put it beyond her power to convey the legal title to the plaintiffs, it would have been an idle act for them to have tendered the amount expended by the defendant in obtaining such title. By her wrongful act, she became liable for a mere money demand, the difference between the value of the property and the amount expended by her. It was not necessary for the plaintiffs to show adequacy of consideration or the inadequacy of a remedy at law. 25 Cal. Jur. 229. Neither was it necessary to prove a demand before suit. The defendant's answer and her testimony given at the trial show that she would not have complied with such a demand. Under such circumstances no demand is required. 25 Cal. Jur. 229. The other contentions of the appellant are not deemed to have sufficient merit to warrant a discussion thereof.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

101 Cal. App. 376

PEOPLE v. WILSON. (Cr. 1856.)

District Court of Appeal, Second District, Division 2, California. Oct. 21, 1929.

1. Criminal law 🔑977(3)—Time in which sentence must be pronounced starts to run with return of verdict (Pen. Code, § 1191).

Requirements of Pen. Code, § 1191, that, after verdict, court must appoint time for pronouncing judgment being mandatory, time in which sentence must be pronounced starts to run with return by jury of verdict.

2. Criminal law 🔑977(3)—Pronouncement of sentence within 20 days of verdict allowed for considering question of probation held timely, although court was considering such question of its own motion (Pen. Code, §§ 1191, 1202, 1203).

Pronouncement of sentence within 20 days of verdict, under Pen. Code, § 1191, where court was considering question of probation of defendant convicted of violating State Poison Act (St. 1907, p. 124, as amended), *held* timely, although court was considering such question on its own motion as permitted by Pen. Code, § 1203, and section 1202 provides that court should grant new trial in case of failure to comply with direction of section 1191, that, after verdict, court should appoint time for pronouncing judgment, which must not be more than 5 days after verdict.

3. Criminal law 🔑1177—Procedural error in failing to sentence defendant within statutory period does not require reversal, where such failure, does not result in miscarriage of justice (Pen. Code, § 1191).

Failure to impose sentence within period provided by Pen. Code, § 1191, being error of procedure only, does not require reversal of order denying motion for new trial based on such error where such error does not result in miscarriage of justice.

4. Constitutional law 🔑203—Criminal law 🔑1201—Statute providing for amendment of information to charge prior convictions held not ex post facto (Pen. Code, § 969a, as added by St. 1927, p. 1064).

Pen. Code, § 969a, as added by St. 1927, p. 1064, providing that, if pending information does not charge prior convictions, such information should be amended to charge such prior convictions, *held* not ex post facto legislation.

5. Criminal law 🔑162—Statute providing for amending information to charge prior convictions held not invalid as creating double jeopardy (Pen. Code, § 969a, as added by St. 1927, p. 1064).

Pen. Code, § 969a, as added by St. 1927, p. 1064, providing that, if pending information does not charge prior convictions, such information should be amended to charge such prior convictions, *held* not unconstitutional on ground that such statute puts defendant twice in jeopardy.

6. Constitutional law 🔑265—Statute providing that information should be amended to charge prior convictions held not to deny due process (Pen. Code, § 969a, as added by St. 1927, p. 1064).

Pen. Code, § 969a, as added by St. 1927, p. 1064, providing that, if pending information does not charge prior convictions, such information should be amended to charge such prior convictions, *held* not in violation of due process, as such statute provides for supplemental pleading, plea thereto, and trial by jury of issue made thereby.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

George M. Wilson was convicted of violating the State Poison Act, with a charge of prior convictions, and he appeals. Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Friedlander, Morfoot & Gray and John L. Van Buskirk, all of Los Angeles, for the People.

IRA F. THOMPSON, J. Two informations, both of them charging the offense of violating the State Poison Act (St. 1907, p. 124, as amended), were filed against the defendant. One of them alleged the crime to have been committed on March 24, 1929, and the other on March 25. The cases were consolidated, and he was found guilty of both offenses. This was on May 20, 1929. Time for sentence was fixed by the court for May 23. On this latter day the court denied defendant's motion for a new trial and at the same time permitted the district attorney to file two amended and supplemental informations charging the defendant with a prior conviction, in the District Court of the United States, of the offense of violating the Harrison Narcotic Act (26 USCA §§ 211, 691–707) and Jones-Miller Act (21 USCA §§ 171–177, 180, 182, 184, 185). Upon the denial by the defendant of the prior conviction, the trial judge refused to pronounce sentence, set the trial upon the issues presented by the supplemental informations for May 31, and continued the time for sentence to the same date. Just before the defendant denied the prior conviction, his counsel moved for a new trial on the ground that the filing of the supplemental informations necessitated a retrial of the entire action. He also made a motion to dismiss the supplemental informations on the ground that they came too late and for the further reason that section 969a of the Penal Code, which purports to authorize such procedure, is unconstitutional. The motion was denied. Although the record does not disclose that any application for probation was made, the transcript shows that, when the cause was continued to May 31, the trial judge said, in defining the purposes of the continuance, "and also for considering whether or not probation should be granted." The jury returned verdicts of guilty of prior convictions charged in both of the supplemental informations, and the cause was continued until June 3. The defendant again moved for a new trial, which motion was denied, and sentences were pronounced. A second supplemental information was then filed, alleging another prior conviction, but the trial thereon resulted in a verdict of not guilty, and for that reason it is not involved herein. The defendant has appealed from the judgments, from the order denying his motion for a new trial, made and entered May 23, 1929, from a similar order on May 31, 1929, from the order denying his motion for a new trial upon the issue of a prior conviction, made and entered June 3, 1929, from the order denying his motion for a new trial on the ground that he was not sentenced within the required time, and from the order denying his motion to dismiss the supplemental informations. He also says that he appeals from the verdicts of the jury, both upon the original as well as the supplemental informations. But it is apparent that they are not appealable.

The first and most insistent claim of appellant is that the trial court was bound to grant him a new trial when it failed to sentence him within the five-day period provided by section 1191 of the Penal Code. The material portion of the cited section is as follows: "After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment, which must not be less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or arrest of judgment; and provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section 1203 of this code; provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional." Section 1202 of the same Code provides that the court shall grant a new trial in the case of failure to comply with the directions of the statute just quoted.

In 1927 (St. 1927, p. 1064), a new section, numbered 969a, of the Penal Code, was adopted, reading as follows: "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this state or elsewhere, said indictment or information shall be forthwith amended to charge such prior conviction or convictions, and such amendment may and shall be made upon order of the court, and no action of the grand jury (in the case of an indictment) shall be necessary. Defendant shall promptly be rearraigned on such information or indictment as amended and be required to plead thereto. Whenever after sentence, *and before the sentence has expired*, it shall be discovered that the indictment or information on which defendant was convicted did not charge all felonies of which defendant had theretofore been convicted, either in this state or elsewhere, it shall be the duty of the district attorney of the county wherein defendant was sentenced to cause to be filed a supplemental information setting up such prior conviction or convictions. Said supplemental information may be filed either in the county from which defendant was sentenced or in the county in which he is then confined. Defendant shall thereupon be arraigned upon such supplemental information and be required to plead thereto. In whichever county the supplemental information is filed, the district attorney of the county from which defendant was sentenced shall sign the same and prosecute the proceedings. If defendant admit the prior conviction or convictions charged, the court shall resentence him to the sentence which would have been legal if such prior conviction or convictions had been admitted at the time of defendant's conviction, and such resentence shall operate as of the date of the original sentence. If defendant deny the prior conviction or convictions so charged, the issue shall be tried by a jury, or by the court if a jury be waived. If the issue be found in defendant's favor, such supplemental information shall be dismissed. If the issue be found against defendant, the court shall resentence defendant to the sentence which would have been legal if such prior conviction or convictions had been admitted at the time of defendant's conviction, and such resentence shall operate as of the date of the original sentence." (Italics ours.)

[1, 2] Obviously the Legislature intended, as is manifest from a reading of the statute, that an amended or supplemental information might be filed at any time prior to the expiration of the sentence of the convict. Undoubtedly the requirements of section 1191 are mandatory, and the time for sentence started to run with the return by the jury of the verdicts. People v. Gilbreth, 33 Cal. App. 23, 164 P. 18; In re Todd, 44 Cal. App. 496, 186 P. 790; Rankin v. Superior Court, 157 Cal. 189, 106 P. 718. However, the order of continuance recites that it was for the additional purpose of considering the question of probation. We cannot assume that, merely because counsel did not make application for the lenient consideration of his client, the trial judge was not actually contemplating its advisability in face of the order in the record. In fact, section 1203 of the Penal Code recites that the court "upon its own motion * * * at a time fixed may hear and determine in the presence of the defendant the matter of probation of the defendant and the conditions of such probation, if granted." Subsequent orders of the court indicate that the matter of probation was still in the mind of the court, at least until after the return of the verdicts upon the supplemental informations. The sentence was pronounced within the twenty-day period which the court is entitled to take when considering that question.

[3] In addition to what has already been said upon the subject, we may add that the law is now well settled that the failure to impose sentence within the statutory period is an error of procedure only, not requiring a reversal of the order denying the motion for a new trial, where it does not result in a miscarriage of justice. People v. Zuvela, 191 Cal. 223, 215 P. 907; People v. Powell, 83 Cal. App. 62, 256 P. 561. To make apparent the fact that no prejudice could have been suffered in this cause by the delay, let us remark that, if sentence had been pronounced within five days, the supplemental informations then filed and verdicts thereon returned and the appellant resentenced, he would be in no different position from the one he now occupies.

[4-6] Counsel also asserts that section 969a, to which reference has already been made, is unconstitutional, and that the court erred in permitting the supplemental informations to be filed. His contention in this regard is somewhat vague. He says, first, that a defendant is thus twice put in jeopardy; that the law violates the ex post facto as well as the due process provisions of the State and Federal Constitutions, and provides for cruel and unusual punishment. That there is little merit in any of these assertions is apparent from their face as well as from the concession of counsel in a subsequent portion of his brief when he employs the following language: "While in a strict sense, it cannot be claimed that he is 'twice put in jeopardy,' or that the act is an 'ex post facto' law, still it partakes somewhat of both. But, in a broad construction of the section, accused is 'deprived of life, liberty, or property without due process of law.'" We can hardly be expected to take time from other pending causes when counsel, with all of their enthusiasm for the case in hand, confesses his inability to find a provision of the fundamental law to which the section of the Code actually does violence. We think the argument that the law is unconstitutional because it is ex post facto legislation is completely answered by Ex parte Gutierrez, 45 Cal. 429, and, on the ground that it put the defendant twice in jeopardy and provides cruel and unusual punishment, by People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401, and in re Finley, 1 Cal. App. 198, 81 P. 1041. That it does not violate a proper conception of the due process provisions is patent from the fact that it provides for the supplemental pleading, the plea thereto, and a trial by jury of the issue. The defendant is fully protected in his right to his day in court.

The next attack of appellant is to the effect that the prior conviction must be alleged in the information or indictment, and cannot be added by the supplemental pleading. This is but a restatement of the former argument that the section under discussion is unconstitutional, because there can be no doubt that it authorizes the procedure here employed and made use of also in the case of People v. Wilson (Cal. App.) 280 P. 137.

The remaining points deal solely with the sufficiency of the evidence. It was sufficient in all respects to support the jury in its deductions, and, of course, we are bound thereby.

Judgments and orders affirmed.

We concur: WORKS, P. J.; CRAIG, J.

101 Cal. App. 447

WOOD v. NELLIS-RYUS. (Civ. 7098).

District Court of Appeal, First District, Division 2, California. Oct. 25, 1929.

1. Perpetuities 🔑6(1)—Covenant prohibiting sale of any lot with less than specified frontage held inapplicable to lot having less than specified frontage at time of agreement.

Covenant between landowners prohibiting sale of lots so that street frontage of any portion of any lot sold shall be less than 60 feet *held* inapplicable to prevent transfer of lot which had less than that frontage at time of agreement, and which was then held in private ownership, since to hold otherwise would render agreement unreasonable and unenforceable as perpetual restraint against alienation.

2. Covenants 🔑79(1)—Covenant declaring reversion to original grantor for breach of any conditions held not to confer right of action on grantee.

Covenant in deed providing that breach of any of foregoing conditions shall cause premises to revert to grantor, its successors and assigns, with right of immediate entry in event of breach, *held* not to confer right of action on grantee for breach of any of conditions.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Frank Linley Wood against Celeste Nellis-Ryus. Judgment for defendant, and plaintiff appeals. Affirmed.

Porter & Sutton, of Los Angeles, for appellant.

Erwin P. Werner, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued for damages, claiming breaches of several covenants relating to real property. Defendant had judgment, and the plaintiff has appealed on a bill of exceptions.

Plaintiff is the owner of lot 6 and of a portion of lot 8 in what is known as Laughlin Park in the city of Los Angeles. Defendant is the owner of a portion of lot 9 of the same tract. The Laughlin Park Company, a corporation, in 1913 subdivided and platted the tract in which the properties are located, and issued deeds which uniformly contained restrictions and covenants relating to the use and occupation of the lots by the grantees and their successors in interest. These deeds provided that "the breach of any of the foregoing conditions shall cause said premises to revert to the said grantors, its successors and assigns, each of whom respectively shall have the right of immediate re-entry upon said premises in the event of any such breach."

The portion of lot 9 owned by the defendant fronted on the De Mille road, and sloped down to the rear at a steep pitch. The plaintiff, feeling aggrieved because the defendant had constructed a residence upon her lot with a garage in front at the street level, instituted this proceeding on the theory that the defendant had breached some of the covenants and conditions contained in the original grant of the park company. The cause was fairly tried before the court sitting without a jury, and the court found in each instance claimed that there had been no breach.

On this appeal the appellant merely asserts in a general way that these findings are not supported by the evidence, but he does not cite any evidence which would require a different finding. On the other hand, the respondent cites evidence supporting each finding under attack, and this should be sufficient to support the judgment if it were not that the finding covering the restrictions contained in the lot owners' agreement partakes of the nature of a conclusion of law. Thus the finding that it was untrue that the defendant had violated the restrictions by building a home on the premises which had only 40 feet frontage on the street carries an interpretation of the meaning and effect of this restriction. The facts are that in May, 1921, the lot owners, including plaintiff and the predecessor of the defendant, executed and caused to be recorded an agreement placing additional restrictions upon the use of the lots located in the tract. One of these restrictions was "that no sale of said lands shall be made so that the street frontage of any portion of any lot so sold shall be less than sixty feet."

[1] The predecessor of defendant who signed this agreement had purchased from the park company a portion of lot 9—the southerly boundary of which was described as running "along the arc of a curve concave to the south, with a radius of 67 feet, along the southerly line of said lot 9, 40 feet to a point." The same lot with the same description was conveyed to defendant's husband, who conveyed it to the defendant by deed of gift. The suit being against the present owner of the property and the restriction being one against the sale of the lands only, the defendant cannot be charged with a breach of this restriction on the sale of the property, nor can she be charged with the breach of any unwritten implied covenant or condition because she uses the land which she thus acquired. The restriction upon the sale of lots, which was contained in the agreement, but not in the original deeds, cannot have any other meaning than that the owner of lands in the tract should not be permitted to so subdivide his holdings as to transfer any portion of his property having less than a 60-foot frontage. To apply the restriction to prevent the transfer of a lot which had less than that frontage at the time of the agreement, and which was then held in private ownership, would render the agreement unreasonable and unenforceable as a perpetual restraint against alienation of property.

[2] As to the restrictions contained in the deeds, the express language which we have quoted herein declares the original grantor to be the reversioner, and there is nothing in the deeds to indicate an intention to carry this right on to the grantees. Such being the case, the appellant herein has no right of action. Werner v. Graham, 181 Cal. 174, 179, 183 P. 945; McBride v. Freeman, 191 Cal. 152, 154, 215 P. 678.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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101 Cal. App. 359

WELCH v. GUNN. (Civ. 5578.) ★

District Court of Appeal, Second District, Division 1, California. Oct. 21, 1929.

Rehearing Denied Nov. 1, 1929. Hearing Denied by Supreme Court Dec. 19, 1929.

1. Work and labor ⟹7(6)—Person living with stepsister agreeing to furnish permanent home until stepsister's conduct prevented continuance could recover in quantum meruit for services.

Where person, on being solicited, left position in another state for purpose of residing with stepsister, who was to furnish her permanent home, and stepsister with whom she was to live by conduct made continuance of arrangement impossible, one solicited could recover in quantum meruit action for services.

2. Work and labor ⟹14(1)—Plaintiff, solicited to make "permanent home" with stepsister, could treat contract as rescinded, where stepsister's conduct prevented fulfillment of contract, and recover reasonable value of services.

Where plaintiff was solicited by stepsister to give up position in another state, and come and make permanent home with her, and, after time, stepsister's conduct prevented continuance of arrangement, term "permanent home" being interpreted to mean home until either one deceased, plaintiff solicited to enter into arrangement could consider contract rescinded and recover for reasonable value of services rendered.

3. Work and labor ⟹29(3)—$1,000 for services rendered by plaintiff to stepsister for eight months held not excessive.

$1,000 as value of services of plaintiff living with stepsister, who solicited plaintiff to make permanent home with her, *held* not excessive, where stepsister prevented continuance of arrangement after about eight months by her unjustifiable acts and conduct.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Ethel Welch against Hettie Reese, in which L. O. Gunn, as executor of the last will and testament of Hettie Reese, deceased, was substituted as defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

S. C. Schaefer, of Los Angeles, for appellant.

James, Pace, Smith & Younkin, of Los Angeles, for respondent.

HAHN, Justice pro tem. The action which gives rise to this appeal was brought in the municipal court of the city of Los Angeles for the purpose of recovering judgment for $1,000, the complaint being drawn in the form of a common count, alleging the rendering of services by the plaintiff to the defendant, Hettie Reese, at her instance and request, and the reasonable value thereof. From a judgment rendered in favor of the plaintiff for the sum of $1,000, the defendant, Hettie Reese, appealed to the superior court in and for the county of Los Angeles, which court in due course affirmed the judgment of the lower court.

The case comes here upon appeal taken by defendant, Hettie Reese, during her lifetime. Pending appeal, the defendant, Hettie Reese, deceased, and L. O. Gunn, the duly appointed and qualified executor of the last will and testament of Hettie Reese, deceased, was substituted as defendant and appellant by order duly made.

Appellant argues at length that the superior court erred in refusing to grant her motion for a new trial and her motion to vacate the judgment of the municipal court. The reasons urged are: (1) That the evidence is insufficient to support the findings; (2) that, upon the findings, the conclusions of law should have been in favor of defendant and judgment rendered thereon for the defendant; (3) that the judgment is excessive.

A brief résumé of the evidence is necessary to a discussion of the points raised.

Plaintiff and defendant were stepsisters, the former residing in New York and the latter in Los Angeles. Each was advancing in years and living alone without a family. Plaintiff was employed at a salary that provided her with a comfortable living, while defendant was possessed of a home and independent means, but in poor health, and requiring the companionship of some one in the home with her. Through correspondence the defendant suggested to the plaintiff that, if she would come and make her permanent home with her, she (the defendant) would pay the expenses of maintaining the home. Without going into the details of the testimony with regard to the arrangement, it may be fairly inferred that it was the understanding of both parties that the arrangement contemplated a permanent home for the plaintiff as long as either of the sisters lived. Pursuant to the invitation to the plaintiff from the defendant, plaintiff gave up her position in New York and came to Los Angeles, making her home with the defendant for a period of about eight months, when, by reason of the

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★Rehearing denied. Hearing denied by Supreme Court.

conduct of the defendant and her treatment of the plaintiff, she (the plaintiff) was compelled to leave the home and return to New York. Following this breaking up of the arrangement, plaintiff brought this action in the municipal court of the city of Los Angeles to recover a judgment for the sum of $1,000 as compensation for the services rendered by her to the defendant during said period of eight months.

[1] Appellant urges at length in her brief that the plaintiff had no cause of action on a quantum meruit; that, if she had any cause of action, it was for damages for breach of contract. There is no merit in this contention. It is so well settled in California that citations seem unnecessary that under certain types of contracts, particularly those providing for the rendering of personal services, where the employer without legal cause prevents the completion of the contract, the other party may recover in a quantum meruit action. The rule is set forth in the case of Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 P. 86, 90, as follows:

"It is the general rule that where an employé is without cause discharged by his employer during the term of his employment, he may regard the contract as rescinded, and sue upon a quantum meruit, and recover the reasonable value of his services, as if the special contract of employment had never been made."

[2] Appellant dwells at length on the meaning of the term "permanent home," which the court found was the term which was used between the parties in their contract in relation to the consideration that should flow to the plaintiff for coming out and caring for her sister. Whatever may be the various interpretations placed upon that term depending upon the circumstances under which it is used, in view of the circumstances involved in the instant case, and particularly in view of the fact that the plaintiff gave up a position in New York to come to California to be with her sister, it is reasonable to conclude that the term "permanent home" was understood between the parties to mean a home until either one deceased. With that interpretation of the term, and the plaintiff being deprived of that "permanent home" by the unjustifiable acts and conduct of the defendant, plaintiff comes well within the rule that permits an employee to consider the contract as rescinded and recover for the reasonable value of the services rendered.

[3] We are satisfied that there is sufficient evidence to support the findings and that the conclusions of law and judgment properly flow from the findings of fact. Nor do we feel that there is any merit in the contention that the judgment is excessive. The character of the services rendered by the plaintiff, as well as the testimony as to the reasonable value of such services, fully warrant the amount of the judgment.

Other questions are touched upon in the briefs, but we do not deem it necessary to consider them in detail.

We are of the opinion that the judgment of the superior court sustaining the judgment of the lower court was proper. The judgment is affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

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101 Cal. App. 354

CORNELIUS v. CORNELIUS. (Civ. 3903.)

District Court of Appeal, Third District, California. Oct. 19, 1929.

1. Divorce ⚷108—In husband's divorce action, variance held to exist between allegations of complaint that property settlement was procured by duress and proof thereon.

In husband's divorce action, where husband alleged wife procured property settlement by threatening criminal prosecution, and wife testified that, after signing of contract, she wadded up contract and threw it away, that husband picked it up and begged her to take it, and that she had never urged signing of contract by threatening criminal prosecution, variance *held* to exist between allegations of complaint and proof thereon.

2. Divorce ⚷253—In divorce action, evidence held to support finding upholding validity of property settlement which husband claimed had been procured by duress.

In husband's divorce action, where husband alleged wife procured property settlement by threatening criminal prosecution, and wife testified that, after signing of contract, she wadded up contract and threw it away, that husband picked it up and begged her to take it, and that she had never urged signing of contract by threatening criminal prosecution, evidence *held* to support finding upholding validity of property settlement contract.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Charles E. Cornelius against May E. Cornelius. From a judgment for the defendant, plaintiff appeals. Affirmed.

Homer C. Mills, of Los Angeles, for appellant.

A. P. G. Steffes and Frank T. Hennessey, both of Los Angeles, for respondent.

THOMPSON, J. This is an appeal from a judgment of divorce which was awarded the defendant upon her cross-complaint and confirming a previous agreement settling the property rights of the spouses. The sole question is the validity of this contract.

The plaintiff filed an action for divorce against the defendant on the ground of ex-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

treme cruelty. The complaint alleged that she was possessed of certain community property which she was holding by virtue of a previous written agreement purporting to settle all property rights between them, but which contract was procured by means of duress on the part of the defendant consisting of threats to prosecute the plaintiff on a charge of adultery, and that this contract was subsequently canceled by the resumption of matrimonial relations and by mutual consent of the parties. The complaint prayed for a decree of divorce and the cancellation of the property settlement contract, together with an award of a share of the community property.

The answer denied seriatim the charges of cruelty, the existence of any community property, the exercise of duress or threats in procuring the execution of the agreement, and the cancellation by a resumption of marital relations or by mutual consent. The affirmative defense of res judicata was asserted with respect to the attack upon the validity of this agreement. In a cross-complaint the defendant charged the plaintiff with adultery, and prayed for a divorce on that ground.

Upon the trial the court adopted specific findings against the plaintiff on each of the material issues, and awarded the defendant a decree of divorce upon her cross-complaint. The validity of the property settlement agreement was upheld.

The appellant does not attack that part of the judgment which grants the defendant a divorce, but contends that the findings upholding the property settlement agreement are unsupported by the evidence. Much of his brief is devoted to an attack upon the jurisdiction of the municipal court of Los Angeles, which passed upon the validity of that contract.

The findings and judgment are amply supported by substantial evidence upon every essential issue.

The parties to this action were married in 1908, and lived in harmony for several years. The appellant was a linotype operator, and for some time was engaged with the Los Angeles Examiner at a salary of about $50 a week. The respondent testified that at the time of their marriage the appellant was without means, and subsequently acquired none, his wages having been expended for their maintenance; that, upon the contrary, she owned the Byron Hotel when they were married, which she afterwards sold leaving her a net balance of $2,500; that she engaged in the apartment house business during their married life, investing her separate funds in one apartment house after another, each of which was sold at a substantial profit, until in 1921 she had accumulated a fund of some $8,700, which she kept in a bank in her own name, and in which fund the appellant had no interest. At the time of the trial of this case it appears that there was but about $1,600 of this fund remaining. Dissensions arose between the spouses. During respondent's illness in May, 1922, the appellant fraudulently procured and cashed a check on her account for $4,500. Upon discovering this fraud, she threatened to prosecute him, and he returned nearly all of this money. Subsequently the appellant was arrested and convicted of battery upon his wife. He appropriated her automobile and forged her name to obtain a transfer of the license to his name. He consorted with another woman whom he accompanied upon an extended automobile trip, and confessed to his wife his illicit intercourse with this woman. The spouses were separated in January, 1924. For a period of time he occupied an apartment with communicating bedrooms, in one which this woman slept. They shared the use of the dining room and kitchen together. The evidence is convincing that during this time and upon other occasions he was guilty of adultery with this woman. Indeed, this fact is not controverted on appeal. Near midnight on March 21, 1924, the respondent, in company with two officers, visited her husband's apartment, where they found him with his paramour under circumstances which led to his arrest on a charge of adultery. This charge was subsequently dismissed for lack of prosecution on the part of the respondent. February 16, 1924, the following letter was sent to the appellant:

"Los Angeles, Cal. Feb. 16, 1924

"Mr. C. E. Cornelius: With the persuasion of my friends and to spare myself and family the disgrace of making you answer to the charge of *forgery* and paying the penalty for same you go to my attorney and sign an affidavit that he will prepared for you that must be done by Monday evening Feb. 18th, 1924, and then you can go your way as long as you conduct yourself so as not to disgrace me with the woman that has caused you your trouble. Your wife, Mrs. C. E. Cornelius."

April 2, 1924, the parties to this action went together to the office of E. M. Schwartz, who was acting as attorney for the respondent in the negotiations preliminary to the contemplated divorce proceedings. Without controversy, this property settlement agreement was then signed by the respective parties. It recited that the parties were then separated, and that a suit for divorce had been dismissed; that during the time the parties remained separated the appellant would pay his wife the sum of $15 a week as maintenance; that all property then in the possession of the respective spouses, together with all property which might be acquired by either party in the future, should remain the separate property of such party. It was then provided that, in the event the parties should become reconciled and resume matrimonial relations, this contract should thereupon become void. The parties were not thereafter reconciled, and respondent testified that they never again resumed matrimonial relations. Payments were made by the appellant on this contract for the period of about a year, and then he ceased to comply with its terms. In August, 1925, suit was commenced by this respondent against her husband in the justice's court of Los Angeles county to recover the deferred payments upon this contract. The appellant answered, setting up the defense that the contract had been annulled by the reconciliation of the parties and their resumption of marital relations, but neglected to claim that the agreement was procured by duress or threatened prosecution of a crime. A trial ensued. All the issues were decided against this appellant, and a judgment was duly entered, in effect upholding the validity of the contract. From this judgment no appeal was perfected, and it became final.

[1, 2] This suit was subsequently instituted. The appellant's effort to prove that this contract settling property rights was procured by duress utterly failed. There was a clear variance between the allegations of his complaint and the proof thereof. The complaint charged the respondent with procuring the signature of the appellant by threatening to prosecute him for adultery. The letter which was offered in proof of the charge of duress read in part, "* * * to spare myself * * * the disgrace of making you answer to the charge of *forgery* and paying the penalty for same you go to my attorney and sign an affidavit. * * *" It does not appear what the "affidavit" had to do with the property contract. Certainly it had no reference to the alleged threat to prosecute the appellant for adultery. The letter was written before the discovery of the offense of adultery. The appellant testified that, immediately after signing the document, he sat down and said: "I had to sign that contract to keep out of the penitentiary." Mrs. Cornelius testified regarding this transaction: "After the contract was signed he passed some insulting remark, I don't just recall what he said, and I wadded up the contract and threw it out. I said 'If that's the way you feel about it we will just let the courts settle this' (adjustment of property rights). He picked it up and begged me to take it." This seems to refute the theory of coercion. Moreover, the respondent further testified that she never urged the signing of the contract by threatening a prosecution of any sort, but, upon the contrary, that the appellant voluntarily offered to do so. On cross-examination she said: "He came to me and offered to do that voluntarily. * * * Q. Now you never used any threats at all to get him to sign that contract, did you? A. Absolutely not." She further testified that at no time since the execution of the contract had they ever lived together or resumed matrimonial relations. This was a sufficient showing in spite of the conflict of evidence upon which to support the findings and judgment upholding the binding validity of the contract. In truth, the record may well be deemed to be sufficient upon which to support a finding that all the property possessed by the respondent at the time of the divorce proceeding was her separate property, independent of the provisions of the contract in question.

Surely the merits of this cause are favorable to the respondent. Her domestic happiness was destroyed by the conduct of the appellant. There are ample grounds upon which to sustain all the relief which she secured.

With this view of the record it becomes unnecessary to consider the further contention of the appellant that the municipal court was without jurisdiction to pass upon the validity of the contract, or the respondent's claim that the present controversy over its validity is res judicata.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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101 Cal. App. 248

MILLS v. MILLS. (Civ. 5.)

District Court of Appeal, Fourth District, California. Oct. 16, 1929.

1. Divorce ⚷161—Husband held not entitled to have default divorce judgment set aside on ground of inadvertence and excusable mistake.

In action for divorce, where trial was not had until approximately 3½ months after service on husband of original summons and complaint, 2½ months after his being notified by letter that plaintiff was preparing to proceed with her action, and over 1½ months after second service of process on husband, husband *held* not entitled to have default divorce judgment set aside on ground of inadvertence and excusable mistake.

2. Divorce ⚷161—Court's discretion in denying application to set aside default divorce judgment will not be disturbed in absence of abuse.

Application to set aside default judgment of divorce being addressed to discretion of court, its action in denying or granting such application will not be disturbed on appeal unless clear abuse of such discretion is shown.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Ardys M. Mills against Marshal C. Mills. From an order denying defendant's motion to set aside a default judgment and interlocutory decree of divorce, defendant appeals. Affirmed.

A. L. Sebille and Bruce G. Sebille, both of Brawley, for appellant.

Leland S. Davidson, of Ontario, for respondent.

MARKS, J. This action was brought by plaintiff against defendant for divorce and to secure the custody of and support for Marcelle Mills, the daughter of the parties, of the age of 3 years. The plaintiff was given an interlocutory decree of divorce, with the custody of the child and $20 a month for the support of the minor.

The complaint was filed by plaintiff in the superior court of San Bernardino county on or about April 1, 1926, and the summons served on defendant personally in the county of Imperial, on or about April 19, 1926. An amended complaint was filed June 16, 1926, and personal service of the summons was had on the same day in the county of San Bernardino. The default of the defendant was entered on July 1, 1926. The trial was had on August 5, 1926, and the interlocutory decree of divorce signed on that day.

On October 30, 1926, the defendant appeared and filed a notice of motion to set aside and vacate the interlocutory decree of divorce. An answer and cross-complaint and a motion in the form of an affidavit by defendant was filed at the same time. This motion was heard and denied on November 22, 1926.

[1] Defendant's motion was made under the provisions of section 473, Code of Civil Procedure, on the grounds of inadvertence, mistake, and excusable neglect on his part, and also upon the grounds of fraud and subterfuge on the part of the plaintiff.

The inadvertence, mistake, and excusable neglect on the part of defendant is set forth in his affidavit substantially as follows: That, upon learning of the divorce proceedings, he became ill, worried, and grief-stricken to such an extent that he became temporarily mentally incapacitated and incapable of properly protecting his interests in the divorce action.

The fraud and subterfuge on the part of plaintiff, as alleged by defendant grew out of purported statements made by plaintiff to defendant at various times, after the filing of both the original and amended complaints, to the effect that she would dismiss her complaint or that they would live together again, and that "if things went to suit plaintiff she would not procure the permanent decree."

Plaintiff filed her own and three other affidavits which were before the court on the hearing of the motion. These affidavits controvert all of the allegations of defendant as to his mental incapacity and as to any fraud or subterfuge on the part of the plaintiff. It will be noted that, during the entire period of defendant's alleged "temporary mental incapacity," it appears from his affidavit that he had sufficient mind and memory to remember all of the various alleged conversations with and conduct of plaintiff upon which he bases his charges of fraud and subterfuge.

Instead of showing any inadvertence, mistake, or excusable neglect on the part of defendant or fraud or subterfuge on the part of plaintiff, the record before this court shows that the defendant knew and understood the nature of the proceedings against him and that plaintiff and her attorney were fair in all their dealings with him. On May 18, 1926, plaintiff's attorney wrote the defendant as follows: "I am writing you in regard to the matter of the suit for divorce your wife has started against you. You will recall I promised not to take advantage of you in the matter of entering a default against you and promised you I would notify you and give you a chance to put in an answer. She has instructed me to go ahead with the divorce and I am giving you the chance to put in an answer. I shall wait one week to have default entered, and if you do not enter your answer by that time I shall have the default entered." It will be noted that the amended complaint was not filed until June 16, upon which day defendant was again served, and that his default was not entered until July 1. The hearing was had and the interlocutory decree of divorce signed August 5, 1926.

We are aware of the well-established rule that the courts are very zealous in giving litigants their day in court in domestic relations cases. We believe that where, as in this case, the defendant was served with process not only once, but twice, where the trial was not had until approximately 3½ months after the service upon him of the original summons and complaint, 2½ months after his being notified by letter that plaintiff was preparing to proceed with her action, and over 1½ months after the second service of process upon him, he cannot be heard to say that his neglect to appear and defend the action was excusable.

[2] "An application of this kind is addressed to the sound legal discretion of the court, and its action in granting or denying the prayer of the petitioner will not be disturbed on appeal, unless a clear abuse of such discretion is shown." McDonald v. McDonald, 173 Cal. 175, 159 P. 426, 427.

In this case the appellant failed to show any abuse of discretion on the part of the trial court, and the order denying his motion is therefore affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

101 Cal. App. 450

SECURITY INVESTORS' REALTY CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6715.)

District Court of Appeal, Second District, Division 1, California. Oct. 25, 1929.

1. Corporations ⚷292—Resignation was complete where corporation's secretary and director mailed resignation, notwithstanding by-laws regarding terms of officers, etc.

Where secretary and director of corporation deposited resignation in writing in mail, directed to corporation and president thereof, resignation was complete and effective, notwithstanding by-laws to effect that each director should serve term for which elected and until successor should qualify, and that officers should be elected annually and hold office until successors were appointed.

2. Corporations ⚷507(10)—Service of summons and complaint on former secretary of corporation, who had resigned, was same as if made on stranger.

Service of summons and complaint on former secretary and director of corporation, who had resigned, was the same as if made upon a stranger.

Application by Security Investors' Realty Company for writ of prohibition to be directed to the Superior Court in and for Los Angeles County, and others, to prevent further action in a certain proceeding. Writ issued.

Ward Chapman and William Ellis Lady, both of Los Angeles, for petitioner.

Pacht, Pelton & Warne and William W. Leavitt, all of Los Angeles, for respondents.

YORK, J. Service of summons in an action was attempted to be made upon Security Investors' Realty Company by delivery of copies of summons and complaint to Shirley E. Meserve, secretary of said company, more than a year after he had tendered his resignation in writing as secretary and director of said company, which resignation was deposited in the United States mail, directed to the Security Investors' Realty Company and J. Meyer, president thereof.

Upon the entry of a default in such action against the said company, petitioner served upon plaintiffs' counsel a notice of motion and special appearance requesting the court to quash the purported service of summons upon petitioner herein as a defendant in such action by such service had upon said Shirley E. Meserve. This notice of motion was made without making an appearance for any other purpose; said motion being supported by affidavits showing that Shirley E. Meserve, before the said service upon him as secretary of the said corporation, had resigned both as secretary and as director thereof. Upon a hearing of said matter, the court, on or about the 10th day of June, 1929, did make and enter an order denying said motion. Thereafter petitioner here petitioned this court for both a writ of review and a writ of prohibition, and this court issued an alternative writ of prohibition, only.

The whole question to be determined in this matter is whether or not the said Meserve was, at the time of the service of the said summons and complaint, secretary of or a director of said corporation.

[1, 2] Some point is made of the fact that in the by-laws of said corporation it is provided that "each director shall serve for the term for which he shall have been elected and until his successor shall have been duly elected and have qualified * * *", and also "the executive officers of the company shall be a president, vice-president, secretary and treasurer. The president, vice-president, secretary and treasurer shall be elected annually by the board, and shall hold office until their successors are appointed."

Quoting from 7 Ruling Case Law, p. 427, § 416: "Resignation: An officer of a corporation may terminate his office by resignation, if the statutes, charter and by-laws impose no limitation thereon, and, in doing so, he need give no notice to the public nor to persons dealing with the corporation."—citing Zeltner v. Henry Zeltner Brewing Co., 174 N. Y. 247, 66 N. E. 810, 812, 95 Am. St. Rep. 574, and note therein. "The fact that a statute requires directors, unless removed, to continue in office until their successors are appointed, does not prevent a director from resigning at any time" citing Briggs v. Spaulding, 141 U. S. 132, 11 S. Ct. 924, 931, 35 L. Ed. 662. "Since an officer may resign, as a rule, at pleasure, no action on the part of the corporation is essential to make his resignation effectual. Acceptance thereof by the directors or governing body is not required. When he tenders his resignation to the proper corporate authorities, to take effect immediately, the resignation is complete, although it is not acted on by the corporation or entered in its books. * * *"

It was said in the cited case of Zeltner v. Henry Zeltner Brewing Co., supra: "When we come to consider the general right of officers and directors of corporations to resign, we are at once reminded of the limitations of the question certified to us. We may admit, for the purposes of this discussion, that, as a general rule, such officers may resign at will, and that the validity of such resignations does not depend upon their formal acceptance."

Quoting from Briggs v. Spaulding, supra: "The resignation was orally tendered to the president, and manifestly accepted by him, since the sale of the stock was made at the same time, and the president informed the cashier of the fact a few days afterwards. Putting a resignation in writing is the more

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

orderly and proper mode of procedure; but if the fact exists, and is adequately proven, the result is necessarily the same, as applied to this case. We do not understand that because section 5145, Rev. St. [12 USCA § 71] provides that directors shall hold office for one year and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the banking law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective."

It would therefore follow that the resignation of Shirley E. Meserve as secretary and as director was complete and effective, and therefore that service in this case had upon him as an officer of the corporation was the same as if made upon a stranger.

Let the peremptory writ issue.

We concur: CONREY, P. J.; HOUSER, J.

101 Cal. App. 363

BILTMORE DRUGSTORE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6992.) ★

District Court of Appeal, Second District, Division 1, California. Oct. 21, 1929.

Rehearing Denied Nov. 1, 1929. Hearing Denied by Supreme Court Dec. 16, 1929.

1. Divorce ⚿264—One to whom alimony was ordered payable held entitled, notwithstanding dismissal of divorce action, to maintain supplementary proceedings in aid of execution to enforce alimony order (Code Civ. Proc. § 717; Civ. Code, §§ 137, 140).

Where alimony under order in divorce action accrued before dismissal of action, party to whom alimony was payable *held* entitled under Code Civ. Proc. § 717, to maintain supplementary proceedings in aid of execution to enforce payment of alimony, notwithstanding dismissal of action, in view of Civ. Code, §§ 137, 140, authorizing execution and enforcement of order for alimony by any remedy applicable to case.

2. Divorce ⚿264—Order for payment of alimony pendente lite in divorce action held judgment within statute authorizing supplementary proceedings (Code Civ. Proc. § 717).

Order for payment of alimony pendente lite in divorce action *held* a judgment within Code Civ. Proc. § 717, relating to examination on supplementary proceedings of debtors of judgment debtor or those having property belonging to him.

Application by the Biltmore Drugstore for writ of prohibition prayed to be directed to the Superior Court in and for Los Angeles County, Harry R. Archbald, Judge, and another, to prevent enforcement of an order in a supplementary proceeding in aid of execution issued pursuant to an order for payment of alimony. Writ denied.

Max Schleimer, of Los Angeles, for petitioner.

CONREY, P. J. In this proceeding petitioner seeks to prevent the enforcement of an order made by the superior court in a supplementary proceeding brought under section 717 of the Code of Civil Procedure, in aid of an execution issued pursuant to an order for the payment of alimony in a certain divorce action commenced by Julius Robbins, plaintiff, against Pauline Robbins, defendant. After the supplementary proceeding had been commenced the plaintiff filed a dismissal of his action.

[1, 2] It is contended that the order for payment of alimony and attorney's fees pendente lite became inoperative upon dismissal of the action, and therefore that petitioner cannot be examined under the order in supplementary proceedings. Petitioner contends also that supplementary proceedings can be based only upon a judgment, and that an order for the payment of alimony and attorney's fees pendente lite is not a judgment. In our opinion these contentions of petitioner are without merit. We do not doubt that upon the dismissal of the action further payments under the order would no longer accrue; but we think that payments which already had accrued and were due and payable remain so due and payable, notwithstanding dismissal of the action. In section 137 of the Civil Code, where the allowance of money necessary for the prosecution or defense of the action and for support and maintenance is authorized, it is provided that "execution may issue therefor in the discretion of the court." Section 140, contained in the same article and same chapter, authorizes the court to require reasonable security for providing maintenance, etc., and "may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." Section 717 of the Code of Civil Procedure is the section which relates to the examination on supplemental proceedings of debtors of a judgment debtor or of those having property belonging to him. It provides that "after the issuing or return of an execution against property of the judgment debtor," etc., these third parties above mentioned may be required to appear for examination. The claim that an order for the payment of alimony pendente lite is not a judgment within the meaning of this statute ignores the fact that such order is in its essence, if not in name, a judgment. It has been so treated in the decisions. "The application for alimony, though it cannot be considered a separate suit, is a proceeding for a separate judgment, which, when granted, has nothing to do with the final judgment in the case, and will not be affected by it. It is a final judgment from which an appeal may be taken." Hite v. Hite, 124 Cal. 389, 393, 57 P. 227, 45 L. R. A. 793,

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★Rehearing denied. Hearing denied by Supreme Court.

71 Am. St. Rep. 82. See, also, Sharon v. Sharon, 75 Cal. 1, at page 38, 16 P. 345; Simpson v. Simpson, 21 Cal. App. 150, 154, 131 P. 99; Millar v. Millar, 175 Cal. at page 810, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184.

The petition for writ of prohibition is denied.

I concur: YORK, J.

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101 Cal. App. 244

TILLOTSON v. MARCUS LAND & INVESTMENT CO. et al. (Civ. 3890.)

District Court of Appeal, Third District, California. Oct. 16, 1929.

Boundaries 🔑3(6)—Where fence had been erected along boundary line as fixed by measurements, such line controlled, although inconsistent with monuments (Code Civ. Proc. § 2077).

Where description by monuments in deed by which grantor conveyed part of land conflicted with description by measurements, but evidence disclosed that fence had been maintained along line as shown by measurements continuously since execution of deed, grantor and successors holding exclusive possession up to such fence, such boundary *held* true boundary, since provision of Code Civ. Proc. § 2077, that, when permanent and visible or ascertained monuments are inconsistent with measurements, monuments are paramount, does not obtain, where other circumstances support boundary line as fixed by measurements.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Elizabeth Nicholson Tillotson against the Marcus Land & Investment Company and others. From a judgment for the defendant, plaintiff appeals. Affirmed.

V. P. Lucas, of Los Angeles, for appellant.

Smith & Breslin, of Los Angeles, for respondents.

FINCH, P. J. This is an action to quiet title. Judgment was entered in favor of the defendants, and the plaintiff has appealed.

June 6, 1905, J. G. Schaefer was the owner of a tract of land adjacent to and "southeasterly of the Ballona Road No. 2" (now Washington boulevard) in Los Angeles county. On that day he executed a deed conveying to A. M. Squire 100.44 acres of the land "lying southwesterly of a line described as follows:

"Said line beginning at a point in the Southeasterly line of said Ballona Road No. 2, which point is distant North-easterly 560.98 feet from a large sand stone marking the East line of said Road and also the Northwest corner of the said John D. Young 184 acre allotment and the Northeast corner of the lands alloted to Andreas Machado and brothers, thence South 65° 03′ East 1870.48 feet to a point, thence South 50° 07′ East 2562.69 feet, more or less, to the Easterly boundary of the said 184 acre allotment to John D. Young, said line being a line drawn through a point 20 feet South-west of the North-west corner of Schaefer's Barn, and a point in the center of the lane as marked at present by fence at angle point, thence following the center of said lane as marked by fences and continued in a straight line to intersection with said Easterly line of said John D. Young 184 acre allotment."

The defendant Marcus Land & Investment Company has acquired title to the adjacent lands which Schaefer owned at the time of the execution of his deed to Squire. The plaintiff, as one of Squire's successors in title, has acquired a lot fronting on Washington boulevard adjoining the company's land and having a depth of 256.41 feet, measured along the common boundary line. The controversy is over the location of the line described in Schaefer's deed to Squire.

The Schaefer barn referred to in the deed is located 262.8 feet southeasterly from the southeasterly boundary line of Washington boulevard. Several witnesses testified that this barn was erected shortly before the execution of the deed, and that the location thereof has not been changed. The court found that prior to and at all times since the execution of the deed there existed a fence marking the boundary line between the lands retained by Schaefer and those conveyed by him to Squire; that "a line drawn through a point 20 feet southwest of the northwest corner of Schaefer's barn and a point in the center of the lane * * * at angle point," as described in the deed, "followed and exactly corresponded with said fence from said southwesterly line of said Washington boulevard for a distance of about 865.70 feet"; and that such line intersects the "southeasterly line of said Washington boulevard at approximately right angles thereto" at a point "549.48 feet from a large sandstone, * * * marking the northwest corner of said John D. Young 184 acre allotment." There is ample evidence to support these findings.

The course of the boundary line as described in the deed is a continuous straight line for a distance of 1,870.48 feet from Washington boulevard. It is first described as beginning at a point 560.98 feet from the northwest corner of the "Young 184 acre allotment." It is again described as running "through a point 20 feet southwest of the northwest corner of Schaefer's barn and a point in the center of the lane as marked at present by fence at angle point"; the latter point being the terminus of the straight line of 1,870.48 feet. The line, according to this latter description, intersects Washington

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boulevard at a point only 549.48 feet from the northwest corner of the 184-acre tract. It thus appears that there is an inconsistency in the description. Section 2077 of the Code of Civil Procedure provides:

"The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it: * * *

"2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

"3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both."

If there were no evidence in the record other than the description in the deed and the location of the three monuments to which reference has been made, it might be necessary, under the provisions of section 2077, to locate the line as beginning at a point 560.98 feet from the sandstone monument, running thence to a point 20 feet southwest of Schaefer's barn, and thence to a point in the center of the lane at angle point, but there are other circumstances supporting the determination of the trial court as to the true boundary line. At the time the Schaefer deed was executed there was a substantial fence along such line. A fence has been maintained along that line continuously since the execution of that deed, and the company and its predecessors in title, during all that time, have held exclusive possession up to the fence. In Miller v. Grunsky, 141 Cal. 441, 450, 66 P. 858, 75 P. 48, 51, referring to the provisions of section 2077, it is said:

"It is provided in subdivision 2 that when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement either of lines, angles, or surfaces, the boundaries or monuments are paramount, but this, like every other rule embraced in the section, is subject to the qualification contained in the first clause, that they control only when there are no other sufficient circumstances to determine a doubtful construction, * * * Appellant cites a number of cases to the proposition that when a boundary line is called for it means the true boundary of the tract, and not what the parties may have supposed the lines to be. In every one of these cases the boundary line was the only call; there was no conflicting call corresponding to what the parties supposed to be the true boundary; * * * no reference to any line marked by a fence or other visible monument."

In the concurring opinion in the same case it is said that "parties to a conveyance are supposed to be on the land or acquainted with the land conveyed, and to have noticed permanent objects constituting the boundary referred to in the description of the property conveyed." The determination of the boundary line by the trial court appears to be fully sustained by the facts proved and found.

The court further found in favor of the company on its claim of an agreed boundary line and on its alleged defense of estoppel. It is unnecessary to consider whether such findings are justified, because the findings already discussed are decisive of the case.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

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101 Cal. App. 453

KNIGHT v. CARLIN. (Civ. 6242.)

District Court of Appeal, Second District, Division 2, California. Oct. 25, 1929.

1. Trial ⟹165—On motion for nonsuit, conflicting evidence must be disregarded and inferences therefrom must be viewed in light most favorable to plaintiff.

In entertaining motion for nonsuit, conflicting evidence must be disregarded and every inference that may be fairly drawn from all evidence must be viewed in light most favorable to plaintiff's claim.

2. Attorney and client ⟹167(2)—Nonsuit at close of plaintiff's case in action by attorney for legal services performed under contract held erroneous under evidence.

In action by attorney for legal services performed under contract in connection with proposed construction of apartment house, granting nonsuit at close of plaintiff's case *held* error under evidence.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by F. A. Knight against D. B. Carlin. From a judgment of nonsuit, plaintiff appeals. Reversed.

P. H. Goddard, of Long Beach, for appellant.

Harry L. Cohn, of Long Beach, for respondent.

CRAIG, J. The parties to this action agreed in writing on April 11, 1923, that the appellant should perform the necessary legal work for respondent in connection with the proposed construction of an apartment house, for a fee of $7,500. Respondent agreed to pay one-third thereof "when the main contract for the construction of the building is let," one-third "when the building is half completed," and the balance upon completion, and delivery of ownership certificates to individual buyers of respective apartments, "this fee to be purely contingent and nothing to be paid for legal services unless the proposition goes." It was provided that the services should consist of "all legal proceedings, giving advice to Mr. Carlin and to his selling agency, and drawing all necessary legal documents until the enterprise is completed and certificates of ownership delivered to purchasers." On January 22, 1926, appellant filed suit for the full amount specified, alleging that the contract was let, that the building was half completed on August 15, 1925, and that it was completed on September 15, 1925; that he performed all services required, but that the certificates of ownership were not delivered because of the interference of the defendant and the latter's refusal to comply or to permit compliance with their agreement in this respect. The defendant answered, admitting the execution of the contract of employment, but denying the performance of the legal services in accordance therewith. It was also alleged that the defendant did not agree to pay any portion of the fee unless the apartments were successfully launched, that it was wholly contingent upon the creation of a bonded indebtedness and the sale of bonds, and that there should be ready for the buyers of apartments a completed, finished, and working apartment house building; that it became necessary to employ other counsel at a cost of $2,500 to prepare the trust deed and bonds; that the bonds were not sold, the project did not "go," and the contingency upon which the plaintiff's fee depended had never accrued. Damages in the sum of $2,500 were demanded by a cross-complaint. Upon conclusion of the plaintiff's evidence, a motion for nonsuit was interposed, which was granted, and he appeals.

[1] It has uniformly been held that in entertaining such a motion conflicting evidence must be disregarded, and every inference that may be fairly drawn from all of the evidence must be viewed in the light most favorable to the plaintiff's claim. Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381; Carter v. Canty, 181 Cal. 749, 186 P. 346.

[2] Applying this rule, we think the nonsuit was improperly ordered. It is true that it was developed during the trial, and is argued in the respondent's briefs, that there was some affirmative evidence tending to support the latter's theory that the project was ultimately worked out differently from that which he at first had in mind. He was called as a witness for the plaintiff, and testified that the completed structure and system of financing were entirely different from those specified in the original agreement, and that the plaintiff did not consummate the original scheme of creating a bonded indebtedness and disposing of the securities. The motion did not specify, however, as a ground for nonsuit, nor can it truthfully be said, that there was no substantial evidence adduced by the plaintiff in support of his allegations which rendered all of the evidence susceptible of two constructions. It was testified by the plaintiff, and admitted by the defendant, that Knight had for some years specialized in the promotion of structures like that involved in the instant case, known as "own-your-own" apartment houses, and that he was employed upon this occasion for the promotion of an enterprise of that character. The defendant and other witnesses testified that he was the owner of three lots at the corner of First street and Alboni place, in the city of Long Beach, that the new building was originally intended to be erected upon said corner, and that he in fact did place it upon the basement which the plaintiff caused to be excavated, on the third lot from the corner, and that he built a croquet court and provided a driveway or "runway" upon the others, for the use of tenants. Appellant testified that he had under way a system of financing conforming to the original plan, but that the plaintiff ignored him and incorporated, and the defendant admitted that he had financed the project by selling stock in the corporation to purchasers or occupants of certain apartments, who were charged a nominal rental to defray incidental expenses. One of the stockholders occupying a double apartment paid but $25 per month. Carlin admitted that he advertised in various newspapers: "Ambassador Apartments, East First Street and Alboni Place—Just Off Ocean Boulevard, now ready for occupancy, Own your own home in this fireproof building. Single, double and four-room apartments can be bought on very easy terms." Appellant also testified: "I know it is a go; the building is there." There is other evidence of a like tenor which, as contended by the appellant, tended to establish the fact that upon a discovery of a more advantageous method of financing, the respondent secretly dealt with others, completed the apartment house in substantially the manner first contemplated, and declined to compensate him for his services. The superintendent who initiated the work under Knight testified that he continued until the structure was about 90 per cent. complete and one suite was then ready for occupancy.

The order and judgment appealed from are reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

101 Cal. App. 411

ROSS et al. v. THIRLWALL.

THIRLWALL v. ROSS et al.

(Civ. 10.)

District Court of Appeal, Fourth District, California. Oct. 22, 1929.

1. Trial ⚷6(1)—Statute requiring five days' notice before trial to absent party held inapplicable, where both parties were represented by counsel when case was called (Code Civ. Proc. § 594).

Code Civ. Proc. § 594, providing that, before any trial may be had in absence of party to suit, proof must be made that such party had five days' notice of trial, *held* inapplicable to case where both parties were represented by counsel when case was called for trial.

2. Trial ⚷6(1)—Statute requiring five days' notice before trial to absent party held inapplicable, where attorneys having knowledge of trial date failed to give clients timely notice (Code Civ. Proc. § 594).

Code Civ. Proc. § 594, providing that, before any trial may be had in absence of party to suit, proof must be made that such party has had five days' notice of trial, *held* inapplicable, where attorneys having knowledge of trial date failed to give timely notice to their clients.

3. Continuance ⚷1—Courts are disposed to show great liberality in granting continuances in civil cases, when it fairly appears that to do otherwise would deny applicant his day in court.

Where it is fairly apparent that to deny continuances in civil cases will have effect of denying applicant right to his day in court, courts are disposed to show great liberality in granting application.

4. Continuance ⚷44—Application for continuance should be supported by affidavits or other proof showing good grounds therefor.

Application for continuance should be supported by affidavits or other proof showing good grounds for exercise of court's discretion.

5. Continuance ⚷46(10)—To warrant continuance for absence of party, there should be showing that presence of such party is necessary.

On application for continuance because of absence of party to suit, there should be a showing that presence of such party is necessary.

6. Continuance ⚷46(10)—If presence of defendant was necessary to advise and assist attorney, such facts should be shown on application for continuance (Code Civ. Proc. § 595).

On application for continuance because of absence of defendant, if presence of defendant was necessary, that he might advise and assist his attorney, it should be shown that attorney was not in possession of all facts, names of witnesses, or for some other reason was not as well prepared to try case without him as with him, in view of Code Civ. Proc. § 595, providing that motion for continuance on ground of absence of evidence must be made on affidavit showing materiality of evidence expected to be obtained and diligence in procuring it.

7. Continuance ⚷46(10)—On application for continuance because of absent party, there must be some showing that, if continuance be granted, absent party will appear within reasonable time.

On application for continuance because of absence of party to action, there should be some showing that absent party may be expected to appear within reasonable time, if continuance be granted.

8. Continuance ⚷46(5)—To warrant continuance because of absence of party, there should be showing of diligence.

On application for continuance because of absence of party, there should be a showing of diligence to warrant granting of application.

9. Continuance ⚷46(10)—Application for continuance for absence of defendant, not showing necessity of defendant's presence, or when he might be expected to appear, or what would be proved, held properly denied.

In action to recover balance of purchase price of hogs, wherein defendant counterclaimed for damages because hogs sold were infected with cholera, where only proof in support of application for continuance because of defendant's absence was verbal statement of counsel that defendant could not be present because of wife's illness, without showing necessity of defendant's presence, or when he might be expected to appear, or diligence in procuring attendance, or what was expected to be proved by defendant, denying application was not abuse of discretion, since denying application for continuance, when no legal showing in support thereof is made, is not an abuse of discretion.

10. Continuance ⚷45—To warrant continuance as matter of right, reasonable showing must be made.

In order to make continuance practically a matter of right, a reasonable showing must be made.

11. Appeal and error ⚷966(1)—Continuance ⚷7—Granting continuance being discretionary, trial court's ruling will not be disturbed on appeal, except for clear abuse.

Application for continuance is addressed to sound discretion of trial court, and its ruling will not be disturbed on appeal, unless discretion has been clearly abused.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by W. T. Ross and another against A. F. Thirlwall, in which defendant filed a cross-complaint against plaintiffs and another. From a judgment for plaintiffs, and from orders denying motions to vacate judgment and for a new trial, defendant appeals. Affirmed.

A. S. Maloney, of San Bernardino, for appellant.

Pollock & Mitchell, of Ontario, for respondents.

BARNARD, J. This was an action originally brought by the plaintiffs as assignees of one W. C. Gilman to recover a balance of the purchase price of certain hogs, alleged to have been sold by Gilman to defendant. To the complaint the defendant filed an answer and counterclaim, based upon allegations that the hogs sold him by Gilman were infected with cholera. He also filed a cross-complaint against the plaintiffs and the said Gilman, based upon damages, alleged to have been suffered, by reason of the communication of cholera from the hogs so purchased to other hogs already owned by him.

When the case was called for trial on April 30, 1926, at 10 o'clock a. m., the defendant was not present. His attorney made a verbal statement to the court that the wife of said defendant was seriously ill at Chino, a distance of about 30 miles from the courtroom, and for that reason defendant and cross-complainant was unable to be present. Upon objection being made to a continuance, defendant's attorney offered both to pay "terms" if such continuance was granted, and to take the deposition in court of a witness then present, who had come some distance. The trial judge suggested that some proof be produced to show that it was impossible for defendant to be present, and took an adjournment until 2 o'clock of the same day.

At 2 o'clock, the motion for a continuance was renewed, and the only proof offered was the affidavit of defendant's attorney, to the effect that defendant was unable to be present for the reason that his wife was dangerously ill and that her condition necessitated defendant's remaining with his wife and children; that this condition had existed for several days before, and would exist for several days in the future; that affiant had been informed by the woman's physician that it would be some time before he could determine whether or not she was out of danger. The motion for a continuance was denied, and the attorney for defendant announced that he would not participate further in the proceedings and walked from the courtroom. The trial proceeded, and resulted in a judgment against the defendant for $491, interest, and costs, and a denial of any relief under his cross-complaint.

The defendant later moved to vacate the judgment and also moved for a new trial, both of these motions being based on the ground that the trial court abused its discretion in refusing to grant a continuance. In support of these motions, a number of affidavits were filed. The first was the affidavit of defendant's attorney, to the effect that the case was set for April 30, 1926, at 10 o'clock, and that on the morning of that day the defendant called affiant on the telephone and informed him of the dangerous illness of his wife, of his inability to get help, and that it was impossible for him to be present; that he had stated these facts to the court, and the judge had asked him to produce proof thereof; that affiant had furnished proof in the form of his own affidavit, but that the court had proceeded with the trial and affiant had withdrawn from the courtroom; and that defendant had a meritorious defense and cause of action on his cross-complaint. The next affidavit, that of defendant himself, set forth that he had a meritorious defense; that his attorney had sent him a letter on October 26, 1925, notifying him of the time and place of trial, but that he never received such notice; that about 8 o'clock on the morning of April 30, 1926, he received a telephone communication from his counsel, asking him whether or not he intended to come to the trial; that he informed his attorney that he had received no notice, and was unable to come because of the dangerous illness of his wife; that he was informed by his physician that the condition of his wife was serious; that he was unable to get assistance in that short period of time; and that he was not in a physical or mental condition to take part in the trial. There was also filed the affidavit of the attending physician, corroborating defendant's statement as to the condition of his wife, and in addition there were several affidavits made by other parties, setting forth certain facts going to the merits of the case.

This appeal is from the judgment and orders denying each of said motions. The only question involved is whether or not the trial court abused its discretion in refusing to grant a continuance.

[1, 2] The contention is first made that under section 594 of the Code of Civil Procedure, before any trial may be had in the absence of a party to the suit, proof must be made that such party has had five days' notice of the trial, and that no such proof was here made. But this provision does not apply to a case where both parties are represented by counsel, when the case is called for trial. Sheldon v. Landwehr, 159 Cal. 778, at page 782, 116 P. 44. Nor does it apply in cases where attorneys, having knowledge of the trial date, fail to give timely notice to their clients. Canty v. Pierce & Anderson, 173 Cal. 205, at page 208, 159 P. 582. It appears from the affidavit here that the attorney for defendant had knowledge of the date of trial more than six months in advance.

[3] It is further urged that the showing made to the court on the date of the trial was amply sufficient to entitle appellant to a continuance. It may be conceded that the facts given, as an explanation of appellant's absence from the trial, if properly presented to the trial court, and in the absence of any lack of diligence, were not only sufficient to entitle him to a continuance, but were sufficient to make the failure to grant the motion an abuse of discretion. It is unquestionably true, as claimed by appellant, that the disposition of the courts is to show great liberality in granting continuances in civil cases, when it is fair-

ly apparent that to do otherwise will have the effect of denying to the applicant the right to his day in court.

Appellant relies upon the following cases: Betts Spring Co. v. Jardine M. Co., 23 Cal. App. 705, 139 P. 657; Jaffe v. Lilienthal, 101 Cal. 175, 35 P. 636; Morehouse v. Morehouse, 136 Cal. 332, 68 P. 976; Pacific Gas & Electric Co. v. Taylor, 52 Cal. App. 307, 198 P. 651; Estate of Stevens, 57 Cal. App. 160, 206 P. 668; Thompson v. Thornton, 41 Cal. 626. We have examined all of these cases, and, while they illustrate the rule of liberality above referred to, in each instance there was a full legal showing made, not only of the impracticability of attendance, but also of the necessity therefor. Nor was there present in any of these cases any lack of diligence.

[4-8] An application for a continuance should be supported by affidavits or other proof, showing good grounds for the exercise of the discretion of the court. Marcucci v. Vowinckel, 164 Cal. 693, 130 P. 430. There should be a showing that the presence of the party is necessary. Greenlee v. Los Angeles Trust, etc., Bank, 171 Cal. 371, 153 P. 383; Queirolo v. Queirolo, 129 Cal. 686, 62 P. 315. In this last case, which was one where the application was supported only by proof of illness, the court says: "There was then no answer to the petition, no denial of its verified averments, no affidavit of defendant, nor even an oral statement of her counsel that, if permitted to be present, defendant would testify to the untruthfulness of the facts stated in the petition, or to any facts whatever; and no showing that her presence was necessary as a witness, or as adviser to her counsel in conducting the hearing. Under such circumstances it was not error to refuse the motion."

Section 595 of the Code of Civil Procedure provides that a motion to postpone a trial on the ground of absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. If the presence of the defendant was necessary, not to give evidence, but that he might advise and assist his attorney, it should have been shown that the attorney was not in possession of all of the facts, or names of the witnesses, or for some other reason was not as well prepared to try the case without him as with him. Wilkinson v. Parrott, 32 Cal. 102. Some showing should be made that the absent party may be expected to appear within a reasonable time, if the continuance be granted. Mead v. Broads, 21 Cal. App. 324, 131 P. 758. There should be a showing of diligence. Marcucci v. Vowinckel, supra.

[9] Applying these rules to the facts in the instant case, the showing here made for a continuance was far from satisfactory. It appears that the attorney for appellant attempted to notify him of the day of trial more than six months in advance, which notice appellant denies receiving, and although defendant was apparently available on the telephone, as well as otherwise, and lived within 30 miles, no other communication between attorney and client appears until the morning of the trial, at about 8 o'clock. When the case was called at 10 o'clock, no affidavit or proof of any kind was offered, and the verbal statement of counsel went only to the inability of appellant to be present for the reason given. The court asked for proof of the facts stated, and adjourned until 2 o'clock. At the afternoon session no proof was offered, except the affidavit of counsel, which was clearly hearsay. If it be assumed that the hearsay nature of such an affidavit may be excused, where counsel has no other recourse (see Pacific Gas, etc., Co. v. Taylor, supra), a different case is presented where first-hand proof was so readily procurable as here.

Even assuming that there was no lack of diligence on the part of counsel in going to the very day of the trial without ascertaining whether his clients had received a notice sent six months before, and further assuming that there was no time to get affidavits from a distance of 30 miles between 8 o'clock and 10 o'clock of that morning, still there would appear to have been time to get other than hearsay affidavits from that distance before 2 o'clock, especially when requested to make proof by the court and when an adjournment had been taken for that purpose. In any event, the affidavit filed went no further than stating the reason why appellant was absent, and covered none of the other essential matters above pointed out.

In connection with the motion for a new trial other affidavits were filed, as above mentioned, as to the reason for absence of appellant, and some going to the merits of the defense, but absolutely no showing was made, either originally or in connection with the motion for a new trial, as to the necessity for the presence of the party, or as to when he might be expected to appear, nor was any showing of diligence whatever made. Neither was any statement made of what was expected to be proved by the absent party. The only fact relied upon as warranting the continuance was the illness of the appellant's wife. This had apparently existed for a considerable time before the trial date, and, with reasonable diligence, there was ample opportunity to make the legal showing required. Where no legal showing is made in support of the application for a continuance, it is not an abuse of discretion to deny the same. Lovern's Estate, 137 Cal. 680, 70 P. 783; Beckman v. Waters, 161 Cal. 581, 119 P. 922.

[10, 11] In spite of the good reasons existing for liberality in granting continuances in civil cases in the interest of justice upon a proper showing, an orderly procedure demands that, in order to make a continuance practically a matter of right, a reasonable showing must be made. To permit otherwise would be an unnecessary burden on the courts

and an unnecessary expense to litigants and the public. An application for continuance is addressed to the sound discretion of the court, and its ruling will not be disturbed unless this discretion has been clearly abused. We are of the opinion that no such abuse of discretion has been here shown.

The judgment and orders are affirmed.

We concur: SLOANE, P. J.; MARKS, J.

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101 Cal. App. 456

BENT BROS., Inc., v. CAMPBELL, City Auditor. (Civ. 3940.)

District Court of Appeal, Third District, California. Oct. 25, 1929.

1. Constitutional law ⚷154(1)—Waters and water courses ⚷167(1)—Statute respecting supervision of dam construction held valid exercise of police power not violating constitutional provisions relative to impairment of contracts (St. 1929, p. 1505).

Act June 10, 1929 (St. 1929, p. 1505), respecting supervision of construction of dam by indirectly giving state engineer power to enforce recommendations by enabling him to begin actions to enjoin construction and maintenance of dam not constructed or repaired according to approved plans and specifications, *held* valid exercise of police powers which did not violate constitutional provisions relative to impairment of contracts.

2. Waters and water courses ⚷167(1)—State engineer under statute respecting supervision of dam construction may maintain suits to prevent contracts from being so executed as to create menace to life and property (St. 1929, p. 1505).

Although state engineer cannot impair obligations of contracts under constitutional provisions, he may, under Act June 10, 1929 (St. 1929, p. 1505), relative to supervision of dam construction, maintain suits to prevent contracts from being so executed and performed as to create menace to life and property.

3. Municipal corporations ⚷354—Where city let contract for dam construction on unit price basis, modification of plans at state engineer's demand did not require reletting of contract (Stockton City Charter, art. 23, § 1).

Where contract for construction of dam provided for unit price method of measuring costs, modification may be made in plans at demand of state engineer without reletting contract, notwithstanding Stockton City Charter, art. 23, § 1, providing that no contract shall be let where expenditure exceeds $1,500, except to lowest bidder after advertisement for sealed proposals.

4. Evidence ⚷65—City and contractor for dam construction are assumed to act with knowledge of applicable law.

It must be assumed that city in adopting plans and specifications for dam and contractor in entering into contract did so with knowledge of law applicable and character of work to be performed just as indicated by Civ. Code, § 1656, and this included knowledge and consideration of possible exercise of police power of state.

Application by Bent Bros., Inc., for a writ of mandate prayed to be directed to J. P. Campbell, as City Auditor of the City of Stockton, requiring him to issue warrant to petitioner for work done under a contract for the construction of a flood control dam. Writ granted.

Hill, Morgan & Bledsoe, of Los Angeles, for petitioner.

J. Le Roy Johnson, of Stockton, for respondent.

PLUMMER, J. This is an original proceeding instituted by the petitioner herein praying that a writ of mandate be directed to the respondent as auditor of the city of Stockton, to draw a warrant in favor of the petitioner against the city of Stockton for the payment of $70,724.27 alleged to be due the petitioner by virtue of a contract entered into between the petitioner and the city of Stockton for the construction of a flood control dam at a point in the Calaveras river, in the county of Calaveras, east of the city of Stockton. After a few preliminary allegations which we need not mention, the petitioner sets forth that on the 17th day of June, 1924, the electors of the city of Stockton, by their affirmative votes, approved an issuance of bonds in the sum of $1,500,000 to construct a flood control dam in the Calaveras river, in the county of Calaveras, at a place on said river designated in the proposal submitted to the electors at the bond election just referred to. Thereafter, and on or about the 14th day of July, 1924, the city council of the city of Stockton, by ordinance duly adopted, provided for the issuance of bonds to construct the flood control dam, as authorized by the electors of said city; that thereafter the bonds authorized to be issued were issued and sold, and the city of Stockton now has the money with which to meet the demand of the petitioner first herein mentioned; that pursuant to direction of the city council, the city engineer of the city of Stockton prepared plans for the erection of a flood control dam in the Calaveras river, and thereafter submitted them to the state engineer and by him were approved; that after the approval of said plans and specifications by the state engineer, and on the 13th day of May, 1929, the plans and specifications for the erection of the proposed flood control dam in the Calaveras river were submitted to the city council of the city of Stockton, and approved and adopted by the city council as the plans and specifications for the erection of said dam and making the improvements mentioned in the plans and specifications; that after these proceedings had been taken and had, and on the 4th day of June, 1929, the city council of the city of Stockton adopted its resolution authorizing the city clerk of the city of Stockton to advertise for sealed proposals for the furnishing of materials and performing the work in the construction of the flood control dam herein mentioned, in accordance with the plans and specifications adopted therefor; that after being so authorized, the city clerk regularly advertised for bids, and at the time appointed therefor, to-wit, on the 10th day of June, 1929, the city council publicly opened and examined all the sealed proposals for the building of said flood control dam, and after examining said bids the city council of the city of Stockton, by resolution, approved the bid of the petitioner, and the petitioner was awarded the contract for the construction of the proposed dam and the performance of all work connected therewith provided for in the plans and specifications; that thereafter, and on the 25th day of June, 1929, the city of Stockton entered into a contract with the petitioner for the doing of said work, and the furnishing of materials, and the petitioner, within the time limit specified, proceeded to begin and carry on the work under its said contract with the city of Stockton, in pursuance of the plans and specifications adopted therefor; that thereafter, and after work to the value of several thousand dollars had been performed under the petitioner's contract, and on the 16th day of September, 1929, the state engineer of the state of California, acting under the provisions of an act of the Legislature approved June 10, 1929 (Stats. 1929, p. 1505), having inspected the work and the plans and specifications therefor as adopted by the city of Stockton for the building of said flood control dam, did demand of the city of Stockton that certain modifications be made in said plans for the construction of said dam, and that certain changes be made in the work already done; that the change in the plans and specifications adopted by the city of Stockton, as made by the state engineer, involved decreasing the radius of the arch section and varying the radii for the horizontal arch sections in length from the base to the crest of the dam. The height, capacity, general location, and general type of the dam were not changed. The location of the central portion of the arch was moved up stream about 50 feet, and the left abutment down stream approximately the same distance. No considerable lateral displacement was made in the central mass of the dam. The quantity of foundation excavation required was about the same as specified in the original plans. The quantity of concrete required to make the necessary changes was increased about 10 per cent. above that estimated under the original plans. No material modification of the gravity section abutments are involved in the proposed changes. No change is made in spillway, outlet, or flood control works, nor in the specifications regarding construction. That in pursuance of the demand of the state engineer, the city of Stockton caused to be prepared certain modifications of the original plans for the work involved, and on the 16th day of September, 1929, the modifications of the plan for the doing of said work were duly and regularly presented to and adopted by the city council of the city of Stockton; that as modified and adopted by the city of Stockton the plans and specifications were thereafter approved by the state engineer; that since the modification of the plans made for the construction of said flood control dam as demanded by the state engineer, the petitioner has proceeded with the work of constructing said dam according to the modified plans, and has performed work entitling him to payment at the present time in the sum of $70,724.27, all of which appears by the certificate of the city engineer of the city of Stockton in his estimate and value of the work and the amount to which the petitioner is entitled, submitted to the city council of the city of Stockton; that the certificate of the city engineer was regularly approved by the city manager of the city of Stockton, and the claim of the petitioner is justly due and payable; that said claim of the petitioner was presented to the city auditor of the city of Stockton on or about the 1st day of October, 1929; that the city auditor, the respondent herein, refused to draw a warrant against the city treasury of the city of Stockton for the payment of the work performed by the plaintiff, as certified by the city engineer and approved by the city manager of the city of Stockton, on the ground that the plans for the construction of the flood control dam hereinbefore referred to had been changed to such an extent that it voided the contract under which the petitioner was seeking compensation.

[1, 2] This brings us to a consideration of the act of the Legislature approved June 10, 1929, relating to the supervision of dams. The first suggestion which we will consider is the unconstitutionality of the act, in that it is in violation of the constitutional provisions of this state and of the United States relative to the impairment of contracts; and, also, that it confers upon the state engineer arbitrary powers enabling him to adopt rules and regulations which, if violated, subjects the violator to a penalty of $2,000, or imprisonment in a county jail not exceeding six months, or both. While the act referred to does not, by its terms, define of what material any dam shall be constructed, whether of concrete, whether of rock-filled dam, or whether partly of concrete and earth filling, or of rock filling, it does provide for the inspection of any proposed dam and the making and proposing of amendments to any plans or specifications for the erection of a

dam. As we read the act there is nothing which authorizes the state engineer to directly require the construction of a dam according to any particular plans or specifications, nor does the act authorize the state engineer to make any material alterations in any contract which has been entered into between an owner and contractor for the construction of a dam. But while the act does not, in terms, directly authorize the state engineer to do what we have mentioned, it does indirectly give him power to enforce his recommendations and suggestions by enabling him to begin actions to enjoin and restrain the construction or maintenance of any dam not constructed or repaired according to approved plans and specifications, and through the medium of the court affect the safety of persons and property living below the point or place of the construction of the dam, and the creating of a reservoir which might become a menace to the property and lives of persons in the course which the impounded waters would take in the event the proposed structure proved inadequate to withstand the pressure of the impounded waters. We do not need to pass upon the question as to the validity of section 17 of the act referred to for the simple reason that, if it should be considered void under the reasoning of the case of Schaezlein v. Cabaniss, 135 Cal. 466, 469, 67 P. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122, no other portions of the act are thereby affected. Section 18 of the act authorizing the state engineer to institute actions by way of mandamus or injunction puts teeth enough therein to make all the reasonable mandates of the state engineer effective. While not so denominated, the act is purely a police regulation and must stand or fall as so considered.

A brief definition and statement will show the validity of the act as a police regulation and proper exercise of the sovereign power of the state. In 12 C. J. p. 904, we find the following applicable definitions: "The police power is the power inherent in a government to enact laws within constitutional limits to promote the order, safety, health, morals and general welfare of society. As applied to the powers of the states of the American Union the term is also used to denote those inherent governmental powers which under the federal system established by the Constitution of the United States are reserved to the several states." The police power of the state differs materially from the powers of eminent domain. In eminent domain one's property can be taken for public use only upon just compensation. Under the police powers it may not simply be taken, but destroyed without any compensation, depending upon the statutes of the state. Again: "The police power is an attribute of sovereignty, and exists without any reservation in the Constitution, being founded upon the duty of the state to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in orderly government. * * * It has for its object the improvement of social and economic conditions affecting the community at large, and collectively, with the view of bringing about the greatest good to the greatest number. On it depends the security of society, order, the life and health of the citizen, the comfort of existence, the enjoyment of private life and beneficial use of property." That the police power of the state to supervise and regulate the construction and maintenance of dams impounding large bodies of water, remained unexercised until the disastrous consequences following the breaking of the St. Francis dam in the southern part of the state, is no argument against its existence, but the experiences attending the breaking of that dam emphasize the necessity for, and the constitutionality of, the police powers being extended to, and including such structures in order that the safety of persons and property may be conserved. With these statements as a premise, we think the conclusion clearly follows that the act of the Legislature approved June 10, 1929, is constitutional in all its essential provisions, as not only a proper, but as a necessary exercise of the police powers of the state. A limited number of authorities only need be cited. In Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 39 S. Ct. 117, 118, 63 L. Ed. 309, 9 A. L. R. 1420, we find the following in relation to the exercise of the police powers of the state, and also of private rights when they come in conflict. It is there said: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court"—citing Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274. And further: "'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from' properly exercising its police powers 'for the general good of the public, though contracts previously entered into between individuals may thereby be affected'"—citing a number of authorities. The opinion in the case from which we are quoting further sets forth the law that: "'Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority'"—citing authorities. Again: "'There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' * * * 'It is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.'" In the notes appended to the case of Salt Lake City v. Utah Light & Traction Co., 52 Utah, 210, 173 P. 556, as reported in 3 A. L. R. 715, are quoted so many cases as to prevent any review of them in this opinion, setting forth the extent to which the police powers of the state may be applied, and the manner in which private rights must yield thereto, establishing abundant authority for the support of the act of the Legislature now being considered. Many of the cases referred to in the notes mentioned have to do with the regulation of rates and charges by public service corporations where contracts had been made giving certain consumers or patrons special rates. In practically all of the cases the contracts were held subject to the police powers of the state as exercised through public service corporations. While differing in the circumstances presented, the principle is the same. The conclusion, therefore, follows that, while the act under consideration does not authorize the state engineer to make a material alteration in the plans and specifications for the construction and maintenance or repair of any structure coming within the purview of the language used in section 2 of the act approved June 10, 1929, defining dams, it does authorize the state engineer to prevent, by injunction, suits, or other appropriate court procedure, the erection or maintenance of any structure impounding waters in such a manner as to create a menace to the safety of persons and property living and being along the course where such impounded waters would flow if suddenly discharged. In other words, while under the constitutional provisions we may admit that the state engineer cannot impair the obligations of contracts, he can maintain suits to prevent contracts from being so executed and performed as to create a menace to life and property.

[3] With these preliminary statements we will next consider certain provisions of the plans and specifications adopted by the city of Stockton for the building of the Calaveras flood control dam, and will consider them in the light of the problems presented, and the right of the state to exercise its police powers over the proposed structure. In the very beginning of this branch of the case it may be well to state that the plans and specifications, proposals, and contract called for bids upon, and provide for payment on, the basis of unit prices. For example, so many cubic yards of concrete at a certain price per cubic yard. We may also further state that the plans and specifications, proposals, and contract all contain language showing that the quantity of material to be used is only estimated, that is, it is estimated at so many cubic yards, whether in excavating or in building. This makes applicable subdivisions 29 and 30 of the plans and specifications. Subdivision 29, in part, reads as follows: "The City of Stockton, by and through its City Council, shall have the right to make such alterations, eliminations and additions as it may elect in the line, grade or dimension of the work herein contemplated or any part thereof, either before or after the commencement of construction. The details and working plans for such alterations, eliminations and additions shall be drawn by or prepared by the City Engineer of the City of Stockton subject to the direction of said City Council. * * * If such changes increase or decrease the amount of work, such increased or decreased quantity of work shall be paid for according to the quantities actually involved and at the unit prices established for such work under this contract." Subdivision 30, relative to extra work, reads: "Extra work or material shall be charged for at actual necessary cost, as determined by the engineer, plus ten per cent. for profit, superintendence and general expenses." Under the premises which we have laid down, we think it cannot be gainsaid that the city of Stockton was presented with an exigency or emergency necessitating the amendment or change of the plans and specifications theretofore adopted for the construction of the Calaveras dam so as to make it conform with the recommendations of the state engineer. The city council could either make the necessary changes and additions so as to safeguard the work and provide against all future contingencies in likewise safeguarding the lives and property below the proposed structure as recommended by the state engineer, or subject itself to an injunction suit to restrain its further proceeding with the proposed construction. Under these conditions the city council amended its plans to conform with the state engineer's suggestions providing additional safeguards. In so doing did the city council run counter to the provisions of section 1 of article 23 of the charter of the city of Stockton, in that said section specifies that no contract for work shall be let where the expenditure exceeds the sum of $1,500, except to the lowest bidder, after advertisement for sealed proposals? The answer to this question is found in the unit price method adopted for measuring the cost of the work prior to call-

ing for sealed proposals or bids in the first instance. While the extent of the work is indicated by the plans and specifications, and the amount of material to be used in the construction of the proposed dam is set forth, and the excavations to be made described, they are all in the nature of estimates. In other words, the extent of the excavations to be made and the quantity of material to be used are approximated only. The kind of material to be used is particularly described. The plans and specifications were sufficient to notify all patrons of the kind and character of the work to be done with an appropriation of the amount and extent thereof, and bids were called for on a unit price basis so that each contractor had the same opportunity to bid, and the interest of the taxpayer, in having the work performed for the least possible expenditure of money, properly guarded. The estimated cost of the work in this instance was over $800,000. The quantity of material runs up into several hundred thousand barrels. The circumstances surrounding the work and the character of the work itself precluded the possibility of fixing an exact price for the completed project. Where the unit price is fixed for measuring the value of the work done, every safeguard of the taxpayer is provided, as contemplated by the electors of the city of Stockton when adopting a charter containing the provisions found in section 1 of article XXIII relative to the calling for bids. It is scarcely within the domain of reason to conclude that where a unit price basis is adopted for measuring the value of the work estimated to be done, that if the city council, in the carrying forward of the work costing over $800,000, should find it advisable to make an addition or amendment to, or change in some immaterial portion of the work in order to render it more secure and the cost of so doing would aggregate the sum of $1,501, that the work of letting a contract would all have to be done over again.

In 44 C. J., page 379, we find the following: "Frequently, a municipal improvement contract is so worded and construed as to provide for the payment, not of a lump sum, but rather of a sum to be determined by applying specified unit prices to actual measurement of the work done. Also, provision is sometimes made for an estimate certificate or determination by the City Engineer or other designated officer or Board, of the amount and quantity of work done or materials furnished, or for a determination by him of all questions involving the amount earned under the contract, and for the payment each month, or at other stated periods, of a certain percentage of the estimate, and under such a provision the decision, estimate or certificate of the engineer or other designated officer or board is ordinarily binding and conclusive, provided it is not made fraudulently or in bad faith. * * * Where the certificate provided for has been given, the contractor is entitled to payment according to its terms." This statement of the rule exactly fits the conditions of the cause now before us and applies to the contract under which the petitioner has been, and now is performing work. No supplemental contract has been entered into in this case. If the additional work recommended by the state engineer and agreed to by the city council had necessitated the entering into or execution of a supplemental contract between the petitioner and the city council, then section 1 of article 23 of the charter of the city of Stockton would have applied, unless covered by the provisions of the contract. Thus, in 44 C. J. page 101, the law as to the statutes or charter provisions is thus stated: "Such statutes apply equally to supplemental contracts covering items not provided for by the terms of the original contract, unless bids for the original contract were made on the basis of contemplated extensions of the work under supplemental contracts to be made with the successful bidder without further bidding, and such statutes also apply to amendments of a contract already executed in compliance with the law, where such amendments alter the original contract in some vital and essential particular, notwithstanding a clause in the original contract reserves to the city the right to modify any of its essential terms by subsequent supplemental contracts to be made by its officers without due advertisement and competitive bidding." In the same volume, on page 297, the rule as to change of plans is thus worded: "A slight change in the character of the improvement as determined upon by the petitioners or by the municipal authorities, can be made at any time during the proceedings and prior to the execution of the improvement plan, but a substantial alteration, such as one which materially increases the cost of the improvement, amounts to an abandonment of the contract and cannot be made without the institution of new proceedings." Again, on page 373, we find the following: "Generally speaking, a municipal improvement contract may be changed or modified by the municipality, with the consent of the other contracting party, and without consulting abutting owners, but cannot be rewritten by the court or by one party alone." The foregoing statements of the law, save and except where otherwise stated herein, refer to contracts where the compensation is fixed at a lump sum, and under such circumstances we find that immaterial changes or modifications, which do not substantially affect the character of the work or unreasonably increase the cost thereof, are permissible.

In the case of Frazer et al. v. City of Ardmore, 103 Okl. 31, 229 P. 143, we have a case on all fours with the one at bar. There, the contract was based upon a unit price of the work to be performed in determining the compensation that would be earned by the contractor. The estimated cost of the work, as set forth in the contract, was $19,915.92, but, measured by the unit price method adopted for determining the cost and the money to which the contractor was entitled, it was found, upon completion of the work, to amount to the sum of $23,730.14. The right of the contractor to receive such payment was contested. The Supreme Court of Oklahoma upheld the contract and sustained the judgment of the trial court in awarding to the contractor the value of the work as measured by the unit price. We may here add that the compensation to which the contractor is found to be entitled exceeded the estimate in the contract by more than 10 per cent., which goes beyond the value of the extra work recommended in this case by the state engineer. That a clause in the contract authorizing the city to direct the performance of extra work, does not invalidate the instrument, is held in the case of City Street Improvement Co. v. Kroh, 158 Cal. 308, 110 P. 933. In the Kroh Case the contract involved was for a lump sum and was not let upon a unit price basis, and, while providing for extra work, did not obviate the provisions of the law relative to advertising and letting of bids for work exceeding the limit of expenditures allowed without bids.

To review all the authorities bearing upon the questions here involved would extend this opinion to an undue length. Therefore, we will confine our citation of authorities to a limited number, which support the following statements of the law: That where unseen emergencies arise after the letting of a contract and the beginning of work, further publication and letting of bids are not required. Board of Commissioners v. Gibson, 158 Ind. 471, 63 N. E. 982; City of Chicago v. McKechney, 91 Ill. App. 442; City of Ida Grove v. Ida Grove Armory Co., 146 Iowa, 690, 125 N. W. 866; Meyers et al. v. Wood, 173 Mo. App. 564, 158 S. W. 909; Alsmeier v. Adams, 62 Ind. App. 219, 105 N. E. 1033, 109 N. E. 58. Various illustrations are given in the cases just cited as to the changes in the plans necessitated by emergencies arising after the beginning of the work, and all of the cases hold that such changes do not invalidate the contract. A distinction, however, is made in all of the cases, between amendments or alterations in the plans and specifications which do not affect the material character of the work and those admitted changes or alterations which constitute substantial modifications or changes in the character and quality of the work to be performed. Where changes are only incidental, the contract is held unaffected; otherwise a different conclusion is reached. In the case at bar nothing has been called to our attention which would indicate any substantial change, either in the character of the work to be done, or, in view of the extent of the work to be done, any really substantial addition thereto. As we have shown, the added work does not reach the percentage degree approved in the case of Frazer et al. v. City of Ardmore, supra.

[4] Finally, it must be assumed that the city of Stockton, in adopting plans and specifications, and the contractor in entering into the contract, did so with the knowledge of the law applicable, and the character of the work to be performed, just as indicated by section 1656 of the Civil Code. This included a knowledge and consideration of the possible exercise of the police powers of the state in safeguarding the lives and property of all those persons living along the line that would be submerged by the sudden release of the impounded waters.

We think the prayer of the petitioner should be granted, and it is hereby ordered that a writ of mandate issue from this court directing J. P. Campbell, as the city auditor of the city of Stockton, to draw a warrant in favor of the petitioner for the sum of $70,724.27, payable out of the funds provided for the erection of the Calaveras flood control dam.

Demurrer overruled.

We concur: FINCH, P. J.; THOMPSON, J.

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101 Cal. App. 614

COFFIN v. BURNETT. (Civ. 6694.)★

District Court of Appeal, Second District, Division 1, California. Oct. 31, 1929.

Rehearing Denied Nov. 19, 1929. Hearing Denied by Supreme Court Dec. 30, 1929.

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

C. Franklin Baxter, of Los Angeles, for appellant.

Delmar W. Doddridge, of Los Angeles, for respondent.

PER CURIAM. This is an action by the mother of two illegitimate children to compel the defendant, as father of said children, to provide funds for their support. Defendant appeals from the judgment entered against him.

This appeal is presented solely upon the ground that the evidence is insufficient to sustain the finding of the court that appellant is the father of said children. Examination of the record shows that the evidence is quite sufficient to sustain the finding of the court.

The judgment is affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

101 Cal. App. 426

FORREST v. PICKWICK STAGES SYSTEM et al. (Civ. 7120.)★

District Court of Appeal, First District, Division 2, California. Oct. 23, 1929.

Rehearing Denied Nov. 21, 1929. Hearing Denied by Supreme Court Dec. 19, 1929.

1. Damages 🔑143—Plaintiff in action for injuries need not allege specifically each injury sustained or resulting from accident.

Plaintiff in action for injuries is not required to allege specifically each physical injury sustained, or which may have resulted, from accident, but it is sufficient if such injuries can be traced to the occurrence complained of, and are such as might naturally result.

2. Damages 🔑158(7)—Evidence of carbuncles, infection, and partial paralysis of plaintiff's shoulder and arm, resulting from accident, held admissible, under amendment of complaint alleging that plaintiff sustained permanent injuries, involving loss of use of shoulder and arm.

Under amendment of complaint, in action for injuries, alleging that plaintiff had been confined in hospital for period of 10 weeks, and would be confined in the future for indefinite period, and had been forced to undergo major operations, and had sustained permanent injuries involving loss of use of left shoulder, arm, and hand, evidence *held* admissible to show damages suffered by plaintiff by reason of carbuncles, infection of bones, and partial paralysis of left shoulder, arm, and hand, due to accident.

3. Continuance 🔑31—Where complaint was amended, prior to second trial, to allege permanent injuries involving loss of use of plaintiff's shoulder, arm, and hand, defendants were not entitled to continuance on account of plaintiff's evidence of carbuncles, infection, and partial paralysis.

Where, after first trial and eight months prior to beginning of second trial, plaintiff amended complaint in action for injuries, by claiming past and future treatment in hospital, major operations, and permanent injuries, causing loss of use of left shoulder, arm, and hand, defendants on second trial were not entitled to continuance on ground of surprise, on account of evidence not offered at the first trial of carbuncles, infection of bones, and partial paralysis of plaintiff's left shoulder, arm, and hand.

4. New trial 🔑151—Refusal of new trial for newly discovered evidence held not abuse of discretion, in view of counter affidavits and failure to show due diligence.

Refusal of motion for new trial in action for injuries sustained in automobile collision *held* not abuse of discretion, in view of counter affidavits and failure of affidavits to show diligence in obtaining newly discovered evidence.

5. New trial 🔑140(2)—Regard must be had to counter affidavits in determining motion for new trial.

Obtaining new trial is not merely matter of drawing up good affidavits, but regard must be had also to counter affidavits.

6. New trial 🔑56—Refusal of new trial for misconduct of jurors in speaking to courtroom clerk about progress of case held not abuse of discretion.

Refusal of trial court to grant new trial for indiscreet conduct of jurors in speaking to courtroom clerk about progress of case *held* not abuse of discretion, where substantial rights of parties were not prejudiced.

7. New trial 🔑56—Misconduct of jurors does not necessitate new trial, unless parties were prejudiced thereby.

Misconduct of jurors does not necessitate granting of new trial, unless it appears that prejudice to the substantial rights of the parties resulted.

8. Trial 🔑191(7)—Instruction that jury must presume plaintiff complied with law, "in absence of all evidence to show" his violation of ordinance, held not to assume absence of contributory negligence.

In action for injuries, instruction that, "in the absence of all evidence to show" whether plaintiff did or did not do anything required by law or ordinance at time of collision, jury must presume that plaintiff complied with regulations, *held* not erroneous, as assuming absence of contributory negligence.

9. Automobiles 🔑246(24)—In action for injuries in collision, in which defendants' stage was driven without headlights, instruction that plaintiff could presume other vehicles would be lawfully operated held not erroneous (Motor Vehicle Act, § 99).

In action for injuries resulting from automobile collision, instruction that plaintiff had right to presume that any other motor vehicle operating on highway would be lawfully propelled, in accordance with Motor Vehicle Act, § 99 (St. 1923, p. 546), *held* not erroneous, as ignoring issue of contributory negligence, where negligence relied on by plaintiff was operation of defendants' motor vehicle without headlights.

10. Negligence 🔑136(26)—Issue of contributory negligence is generally one of fact.

Issue of contributory negligence is one of fact, except where standard of conduct indicates certain definite things.

11. Automobiles 🔑208—One driver's failure to display headlights does not relieve another of duty of exercising ordinary care (Motor Vehicle Act, § 99).

Defendants' violation of Motor Vehicle Act, § 99 (St. 1923, p. 546), requiring headlights on motor vehicles, does not relieve another traveler on highway from duty of exercising ordinary care to avoid accident.

Appeal from Superior Court, Los Angeles County; Edward I. Butler, Judge.

Action by Alex J. Forrest against the Pickwick Stages System and another. Judgment for plaintiff, and defendants appeal. Affirmed.

B. P. Gibbs, of Los Angeles, for appellants.

Fredericks, Hanna & Morton, of Los Angeles, for respondent.

★Rehearing denied. Hearing denied by Supreme Court.

KOFORD, P. J. This is an action for damages for personal injuries sustained by plaintiff when an automobile milk truck in which he was driving was struck by a stage of the defendants in Los Angeles county, one-half mile east of the city of Girard. Plaintiff was proceeding westerly on Ventura boulevard, and was making a left-hand turn into Peralta avenue, when he was struck by the stage which was running east on Ventura boulevard without headlights. The collision occurred June 5, 1926, in the early morning, at least one-half hour before sunrise.

This is the second trial of the action. The first one, in June, 1927, resulted in a verdict for plaintiff for $2,000. The defendants moved for a new trial, and it was granted. A second trial was had in May, 1928, before a jury, and this time plaintiff obtained a verdict of $20,000. Defendants again moved for a new trial, but the motion was denied.

The first point on appeal is that the court erred in admitting testimony of the damages suffered by plaintiff by reason of carbuncles, infection of the bones, and partial paralysis, all of the left shoulder, arm, and hand, which according to plaintiff's evidence, were caused by the collision, when these things were not specially alleged in the complaint. The court ruled that the allegations of the complaint were sufficient, and allowed the testimony to be received, but at the close of plaintiff's case allowed a supplementary sentence to be added by amendment to the complaint, directly alleging the loss of use of the said left member. Defendants did not object to the filing of this amendment, but did claim the right to a continuance to meet the proof. The court, after consideration, denied defendants' motion for a continuance.

The allegation of the original complaint in respect to damages was as follows:

"That in said collision, caused alone by the said acts of the agent of the defendant, Pickwick Stages System, this plaintiff was hurt in his health, strength and activity, and received a profound shock to his nervous system, and received bruises upon the head, body and person, and made sick, sore and lame thereby, and particularly received serious and painful injuries in and around the head, and his back was wrenched, and he received bruises and abrasions on the left shoulder, back, both ankles and both knees; that from said injuries said plaintiff has suffered great physical pain and mental anguish."

In September, 1927, three months after the first trial and eight months before the second trial, a supplementary amendment to the complaint was made, adding to the above-quoted paragraph the following:

"That subsequent to the filing of the original complaint herein, plaintiff has been confined in the Los Angeles county hospital for the period of approximately ten (10) weeks, and is now so confined, and is informed and believes and on that ground alleges that he will be so confined for an indefinite period in the future; that during said confinement plaintiff has been forced to undergo two major operations, all as a result of said accident and the careless and negligent acts of defendants as hereinbefore alleged.

"Plaintiff is informed and believes and upon that ground alleges that the said personal injuries so sustained as aforesaid are permanent and that plaintiff will continue to suffer as hereinbefore set forth and will be permanently disabled as a result thereof.

"Upon the same ground plaintiff alleges that in addition to the moneys paid out for hospital, doctors, nurses and medical bills as hereinafter referred to, plaintiff will be required to expend additional undetermined sums in the future on account of such bills."

The amendment made at the end of plaintiff's case was as follows:

"That plaintiff as a result of the injuries as hereinbefore alleged has lost the use of his left shoulder, left arm and left hand, and the same has become permanently injured and disabled."

[1, 2] The allegations of the complaint as it was amended September, 1927, which was about 8 months prior to the beginning of this trial, were sufficient to inform defendants that they could expect something far more serious in the way of claimed injuries in the approaching trial than in the first trial. These amendments added the following significant items of injuries: Ten weeks in hospital with prospect of staying there an indefinite period in the future, two major operations, injuries permanent, permanently disabled, and more doctor bills coming. Certainly defendants could not have been taken by surprise, unless it be the law that a pleading must itemize each physical result of the injuries like a bill of particulars. The 1927 amendments to the complaint do not sound like the work of one who is attempting to conceal from his adversary the seriousness of the plaintiff's injuries. But that is the claim of appellants in claiming error in the court's refusal to grant a continuance to meet the proof.

It is true that the allegations to the effect that "said injuries are permanent and that plaintiff will be permanently disabled" are quite general, and that such alleged permanent disability might relate to any one or more of the broadly stated injuries previously alleged. For this reason the complaint was uncertain in respect to what it alleges, and was subject to a special demurrer; but that does not mean that it was insufficient to admit the proof received at the trial. "A plaintiff is not required to allege specifically each physical injury sustained or which may have resulted from the accident. It is sufficient if such injuries can be traced to the occurrence complained of and are such as might naturally result from the injury." Kuhns v. Marshall, 44 Cal. App. 588, 186 P. 632, 633, and cases cited. See, also, Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 264 P. 246; Dullanty v. Smith, 203 Cal. 621, 265 P. 814; Lauder v. Currier, 3 Cal. App. 28, 84 P. 217.

In Kuhns v. Marshall, supra, evidence of bladder trouble resulting from the accident was admitted under the general allegation that plaintiff was by the accident rendered sick, sore, lame, and was physically impaired. In the Martin Case, under special circumstances, evidence of curvature of the spine, chorea, endocarditis, and likelihood of cancer was admitted, under a complaint which did not specifically allege these diseases. In the Lauder Case, evidence of pleurisy and pneumonia was admitted without being specifically pleaded. The objection to evidence of the specific diseases and permanent disabilities resulting from the plaintiff's injuries in this case was, therefore, properly overruled. The amendment to conform to proof was unnecessary. The court's denial of appellants' request for a continuance is sustained.

[3] The refusal of a continuance was made after due consideration of the circumstances and occurrences at the trial. Appellants' experts were not prevented from making a physical examination of the plaintiff either before or during the trial. In fact, this was done by appellants one week prior to the trial, and testimony given of the results of such examination. If appellants were in fact surprised by the respondent's evidence, it was because their counsel unjustifiably took it for granted that the evidence at this second trial would be about the same as at the first trial, despite the nature of the amendments made to the complaint in the interim, which sufficiently, if not strongly, indicated that the contrary was to be expected.

[4, 5] Appellants also urge that the motion for a new trial should have been granted upon the grounds of newly discovered evidence. The numerous affidavits filed in support of the motion show that, if a third trial were allowed, the defendants would have more witnesses than upon the second trial. The new evidence in our opinion would add almost nothing to the critical issue in the case with respect to liability, as we conceive it to be, which is, what time did the accident happen? Some witnesses stated it was dark, and others light, daylight, daybreak, and good daylight. Some were looking west, and some east. What appears light to one may seem dark to another. In this state the time, one-half hour before sunrise, gives a more definite idea of maximum visibility than the various opinions of witnesses. The law of this state has fixed that exact time as the earliest in the day that one may motor on the highway without lighted headlamps. The newly discovered evidence gave no promise of helping on this point. This is stated without regard to the counter affidavits. The counter affidavits leave no room for this court to decide that the trial court abused its discretion in denying the new trial asked for on this ground.

As to the newly discovered evidence in regard to the nature of the damages suffered by plaintiff, the affidavits show that defendants' diligence *after* the trial netted considerable cumulative expert testimony upon the question of whether plaintiff's permanent disabilities were attributable to the collision, and promised some declarations of the plaintiff against interest made October, 1926, concerning his then state of health. The affidavits, however, are deficient in failing to state facts showing diligence of defendants prior to the trial. The affidavits contain only conclusions on this important point. But obtaining a new trial is not merely a matter of drawing up good affidavits; regard must also be had to the counter affidavits. The decision of the trial court upon the motion for a new trial does not show an abuse of discretion in deciding either that the new evidence would not probably change the result upon a third trial, or that the defendants did not exercise reasonable diligence in endeavoring to discover the evidence before the second trial. For these reasons, the motion for a new trial upon the ground of newly discovered evidence was properly denied. Estate of Emerson, 170 Cal. 81, 82, 148 P. 523; Oberlander v. Fixen & Co., 129 Cal. 690, 62 P. 254; Spiegelman v. Eastman (Cal. App.) 272 P. 761; 10 Cal. Jur. 184.

[6, 7] The third ground urged for a new trial was the alleged misconduct of two jurors in speaking to a courtroom clerk about the progress of the case. The judge investigated the matter in chambers in the presence of counsel. The clerk and the two jurors were sworn and examined. Each juror denied that she had talked about the merits of the case. The trial court resolved this conflict of evidence, and we may not say improperly, on this appeal. Even taking the clerk's version of the matter, it was at most the unimportant chatter of an inexperienced juror. It was improper on the part of the juror, but not serious. The court was well warranted in finding that the indiscretion did not call for a mistrial. Misconduct does not necessitate the granting of a new trial, unless it appears that prejudice to the substantial rights of the parties resulted therefrom. McPherson v. West Coast Transit Co. (Cal. App.) 271 P. 509, and cases cited.

[8] The court gave the jury the following instruction: "You are instructed that, in the absence of all evidence to show whether the plaintiff did or did not do any thing or act required by any law or ordinance at the time of the collision in question, you must pre-

sume that the plaintiff did comply with all laws or regulations governing his conduct." Appellants claim this instruction assumed as a fact that there was an absence of all evidence upon the subjects mentioned. If so, it is very slight and indirect and is cured by other instructions upon contributory negligence. In such instruction, the expression "in the absence of all evidence to show" should be understood to mean "if the jury finds an absence of all evidence," and it is not an assumption of fact which is prohibited the trial judge. It is like defining negligence and contributory negligence. That does not assume negligence or contributory negligence to be an established fact in the case.

[9-11] The court also instructed that plaintiff had a right to presume that any other motor vehicle operating on the highway would be lawfully propelled in accordance with the Motor Vehicle Act. It is claimed that this instruction was reversible error, under the authority of McPherson v. Walling, 58 Cal. App. 563, 565, 209 P. 209. That case, following certain railroad crossing cases, holds that such an instruction ignores the issue of contributory negligence, because it tells the jury that a plaintiff may rely upon the assumption that the defendant will do his duty, even though he himself disregards his own duty. The same decision, however, points out cases in which such an instruction may be given without error. Of course they are not cases where there is no issue whatever of contributory negligence. There would be no object in telling the jury what the plaintiff might rely upon or assume, if there were no issue as to the reasonableness or carefulness of his conduct. The issue of contributory negligence is one of fact, except where the standard of conduct indicates certain definite things.

Whether the giving of the instruction constitutes reversible error depends upon whether it has the effect of leading the jury to ignore the issue of contributory negligence. In the instant case the giving of the instruction could mean substantially nothing more than that plaintiff had the right to expect vehicles bearing down on the crossing to have burning headlights, if the time was one-half hour before sunrise. That is the main requirement of the Motor Vehicle Act involved in this case. If there was negligence, it was the absence of headlights. If there was contributory negligence, it was plaintiff's failure to see the stage. No witness who observed the time of day at the time of the collision fixed the time later than the driver of the stage, who fixed it at 4:10 a. m. The sun rose at 4:42 a. m. on the day and place of the collision. The witnesses disagreed upon whether it appeared to them dark or light; but the law decrees that at one-half hour before sunrise it is dark enough to need headlights. Motor Vehicle Act, § 99 (St. 1923, p. 546).

Plaintiff could, therefore, charge defendants with actionable negligence for failure to display such headlights, but was not entitled to any instruction which would have the effect of removing from the case the issue of contributory negligence; for, even in the absence of headlights on the stage he still had the duty of seeing it, if in the exercise of ordinary care he should have done so. The court instructed the jury very fully upon the issue of contributory negligence. It gave an unusually large number of paragraphs upon this one subject, as if a new and complete paragraph had been prepared for each possible factor entering the law of contributory negligence. It does not seem possible that the jury could have understood that the plaintiff was not obliged to use every reasonable and ordinary precaution for his own safety, even though the stage displayed no headlights. We accordingly hold that the instruction does not justify a reversal of the case.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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101 Cal. App. 418

RICHARDSON v. MORRISON, Justice of the Peace. (Civ. 14.)

District Court of Appeal, Fourth District, California. Oct. 22, 1929.

Justices of the peace ⚷17—Under fee statute, justice of the peace held not required to pay county treasurer fees for solemnizing marriages (Pol. Code, §§ 4290, 4292).

Under Pol. Code, § 4292, providing all salaried officers of counties and townships should collect certain fees and pay them to county, Const. art. 6, § 15, providing that no judicial officer shall receive for his own use any fees of such office, and section 4290, providing salaries and fees provided should be full compensation for all services rendered by officers named, justice of the peace being one of those named, justice *held* not required to pay to county treasurer fees collected from solemnizing marriages.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Geo. S. Richardson, as taxpayer, in behalf of himself and all other taxpayers of Orange County, against Kenneth E. Morrison as Justice of the Peace, Santa Ana Township, Orange County, seeking a writ of mandate. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

W. M. Smith, of Santa Ana, for appellant.

R. Y. Williams and L. A. West, both of Santa Ana, for respondent.

BARNARD, J. The plaintiff brought this action as a taxpayer, in behalf of himself and all other taxpayers of Orange county, against the defendant as justice of the peace of Santa Ana township, Orange county, seeking a writ of mandamus directed to said defendant, commanding him to pay into the county treasury all money received by him as such justice of the peace from parties to any marriage solemnized by him, either as "fee, gift, reward, tip, compensation or otherwise," during his term of office. The petition alleges the election, qualification, and acting of defendant as such justice of the peace, that he has solemnized a certain number of marriages, for which he has accepted from the contracting parties and retained for himself large amounts of money, and that this retention is a direct injury to plaintiff and all other taxpayers of said county. The trial court entered an order and judgment sustaining a general demurrer to the petition, without leave to amend, and denying the writ of mandate prayed for by plaintiff. This appeal is from such judgment.

Appellant earnestly contends that the order and judgment appealed from is contrary to the Constitution and both the civil and criminal law of the state of California, and against public policy. Four points are relied on, with various citations of authorities. It is unnecessary to pass upon these points, for the reason that they all go to the alleged fact that it was illegal for respondent to accept the money involved. And, even if appellant's contention was upheld as to any or all of the points relied on, such holding that the acts complained of were illegal would not settle the question here involved. The only question presented by this appeal is whether defendant, as such justice of the peace in such an action as this, may be compelled to turn over money received in the manner indicated to the county treasury.

If it be assumed that the accepting of "fees, gifts, rewards, tips, compensation or otherwise" by a justice of the peace for marriages solemnized is illegal, still there is no law requiring such a person to pay over money so received to the county treasury. Prior to the 1913 session of the Legislature, the law provided for a fee of $3 to be charged and collected by a justice of the peace for celebrating a marriage and returning a certificate thereof to the county recorder. Stat. 1907, p. 552. This provision was omitted by the Legislature in 1913 (Stat. 1913, p. 1442), and since that time no such fee has been provided for by law.

Section 4292 of the Political Code provides: "All salaried officers of the several counties and townships of this state shall charge and collect for the use of their respective counties, and pay into the county treasury, on or before the fifth day of each month, the fees now or hereafter allowed by law in all cases, except where such fees, or a percentage thereof, is allowed such officers, and excepting also such fees as are a charge against the county."

In the case of City of Sacramento v. Simmons, 66 Cal. App. 18, 225 P. 36, 41, the defendant, who was a city commissioner of the city of Sacramento, also performed the duties of local registrar of vital statistics for the state in that city, for which he received certain compensation from the county. In this action by the city to collect from defendant the moneys so received, the court said: "That the defendant may not have been legally authorized * * * to collect money from the county of Sacramento for his services to the state does not give to the city of Sacramento any title to the money so collected."

The case of State ex rel. McNary v. Dunbar, 53 Or. 45, 98 P. 878, 880, 20 L. R. A. (N. S.) 1015, decided by the Supreme Court of Oregon, was an action by a taxpayer on behalf of the state to compel the secretary of state to account to the state for certain fees which it was alleged he had illegally collected. In its opinion, the court, after assuming, but not deciding, that the collection of the fees was prohibited by the Constitution of that state, said:

"The right to exact such fees for the benefit of the state, or its title to the money so collected, must be established by legislative authority. If the fees cannot be exacted for the purpose prescribed in the statute, then they cannot be exacted at all, and if collected without authority, may be recovered by the person from whom exacted, if he is not otherwise barred."

"But the state's right to such fees depends upon some legislative provision exacting the same as compensation to the state. * * * but the unauthorized exaction of fees by an officer cannot operate to give the state or the county title to the money so received."

The case of Bell v. Martin, 64 Or. 519, 130 P. 1126, 1127, also decided by the Supreme Court of Oregon, is nearly identical with the case at bar. The plaintiff, a justice of the peace, secured an alternative writ of mandamus, directed to the county auditor, directing him to approve a claim for petitioner's salary, or show cause why he had not done so. By way of return, the auditor alleged that plaintiff had received a large sum as fees for solemnizing marriages, which he had failed to pay to the county treasurer. The lower court sustained a demurrer to this answer, and, upon a refusal to plead further, a peremptory writ was issued. It was stipulated that the appeal was to test the one question as to whether or not the justice of the peace had the right to keep fees collected for performing marriage ceremonies. The opinion states that originally such officers derived their compensation from fees collected from litigants, and from those to whom other services were rendered, including a fee of $5 for performing a marriage ceremony and making a return thereof; that this was later changed and at the time involved the law provided for a definite salary, "which said salary shall be in full compensation for all services or duties performed by said justices of the peace and no other fees, commissions or compensation whatever shall be allowed to or received by them"; that the law required them to perform the duties of their office, collect the fees allowed by law, and on the 1st day of each month turn the same over to the county treasurer; and that, as the law then stood, a justice of the peace had no authority to exact a fee for performing a marriage ceremony. The court then says: "It is solely by virtue of the statute that the county has any right to the fees collected by the justices, and, if the latter had no right to collect them, neither has the county any right to demand the same from him. * * * The title of the county to the money cannot be better than that of the officer who collected it."

Appellant relies on similar provisions in California, limiting a justice of the peace to his fixed salary. The Constitution of California, art. 6, § 15, provides: "No judicial officer, * * * shall receive to his own use any fees or perquisites of office. * * *" And section 4290 of the Political Code provides, in part: "The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title." One of the officers named in this title is justice of the peace.

In support of his contention that an officer collecting fees not authorized by law may be compelled to turn over the same to the public treasury, appellant cites only two cases, to wit, People v. Van Ness, 79 Cal. 84, 21 P. 554, 12 Am. St. Rep. 134, and County of Kern v. Fay, 131 Cal. 547, 63 P. 857. We think these cases are not controlling here. In People v. Van Ness the money involved was collected by the defendant in his official capacity and under color of office, under his own misconstruction of a Code section, and was paid into the state treasury. Later, in a suit upon his bond for other moneys, defendant claimed the right to offset this money previously so collected by mistake and paid over to the state. The court merely held that the money, in any view, did not belong to defendant; that it belonged to the parties from whom collected, but the state, under the circumstances, was the proper custodian of the money. In County of Kern v. Fay, the court held that certain attorney fees paid to the district attorney of Kern county were authorized by law, were paid to defendant in his official capacity, and that, as his salary was in full compensation for official duties, he could not retain the fees.

We are of the opinion that the law, as now existing, requires a justice of the peace to pay into the county treasury only the fees now provided for by law, and in that these do not include such money as is described in appellant's petition. Whatever be the status of the payments or gratuities involved in this action, they are not such fees as are required to be paid to the county by any existing statute. If the justice of the peace has no right to collect them, neither can the county demand them from him. Irrespective of whatever other action might be taken in regard to any such money, if the *acceptance* of the same be in violation of law, the county has no right nor title thereto, and appellant was therefore not entitled to the writ prayed for.

The judgment is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

208 Cal. 476

LOBB v. BROWN et al. (S. F. 12399.)★

Supreme Court of California. Oct. 31, 1929.

As Modified, on Denial of Rehearing, Nov. 25, 1929.

1. Trial 🔑395(7)—Trial court's conclusion of law must be supported by findings of fact.

Trial court's conclusion of law must find support in findings of fact, and unless so supported must fall.

2. Trial 🔑398—Specific findings control in case of inconsistency between them and general finding.

Specific findings of fact of trial court must control in case of inconsistency between specific findings and general finding.

3. Wills 🔑651—Provision for forfeiture of legacy in event of contest by legatee is valid.

Provision in will for forfeiture of legacy in event of contest of the will by legatee is valid and binding on legatee.

4. Wills 🔑658—Provision forfeiting legacy in case of contest by legatee must be strictly construed.

Provision in will for forfeiture of legacy in event of contest of will by legatee must be strictly construed.

5. Wills 🔑665—Failure of two legatees, made defendants in will contest, to deny charge of contestants that third legatee exercised undue influence, held not to make first two legatees contestants, within forfeiture provision.

In will contest, brought against three legatees under will to set aside will, in so far as third legatee was given interest in residue of estate, failure of the other two legatees to deny by their answer charge made by contestants that third legatee had obtained his legacy by undue influence *held* not to bar the first two legatees from participation under will as contestants, within provision of will for forfeiture of share of contesting legatee.

6. Wills 🔑665—Statements in court of attorney for two legatees, made defendants in will contest, that his clients would like to see contestants succeed, and had financial interest in their success, held not "contest" by legatees, within forfeiture provision.

Statements in open court by attorney for two of legatees, made defendants in will contest attacking that part of will which gave share of estate to third legatee, that they would like to see contestants succeed, and that their clients had a financial interest if they did, *held* not to constitute "contest" of will by legatees, within provision for forfeiture of share of contesting legatee.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Contest.]

7. Wills 🔑665—Legatee testifying for contestants held not contest, within forfeiture provision of will, where testimony was given under subpœna.

Participation by legatee as witness on behalf of contestants, in will contest attacking will in so far as it made provision for another legatee, *held* not to constitute contest of will by the first legatee, within provision forfeiting share of contesting legatee, where legatee did not seek out contestants or their attorney for purpose of becoming a witness, and testified under subpœna.

8. Wills 🔑665—Legatee, who produced in court papers used as evidence by contestants, without being subpœnaed to do so, did not become "contestant," within forfeiture provision.

In will contest, production in court by legatee of certain papers used as evidence on behalf of contestants, without subpœna having been issued for their production, did not render legatee a "contestant," under provision for forfeiture of share of legatee contesting will, where trial court found that legatee did not attempt in any way to establish interest of contestants.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Contestant.]

9. Wills 🔑665—Legatee's conduct in arranging meeting between contestants' attorney and proposed witness held not to render him contestant, within forfeiture provision.

Conduct of legatee in referring proposed witness for contestants to contestants' attorney, and in later arranging for meeting between him and attorney, did not render legatee a contestant, within provision of will for forfeiture of share of contesting legatee, where it did not appear that legatee was acting from any particular desire or intention of assisting contestants in their will contest.

10. Wills 🔑667—Findings as to legatee's connection with will contest instituted by others held not to require conclusion that legatee was contestant, within forfeiture provision.

Findings as to legatee's participation in will contest proceedings as witness for contestants, as to legatee's failure to deny charge that another legatee exercised undue influence, as to legatee's statements in court, and conduct in bringing about meeting between contestants' attorney and witness, *held* not to require conclusion that legatee aided or assisted in contest in any substantial degree, so as to bring him within clause of will forfeiting share of contesting legatee.

11. Wills 🔑665—Contribution by nephew of testatrix to expenses of will contest, after institution thereof by others, held not to render nephew contestant, within clause forfeiting share of contesting legatee.

Where will contest was instituted by persons other than legatees and without their knowledge, to set aside will as regards share of third legatee, who was made executor, and where such third legatee was unrelated to testatrix and had no claim on her bounty, whereas the first two legatees were nephews living with testatrix as part of her family, contribution made by one of nephews to the contest, after institution thereof and after trial had begun,

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★Rehearing denied.

did not work a forfeiture of his legacy, under provision for forfeiture of share of legatee contesting will.

12. Wills 🔑658—Provision for forfeiture of share of contesting legatee should be most strictly construed, where will included legacy to mere acquaintance of aged testatrix.

Where will of aged testatrix included as legatee, together with her nephews, person who had no claim on her bounty, provision in such will for forfeiture of share of contesting legatee should be most strictly construed.

13. Wills 🔑665—Dismissal of will contest not instituted by legatees, on ground of want of standing of contestants, pretermitted question of forfeiture of shares of legatees.

Where trial court dismissed proceedings to contest will on ground that contestants were without legal right to institute contest, and such dismissal was in response to answer to legatees denying interest of contestants in estate, legatees could not be held contestants in such proceeding, within clause of will providing for forfeiture of shares of contesting legatees.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Harry W. Lobb against Frank Arthur Brown and another. Judgment was entered for defendants. From an order denying plaintiff's motion to set aside the judgment and enter a judgment in his favor on the findings, plaintiff appeals. Judgment and order affirmed.

Superseding opinions in 276 P. 583, and 277 P. 371.

Hadsell, Sweet & Ingalls, of San Francisco, and Earl Warren and Ralph E. Hoyt, both of Oakland, for appellant.

Byrne & Lamson and Knight, Boland & Christin, all of San Francisco, for respondents.

CURTIS, J. This action was instituted for the purpose of having it declared that the defendants hold in trust for the plaintiff certain real and personal property received by them under decrees of partial distribution in the estate of Mary Ellen Moore, deceased.

Mary Ellen Moore at the time of her death was about 82 years of age. Her home had been in Alameda, in the county of Alameda, where she had resided many years immediately preceding her death. The defendants are brothers, and were nephews of the deceased. They had been reared by her, and had spent most of their lives with her. The decedent had made a prior will to that which was filed and probated as her last will and testament. In this prior will the defendants were made residuary legatees, and, after certain bequests to friends and acquaintances of the decedent, the residue of her estate, approximately in value $200,000, had been devised and bequeathed to defendants.

Shortly before her death, she executed a second will. In this will the plaintiff was named as the executor thereof, and he and the defendants were named as residuary legatees. This second will contained the following provision, therein designated as paragraph 18, which was not found in her former will:

"If any person named herein, or unnamed herein, shall institute proceedings in anywise contesting this my last will and testament, then I give, devise and bequeath to such person or persons the sum of one dollar ($1.00), and no more. In the event of any person named herein contesting this will, then the share of said person mentioned in this will shall go to the residuary legatees or legatee not contesting."

Mary Ellen Moore died at her home on August 14, 1920. On September 2, 1920, the will hereinbefore referred to as her second will was duly admitted to probate as her last will and testament, and the plaintiff, Harry W. Lobb, was appointed executor thereof. On September 8, 1920, the law firm of Byrne & Lamson, representing both of the defendants, Frank A. Brown and Herbert E. Brown, filed in the office of the county clerk of Alameda county their notice of appearance and demand for notices as such attorneys, as provided by section 1380 of the Code of Civil Procedure. Thereafter two petitions for partial distribution of certain portions of said estate were filed by the defendants, Frank A. Brown and Herbert E. Brown, and the court in response to said petitions made two decrees, one dated January 17, 1921, and the other October 10, 1921, by which it distributed to Frank A. Brown and Herbert E. Brown certain real and personal property of said estate, of the approximate value of $120,000.

Between the dates of said two decrees of partial distribution, and on June 9, 1921, George J. Moore and certain named stepchildren of the decedent, Mary Ellen Moore, hereinafter referred to as the Moore heirs, filed a contest directed solely to that portion of the last will and testament of Mary Ellen Moore, by which there was bequeathed to the plaintiff herein, Harry W. Lobb, one-third of the residue of said estate. One of the grounds upon which this contest was based was alleged to be undue influence of this plaintiff, Harry W. Lobb, in securing the execution of said will by the decedent. In this contest proceeding the plaintiff and the defendants were made parties defendant therein. Frank A. Brown and Herbert E. Brown appeared therein by their attorneys, Messrs. Byrne & Lamson, and filed an answer to said contest. In their answer they denied that the contestants had any interest in the estate of the decedent which would entitle them to contest her will. They did not deny, however, the charge made by contestants that the residuary clause of her will, in so far as it provided that the said Harry W. Lobb should be entitled to one-third of the residue of said estate, was invalid by reason of the undue influence practiced on decedent by the said Harry W. Lobb. The contest was tried by the court sitting with a jury, and resulted in an order of court discharging the jury and dismissing the proceeding. This order was dated September 14, 1922.

In the present action, it is charged by the plaintiff in his complaint that the defendants, Frank A. Brown and Herbert E. Brown, "and each of them, did contest said last will and testament of Mary Ellen Moore, deceased, in violation of the eighteenth paragraph thereof and did seek to destroy and render of no effect the residuary clause in said will, in so far as it bequeathed to Harry W. Lobb one-third of the residue of said estate." The complaint then set forth certain acts of the defendants, and of their attorneys, Messrs. Byrne & Lamson, which were alleged to have been done during the pendency of the said contest proceeding and during the trial of said proceeding in the superior court of Alameda county, and which, it was alleged, were done for the purpose of, and which actually did, aid and assist the contestants in their attempt to have declared invalid that portion of the last will and testament whereby Harry W. Lobb was bequeathed one-third of the residue of said estate. The defendants filed separate answers, in which they made substantial denial of all of the allegations of the complaint embodying the charge that they had contested or had assisted in the contest of the last will of the decedent. The action was tried, and the court made and filed its findings of fact and conclusions of law, upon which judgment was rendered in favor of the defendants. From this judgment plaintiff has appealed.

The court found that it was "not true that defendant Frank A. Brown did contest said last will as mentioned in said complaint, or at all." In addition to this finding, the trial court found certain specific acts to have been committed by the said Frank A. Brown and the said Herbert E. Brown in connection with the proceeding brought and prosecuted to contest the will of said decedent. The court made no definite finding as to whether or not Herbert E. Brown contested said will.

[1, 2] The appellant contends that the finding of the court that Frank A. Brown did not contest the will of decedent is merely a conclusion of law, and that the special findings of the court as to the specific acts of these defendants show conclusively that each of them did contest the will of said decedent, and thereby forfeited his right to the real and personal property bequeathed and devised to him in said will. Whether the finding of the court that Frank A. Brown did not contest the will of said decedent is a finding of fact or a conclusion of law, it would be controlled by the specific findings of the court as to the acts of Frank A. Brown committed by him in connection with said contest proceeding, if there is any conflict between the general finding and the specific findings.

Treating it as a conclusion of law, it must find support in the other findings of the court, which are in fact findings of fact, and, unless it is so supported, it must fall. Treating it as a general finding, and the findings of the court as to the particular acts of Frank A. Brown as specific findings, the latter must control in case of any inconsistency between said general finding and said specific findings. Turner v. Turner, 187 Cal. 632, 203 P. 109; Estate of Ross, 187 Cal. 454, 202 P. 641. It follows, therefore, that the validity of the judgment must be determined by a consideration of the specific findings relative to the acts of the defendants, in connection with the institution and prosecution of said contest. There are other questions raised, such as the capacity of the plaintiff to maintain this action, and the misjoinder of defendants and of causes of action; but, in the view we take of this action, it will not be necessary to pass upon these questions.

The specific findings of the court as to the particular acts committed by the respondents in the matter of the contest of the decedent's will instituted by George J. Moore and others, and which acts of the respondents the appellant claims constituted a contest of said will by respondents, and, therefore, worked a forfeiture of the bequests and devises to which the respondents would otherwise be entitled to receive and hold under said will, may be for convenience divided into three classes: (1) Those which relate to both of the respondents; (2) those which relate to Frank A. Brown; and (3) those which relate to Herbert E. Brown. These we will discuss in the order named.

First. The court found that neither of said defendants knew that any contest of said will had been instituted until after the same had been brought by the contestants; that defendants filed their answer in said contest proceeding, but in said answer they did not deny those allegations in the petition alleging acts of undue influence; that they were represented in said contest proceeding by the firm of Byrne & Lamson; that J. S. Lamson, of said firm, attended the trial of said contest during three or four days of said trial, which lasted for nine days; that on one occasion during the trial of said contest, but at a time when the jury was not present, the said J. S. Lamson, in answer to a question propounded to him by one of the attorneys for the proponents in said contest, stated, "I have no hesitancy in saying that we would like to see the contestants succeed in the case," and further, in answering a question as to whether "you have a financial interest in it, if they do," replied, "There is no doubt about that."

Second. The court found that the attorney for the contestants, Mr. McWilliams, called upon Mr. Lamson and asked to have an interview with Frank A. Brown regarding the contest that he had instituted to have certain portions of the will of the decedent declared invalid. At first Mr. Lamson refused Mr. McWilliams' request, but later arranged a meeting between Mr. McWilliams and Frank A. Brown. Thereafter Frank A. Brown was subpœnaed as a witness at the trial of said contest, and testified to certain facts within his knowledge regarding said decedent and her business affairs. He also produced certain papers which he had secured from the home of the decedent after her death and prior to the appointment of an executor of her will. These papers, or at least a portion, were offered in evidence by the attorney for the contestants, and by order of court were admitted in evidence.

During the trial of said contest, a man by the name of A. W. Porter met Frank A. Brown on a ferryboat running between San Francisco and Oakland, and volunteered to be a witness in the contest proceeding. Frank A. Brown informed him that Mr. McWilliams was handling the case for the contestants, and the next day informed Mr. McWilliams of the conversation with Porter. Mr. McWilliams stated that he would like to meet Porter, and Frank A. Brown replied: "The next time I see him, if I see him in the next day or two, I will tell him that you want to see him." Frank A. Brown thereafter saw Porter on the ferryboat and told him that McWilliams wanted to see him, and arranged to meet him at McWilliams' office a few days later. The meeting at McWilliams' office was held as planned, with the result that Porter later testified as a witness in favor of the contestants. The court further found that Frank A. Brown did not "attempt in any way to establish the interest of contestants in said estate, or that he had any purpose, except that of attending as a witness in obedience to a subpœna, and answering truthfully such questions as were put to him." The court also found that Frank A. Brown did not pay "to the contestants, or to their attorney, or to any of them, any sum or sums of money whatever, for any purpose, or at any time."

Third. Herbert E. Brown did not attend the trial of the contest of decedent's will. The court found, however, that through his attorney, J. S. Lamson, he paid to Robert L. McWilliams, attorney for contestants, the following sums of money: $100 on September 4, $100 on September 13, $506.40 on September 25, and $100 on September 28, 1922. The trial was begun on August 30, 1922, and, as before stated, lasted nine days. The court found that the money paid to McWilliams was used by him for the payment of the expenses or attorney's fees of the trial of said contest, except the sum of $100, which was paid for the purpose of prosecuting an appeal from the judgment rendered, and "that, at the time said Herbert E. Brown delivered said money to said J. S. Lamson, he knew that said money was to be so used, and thereafter knew that the same was so used."

While the foregoing does not comprise all the findings of fact made by the court, it does set forth the more salient and important facts embodied in said findings. The findings themselves are voluminous and cover 18 pages of the typewritten record. The foregoing facts, as set forth above, we think, will sufficiently present the cause of the respective parties and permit the application of the principles of law governing their rights in this controversy.

[3] That a provision in a will providing for a forfeiture of a legacy in the event of a contest of the will by the legatee is valid and binding upon said legatee has been held frequently by this court. Estate of Hite, 155 Cal. 436, 101 P. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; Estate of Miller, 156 Cal. 119, 103 P. 842, 23 L. R. A. (N. S.) 868; Estate of Shirley, 180 Cal. 400, 181 P. 777; Estate of Bergland, 180 Cal. 629, 182 P. 277, 5 A. L. R. 1363; In re Kitchen, 192 Cal. 384, 220 P. 301, 30 A. L. R. 1008. In some of these cases it is expressly held that such a provision in a will is not against public policy, but meets with its approval. Estate of Hite, supra. But in Estate of Bergland, supra, where this court was considering the effect of such a clause in a will upon a legatee therein named who in good faith had attempted to probate a later spurious will, we find the following language:

"It is the policy of the law to encourage the presentation for probate of wills of decedents in order to make the more certain that those really entitled to their bounty shall enjoy it. To place upon one under the moral, if not the legal, obligation of probating the decedent's will the burden of gambling on his ability to do so successfully, no matter how sincere he may be, would be directly opposed to such policy."

In that case this court held "that an attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the party seeking its probate, does not fall within the forfeiture clause under consideration here." The forfeiture clause in the will in the Estate of Bergland, supra, read as follows: "Fourthly, it is my positive instruction that should any one or more of the beneficiaries named in this will object to the distribution as made, or attempt to defeat the provisions of this will that said person or persons shall receive the sum of five dollars ($5.00) each and no more."

[4] It is universally held, we think, that such a clause in a will, like all other forfeiture provisions, is to be strictly construed. In the Estate of Hite, supra, Estate of Bergland, supra, and In re Kitchen, supra, this

court has expressly held that such a provision in a will should be strictly construed. In Estate of Bergland, this court said (180 Cal. 633, 182 P. 279): "While it is the rule in this state that forfeiture clauses of the nature of that involved here are valid and are to be given effect according to the intent of the testator, yet it is also the rule, and a salutary one, that such a provision—being by way of forfeiture and condition subsequent—is to be strictly construed and not extended beyond what was plainly the testator's intent." Again in the same case, on page 635 of the opinion (182 P. 280), we find the following statement: "As we have already said, the forfeiture clause is to be strictly construed: that is, while it is valid and is to be enforced according to the ascertained intent of the testator, yet in ascertaining his intent no wider scope is to be given to his language than is plainly required."

[5] With the law as stated above we will pass to the consideration of the acts of the respondents as found by the court, for the purpose of determining whether they show such a breach of the forfeiture clause of the decedent's will as will subject them to the loss of the property given them by the terms of said will. As to respondent Frank A. Brown we have no hesitancy in declaring that his acts as found by the court are wholly insufficient to justify any conclusion that he had violated the terms of said forfeiture clause. In the first place, the court found as to him, and also as to Herbert E. Brown, that neither of them knew of the institution of said contest until after the same had been brought by the contestants. Not only is there an absence of any finding that the respondents instituted said contest, but in the foregoing findings the court expressly found that they did not even know of the contest until after it had been filed. The court found, however, that neither of these respondents, in their answer to said contest, denied the charge of undue influence alleged in the petition for said contest, and some significance is attached to this failure on their part to deny said charge, as tending to show that the respondents were aiding in said contest. The facts regarding this feature of the case are that the respondents, being beneficiaries under the will, were made parties defendant along with the appellant, the executor of said will.

The respondents filed their answer in said proceeding, which contained no denial of the charge of undue influence made against the appellant by the contestants. The respondents did allege in their answer that the contestants had no interest in the estate of Mary Ellen Moore, deceased, which would entitle them to institute or maintain said contest, and it was this point upon which the case was decided in favor of the proponents of said will. Estate of Moore, 65 Cal. App. 29, 223 P. 73. The respondents were under no obligation, legal or otherwise, to deny in their said answer the charge of undue influence made against appellant. In fact, they may have been unable, as they understood and believed the facts of that case to be, to truthfully deny said charge. Their failure to include such a denial in their answer under these circumstances could not under any possible hypothesis be construed as a breach of any provision of said will.

[6] The court further found that J. S. Lamson, the attorney for said respondents in said contest proceedings, made in open court, but without the hearing of the jury, admissions that they would like to see the contestants succeed and that the respondents herein had "a financial interest in it if they do." In the first of these admissions the attorney simply expressed the attitude of the respondents regarding the contest, and that they desired that the contestants prevail in the contest proceeding. The mere expression of a desire that the contestants succeed was not sufficient to bring the respondents under the ban of the forfeiture clause. In re Largue's Estate, 198 Mo. App. 261, 200 S. W. 83; Haradon v. Clark, 190 Iowa, 798, 180 N. W. 868. Neither was the admission that the respondents had a financial interest in the success of the contest a matter of any probative significance under the peculiar facts of this case.

We have already referred to the fact that the decedent had made a prior will to that which was admitted to probate as her last will and testament. Under this will the respondents were made her sole residuary legatees; under her second or last will and testament the appellant and said respondents were named as residuary legatees. It was the contention of the respondents that, had said contest been successful, they would, under the prior will, be entitled to the whole of the residue of said estate. Whether they were right in that contention it is not necessary for us to decide. They held to that contention then, and still maintain the correctness of their position. With this belief on their part, the admission of their attorney that respondents had a financial interest in the outcome of the contest was simply a statement in accordance with the facts as he understood them. It did not in any way prejudice any right of the respondents under said will.

[7] The further findings of the court regarding Frank A. Brown's participation in the contest of said will refer in particular to his appearance as a witness on behalf of the contestants, to his furnishing the contestants certain papers of the deceased in his possession, and to his activities in procuring A. W. Porter as a witness for the contestants. The findings show that Frank A. Brown attended the trial of the contest of the will of the decedent under a subpœna regularly issued and served upon him, that he testified to certain facts within his personal knowledge, and that

he produced certain papers belonging to said decedent which were then in his possession. He did not seek the contestants or their attorney for the purpose of becoming a witness in the contest proceeding. On the other hand, it was contestants' attorney who sought out Frank A. Brown and interviewed him regarding his knowledge of matters involved in the contest. It is true that Frank A. Brown submitted himself to said interview, and in all probability revealed to said attorney whatever facts were within his knowledge relative to the issues involved in said contest. But it is not shown that he gave to the attorney for the contestants any information that he could not have been compelled to give in court upon being subpœnaed as a witness in said proceeding. It has been held that a legatee who testified as a witness without a subpœna at the request of the contestants and in their behalf, and admitted on cross-examination that he was in sympathy with the contestants, did not thereby contest the will within the meaning of a forfeiture clause similar to that in the will of Mary Ellen Moore, deceased. Haradon v. Clark, supra. If the ban of the forfeiture clause cannot be invoked against a legatee appearing in behalf of the contestants without subpœna, surely one who has been compelled by process of court to appear in court and testify in behalf of contestants should not be subjected to the punitive terms of such a testamentary provision.

[8] Certain papers were produced in court by Frank A. Brown, some of which were admitted in evidence on behalf of contestants. The fact that these were produced without subpœna is admitted by the respondents. We see no reason why a different rule should apply to documentary evidence than that which was applied to oral evidence in the case of Haradon v. Clark, supra. Reference to these papers were made in the findings, and a brief description of them is made therein. Just what their materiality was in the contest proceeding does not appear, from the brief reference thereto made in the findings. They were no doubt before the trial court, and with full knowledge of their contents, and of their probative effect, said court found that Frank A. Brown did not attempt in any way to establish the interests of the contestants. With this finding in the record we would not be justified in assigning to the introduction of these papers in evidence any real importance.

[9] Frank A. Brown's part in procuring A. W. Porter as a witness for the contestants was occasioned more by a casual meeting of said Porter than by any studied effort on his part to assist the cause of the contestants. Although the trial was in progress at the time Porter first suggested that he be a witness on behalf of the contestants, Frank A. Brown displayed little interest and less activity in bringing about his attendance as such witness at the hearing of the contest. If Frank A. Brown had been actively interested in the contest of decedent's will, he would have arranged for a meeting between Porter and McWilliams immediately upon Porter's first suggesting the subject to him. As it was, he merely referred Porter to McWilliams, and on the next day, when McWilliams stated to Frank A. Brown that he would like to see Porter, the latter replied that, if he should see him in the next day or two, he would tell him that McWilliams wanted to see him. While on his second meeting with Porter he arranged for a meeting between him and McWilliams, which led to Porter becoming a witness for the contestants, it does not appear that what he did in this regard was done with any particular desire or purpose of assisting the contestants, or that the contestants were to any extent whatever benefited by his efforts.

[10] After a careful review of the findings relating to the acts and conduct of Frank A. Brown in connection with the contest of the will of said decedent, we are not convinced that the facts so found are sufficient to show that he, either directly or indirectly, in any substantial degree aided or assisted in the said contest. In reaching this conclusion we are leaving out of consideration the general finding already referred to that Frank A. Brown did not contest said will. Whether this finding is one of fact or a conclusion of law, we are satisfied that it is a correct determination relative to the acts and conduct of Frank A. Brown in connection with the contest of the will of said decedent.

[11, 12] We will now give consideration to the findings of the court which involve the acts and conduct of Herbert E. Brown in connection with the contest of the last will of Mary Ellen Moore, deceased. It will not be necessary for us to consider those findings of the court which apply to both Frank A. Brown and Herbert E. Brown alike, and to which we have already given such consideration as we deem necessary. The findings which relate to the particular acts of the respondent Herbert E. Brown are that, after the institution of the contest of decedent's will by the Moore heirs, he contributed various sums of money through his attorney to the contestants therein toward defraying the expense of said contest. Was this act of Herbert E. Brown a violation of the provisions of said will, so as to work a forfeiture of the bequests and devises to which said Herbert E. Brown would, except for said act, be entitled to receive under said will?

By an examination of the terms of said forfeiture clause it will be observed that it consists of two sentences. The first sentence contains a statement that the testatrix gives the sum of "one dollar and no more" to any person named in said will who shall "institute proceedings in anywise contesting this my last will and testament." The findings are to the effect that the contest of the will of decedent was instituted by persons other than these respondents, and that these respondents did not know of the institution thereof until after said contest had been brought. It was instituted June 9, 1921, and the trial thereof was commenced August 30, 1922, and concluded September 14, 1922. The first money contributed by Herbert E. Brown was the sum of $100 on September 4, 1922, over a year after the institution of said contest, and not until after the trial of said contest had been begun. It is clear, therefore, that Herbert E. Brown cannot be successfully charged with the institution of any proceeding contesting said will.

The second sentence of said forfeiture clause is broader in its scope than the first, and includes any person contesting said will, and provides that the share of such person under the will shall go to other persons named therein. In other words, any person contesting said will shall forfeit the share of said estate to which he would otherwise be entitled thereunder. It is not contended that Herbert E. Brown was a party to any contest of said will, or that he directly contested said will, but only that, by furnishing money to meet the expense of said contest, he thereby aided said contest, and indirectly became a party to said contest, and in so doing actually contested said will. Such a construction would be to extend the language of the will beyond the express terms thereof. Generally speaking, what one does by another he does himself, and one who aids and abets another in the commission of any act is equally responsible with the person committing the act for the results of said act. But can we apply this rule when we are construing the terms of a forfeiture which we are enjoined to strictly construe for the purpose of avoiding a forfeiture if possible?

In addition to the authorities already cited herein, to the effect that forfeitures are not favored by the law and should be strictly construed, we find a statement by the Supreme Court of Kansas, which we think aptly expresses the present trend of the courts regarding the subject. This statement is as follows: "It would be clearly against the policy of the law to extend the terms of a forfeiture of this character (forfeiture clause in a will similar to that in Mrs. Moore's will) beyond the express terms of the condition itself. To do so would be to encourage forfeitures by construction. Conditions of this character, as we have seen, are not regarded with favor by the courts, and will not be enforced when they can be reasonably relieved against. For the purpose of defeating a forfeiture, the condition will be construed most strictly. Public policy should be as much concerned in upholding the right of a citizen to have his claim determined by law as it is to prevent contests of wills." Wright v. Cummings, 108 Kan. 667, 196 P. 246, 14 A. L. R. 604. While in Estate of Hite, supra, it was stated that a forfeiture clause in a will is not against public policy, in the later case of Estate of Bergland, supra, it was held that this rule was subject to exception and that it would not apply to the facts of that later case. We think this clause in the will of Mrs. Moore should be construed in the light of the facts of this case.

These facts show that Mrs. Moore had practically raised Frank A. Brown and Herbert E. Brown, and that they had lived with her as part of her family since they were about 5 years old, and until they were grown and had made homes for themselves. She had no children of her own, and evidently regarded the respondents the same as her own children. She had made a will in which, besides a few special bequests, she had given her property to these two nephews. When practically 80 years of age she had dealings with the appellant in connection with the preparation of her income tax returns. He was not related to her in any way, and had no claim upon her bounty. A short time thereafter, and when she was past 80 years of age she made another will, that involved in the present action, in which a large amount of her property, which in her former will she had given to these respondents was given to the appellant, and the forfeiture clause above set out, which was not in the former will, was inserted and made a part of the later will.

A will made under such circumstances—that is, by one of advanced years, in which she takes valuable property which she had given in a former will to her own blood relations, and those who were the natural objects of her affection and bounty, and gives it to another unrelated to her by ties of blood, and without claim upon her bounty is always, as it may well be, subject to suspicion and question as to its validity and legal execution. But, if it is the valid testament of the deceased, it should receive the sanction of the courts and its provisions enforced, notwithstanding the unnatural and unusual character of its terms. On the other hand, public policy demands that full and complete opportunity should be given to all interested parties to test the validity of such a testamentary document, not only to protect that which may be rightfully and legally theirs, but also to preserve the wishes and desires of the testatrix against designing persons, seeking to take advantage of her age and infirmities which are the usual result of advanced years. Any provision in the will which would tend to thwart or defeat such a purpose should be scanned by the courts with the minutest and closest scrutiny and, if found valid, applied with rigorous exactness and precision.

While we are not prepared to hold the forfeiture clause in the will of Mrs. Moore absolutely void as against public policy, we are of the opinion that public policy and the cause of right and justice require that its provisions should receive the strictest construction and interpretation by this court, and that, unless the acts of the respondents come strictly within the express terms of the punitive clause of the will, we will not declare any breach thereof. Herbert E. Brown did not institute any contest of the will of decedent. The most that can be said of his relation to said contest is that he contributed toward the expense of said contest, after it had been instituted and after the trial of said contest had begun. He may have assisted others in a contest, but to hold that such acts of assistance are within the forfeiture clause of the will would be to extend the terms of this clause beyond the express provisions, and thus not only to encourage, but actually to permit, forfeitures by construction. This the courts have refused to do. We are therefore of the opinion that the acts of Herbert E. Brown were not sufficient to bring him within the terms of the forfeiture clause of said will.

As against this holding the appellant has cited the following authorities from jurisdictions outside of this state: Donegan v. Wade, 70 Ala. 501; In re Stewart's Will (Sur.) 5 N. Y. S. 32, and Kayhart v. Whitehead, 77 N. J. Eq. 12, 76 A. 241. The facts in these cases differ materially from those presented in the present action. They are what might be termed extreme cases, and we think are not applicable to the present litigation.

[13] Besides, it may be seriously questioned whether there was any legal contest ever filed against said will. While we have referred to the proceedings instituted by the Moore heirs as a contest of said will, the trial court held that they had no legal standing that would entitle them to institute a contest of said will, and dismissed the proceedings instituted by them. The District Court of Appeal affirmed the order of dismissal, upon the ground that the contestants were without any legal right to institute a contest of the will of said decedent. There was, therefore, in fact no legal contest ever filed against said will, and the respondents could not be held to have been parties even indirectly to a proceeding which in fact had no legal existence. Moreover, the action of the trial court, dismissing the proceeding instituted by the Moore heirs, was in response to the answer to these respondents, which answer alleged the Moore heirs had no interest in said estate, and therefore could not legally institute a contest of the will of said deceased.

The views herein expressed make it unnecessary for us to decide a number of other questions raised by the appellant in his brief and oral argument. After the rendition of the judgment herein, the appellant moved the court under sections 663 and 663a of the Code of Civil Procedure for an order setting aside said judgment and for the entry of a judgment in favor of the plaintiff upon the findings. This motion was denied, and appellant has appealed from said order.

The order denying said motion is affirmed, and the judgment herein is also affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.

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208 Cal. 496

COZAD v. RAISCH IMPROVEMENT CO.
(S. F. 13499.)

Supreme Court of California. Nov. 4, 1929.

Judgment 🔑576(1) — Judgment held conclusive as to all matters presentable on motion to quash execution, regardless of error.

Where there was no showing of mistake, inadvertence, surprise, or excusable neglect at hearing of motion to set aside order quashing execution on those grounds, and at hearing of motion to quash question of plaintiff's right to an execution was clearly before court on its merits, conceding that court may have committed error in considering certain grounds of objection to original order of execution which would have called for reversal on appeal, it had jurisdiction to act, and judgment having become final without appeal or other direct attack, it is conclusive, whether matter was rightly or wrongly decided as to all matters presented or which could have been presented at hearing.

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by D. W. Cozad against the Raisch Improvement Company. Judgment for plaintiff was affirmed by the Superior Court. The judgment was assigned to Guy Le Roy Stevick. Execution was issued, but was subsequently recalled and quashed. A motion of the assignee to set aside the order quashing the execution was granted, and defendant appeals. Reversed.

For opinion of the District Court of Appeal, see 276 P. 1069.

A. B. Weiler and Herbert Choynski, both of San Francisco, for appellant.

Edwin H. Williams, of San Leandro, and Alfred C. Skaife, of San Francisco, for respondent.

PER CURIAM. A hearing was granted in this court after decision by the District Court of Appeal in and for the Third Appellate

District, for the purpose of giving further consideration to the respondent's contention that such hearing was necessary in order to secure uniformity of decision, and that the case of Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334, upon the authority of which the appellate tribunal relied, is distinguishable from the case at bar. Upon further consideration, we are unable to perceive such distinction, and for that reason hereby approve and adopt the reasoning and conclusion of the appellate tribunal in its decision herein, which reads as follows:

It may be gathered from the evidence in this case that the Fidelity & Deposit Company of Maryland "executed a policy of employer's liability insurance on behalf of" the defendant, such liability not to exceed $5,000 for injury to "any one person on any one accident." The plaintiff recovered judgment against the defendant for damages in the sum of $5,898.95 resulting from such an injury. The defendant appealed from the judgment, and the Fidelity & Deposit Company of Maryland executed an undertaking to stay execution. The judgment was affirmed on appeal, and in due time judgment was entered against the surety for the amount of the judgment against the defendant. The surety paid the judgment against it and caused the judgment against the defendant, to the extent of $898.95, to be assigned to Guy Le Roy Stevick, one of the respondents herein. Execution on the judgment against the defendant was thereupon issued in the sum of $898.95. On notice duly given the defendant moved the court "to satisfy said judgment of record and to recall and quash said execution." The Fidelity & Deposit Company of Maryland contested said motion and introduced evidence in opposition thereto. Thereafter the court made and entered the following order:

"This cause having been heretofore submitted on motion to recall and quash execution comes now the court and orders, that said motion be, and the same is hereby granted."

Thereafter Stevick, on due notice, moved the court for an order setting aside the order quashing the execution on the ground, among others, "that said order was made through mistake, inadvertence, surprise and excusable neglect." The other grounds of the motion went to the merits of the original motion to quash the execution. The court granted the motion to set aside the order quashing the execution, and the defendant has appealed therefrom. At the hearing of the motion there was no showing of mistake, inadvertence, surprise, or excusable neglect; but evidence was introduced tending to show that the court committed error in quashing the execution. No evidence was presented which was not or might not have been introduced at the hearing of the motion to quash. At that hearing, "the question of plaintiff's right to an execution was clearly before the court on its merits, and, conceding that the court may have committed error * * * in considering certain grounds of objection to the original order, which would have called for reversal on appeal, it had jurisdiction to act in the premises, and the judgment having become final, without appeal or other direct attack, it is conclusive, whether the matter was rightly or wrongly decided, as to all matters presented or which should have been presented on the hearing." Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 513, 197 P. 334, 338. The case cited is conclusive against respondents, and it is deemed unnecessary to pursue the subject further.

The order is reversed.

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208 Cal. 439

BRYDONJACK v. STATE BAR OF CALIFORNIA. (L. A. 11431.)

Supreme Court of California. Oct. 25, 1929.

1. Constitutional law 🔑67—Courts have inherent and implied powers necessary to function as separate department of state government.

Courts have inherent and implied powers necessary to properly and effectively function as separate department in state government, as courts are set up by Constitution without special limitation.

2. Constitutional law 🔑70(1)—Judicial department must in most matters yield to power of statutory enactments.

Although courts have inherent and implied powers necessary to function as separate department of state government, judicial department must in most matters yield to power of statutory enactments.

3. Constitutional law 🔑55—Criminal and civil proceedings and appeals may be regulated by Legislature.

Legislature has power to regulate criminal and civil proceedings and appeals.

4. Attorney and client 🔑3—Admission to practice as attorney is exercise of inherent powers of court.

Admission to practice as attorney means exercise of judicial function and exercise of one of inherent powers of court.

5. Attorney and client 🔑1—Reasonable restriction on practice of law may be imposed by Legislature.

Legislature has power to impose reasonable restrictions on practice of law.

6. Constitutional law 🔑52—Reasonable restrictions on constitutional functions of court may be imposed by Legislature, provided such restrictions do not defeat or impair exercise thereof.

Legislature may put reasonable restrictions on constitutional functions of courts, provided such restrictions do not defeat or materially impair exercise thereof.

7. **Attorney and client** ⚷**3—Supreme Court may admit petitioner to practice as attorney without favorable action by committee of bar examiners (State Bar Act, § 24).**

Under State Bar Act, § 24 (St. 1927, p. 41), Supreme Court has power to admit petitioner to practice as attorney without favorable action of committee of bar examiners, since such body exercises no judicial powers, but has only power to investigate and make recommendations.

8. **Attorney and client** ⚷**1—Application for admission to practice as attorney, filed before effective date of amendment to statute, is not controlled by such amendment (St. 1929, p. 1965, amending State Bar Act, § 24).**

Where petitioner filed application with Supreme Court for admission to practice as attorney prior to effective date of St. 1929, p. 1965, amending State Bar Act, § 24 (St. 1927, p. 41), such amendment did not control such application.

9. **Attorney and client** ⚷**5—Motion to Supreme Court for order of admission to practice as attorney is sufficient if person has met prescribed test and has submitted himself to board of examiners prior to such motion (Code Civ. Proc. § 279; Supreme Court Rule 1).**

Motion, oral or written, for admission to practice as attorney, is sufficient to bring before Supreme Court for consideration application of any person who claims to have complied with Code Civ. Proc. § 279, and Supreme Court Rule 1, and who has submitted himself to board of bar examiners for investigation and recommendation prior to such application.

In Bank.

Application by A. C. Brydonjack for admission to practice as an attorney and counselor at law after recommendation for admission had been denied by the Committee of Bar Examiners of the State Bar. Application granted.

Sebald L. Cheroske, of Los Angeles, for petitioner.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

PRESTON, J. Petitioner herein moves this court for admission to practice as an attorney and counselor at law in the courts of California. On March 26, 1928, he lodged his application for admission with the committee of bar examiners appointed by the board of governors of the State Bar pursuant to section 24 of the Act of March 31, 1927 (St. 1927, c. 34, p. 38). He later, on April 5, 1928, filed with this court a petition, styled one for a writ of review, which we are treating as a written motion for an order of admission. On the hearing, counsel for petitioner orally moved the court as well for such an order.

Petitioner, claiming to have been admitted to practice in the highest courts of the Dominion of Canada, rests his claim upon an asserted compliance with section 279 of the Code of Civil Procedure and rule I of this court, which admittedly contain all the requirements to be met by him at the time of his application. His application, however, was not accompanied by a recommendation of the committee of bar examiners appointed by said board, and the present application is submitted to this court upon a certified copy of the proceedings had and taken before said committee, from which it is learned that, without any specific findings of fact of any kind, this committee on September 25, 1928, voted to deny the petition for admission. This action we have interpreted as a refusal to recommend petitioner to this court for admission.

Petitioner asserts that the committee was without justification for this action, and that the record presented will so show. It may as well be stated here as later that after careful consideration of the record we agree with this contention of the petitioner. Therefore at this point we may pass to a consideration of the legal questions involved. We are met with the sole contention that the court is without power to admit petitioner unless and until the favorable action of said committee is obtained. The contention is based upon the provisions of the above-mentioned State Bar Act itself. Section 24 thereof (St. 1927, p. 41) is directly involved and reads as follows:

"Sec. 24. With the approval of the supreme court, and subject to the provisions of this act, the board shall have power to fix and determine the qualifications for admission to practice law in this state, and to constitute and appoint a committee of not more than seven members with power to examine applicants and recommend to the supreme court for admission to practice law those who fulfill the requirements. With the approval of the supreme court the board shall have power to fix and collect fees to be paid by applicants for admission to practice, which fees shall be paid into the treasury of the state bar; provided, however, that until otherwise fixed and determined, the requirements for admission to practice under this act shall be the same as those now prescribed by the supreme court for admission to practice in this state and shall be enforced as the same now are enforced through the state board of bar examiners."

Petitioner contends that a favorable recommendation is not, under this section, prerequisite, and to give it any other construction would be to allow an intrusion upon the constitutional and inherent powers of the court. At this point the temptation is present to traverse to some extent the field of judicial expression upon the subject of the inherent power of the court, when compared with the all-pervading police power of the Legislature;

also to survey the history and growth of the practice of the law and the relation of attorneys to the courts. But we do not feel that the requirements of the proceeding in hand warrant any such effort. To our mind it may be disposed of upon a mere question of statutory construction, aided by a reference to some of the now undebatable rules of law that are applicable.

[1-3] Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. In re Garner, 179 Cal. 413, 177 P. 162; Nicholl v. Koster, 157 Cal. 416, 108 P. 302. But this does not mean that the three departments of our government are not in many respects mutually dependent. Of necessity the judicial department as well as the executive must in most matters yield to the power of statutory enactments. McCauley v. Brooks, 16 Cal. 11; Smith v. Judge of the Twelfth District, 17 Cal. 547. The power of the Legislature to regulate criminal and civil proceedings and appeals is undisputed.

[4] Admission to practice is almost without exception conceded everywhere to be the exercise of a judicial function, and this opinion need not be burdened with citations on this point. Admissions to practice have also been held to be the exercise of one of the inherent powers of the court. In re Bruen, 102 Wash. 472, 172 P. 1152; In re Chapelle, 71 Cal. App. 129, 234 P. 906.

[5] But the power of the Legislature to impose reasonable restrictions upon the practice of the law has been recognized in this state almost from the inception of statehood. In Cohen v. Wright, 22 Cal. 293, 319, the court considered an act of the Legislature requiring an applicant for admission to take and file what was known as the oath of allegiance. This enactment was declared valid as against the contention that it usurped judicial functions. It was in that case declared: "The right to practice law is not an absolute right, derived from the law of nature. It is the mere creature of the statute, and when the license is issued and the official oath taken, which authorizes the attorney to exercise the right, it confers but a statutory privilege, subject to the control of the Legislature."

This doctrine was confirmed in Ex parte Yale, 24 Cal. 241, 244, 85 Am. Dec. 62, where it is said: "The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute." Again, in Re Mock, 146 Cal. 378, 80 P. 64, the court recognized the power of the Legislature to centralize all admissions to the bar in the District Courts of Appeal. Again recently the power of the Legislature to transfer this function to this court has been declared. In re Weymann (Cal. App.) 268 P. 971. In Re Galusha, 184 Cal. 697, 195 P. 406, it was noted that the profession of the law required a more detailed supervision by the Legislature than the ordinary profession.

In Re Collins, 188 Cal. 701, 704, 206 P. 990, 991, 32 A. L. R. 1062, the power of the Legislature over the practice of the law was under consideration in the light of the due process of law clause of the Federal Constitution. Collins had been convicted of a felony, and pursuant to sections 287–289 of the Code of Civil Procedure had been ordered disbarred by this court without notice to him of any kind. He moved for an order vacating this action for want of notice. The court there said: "It may be admitted that the right or privilege of exercising the vocation of attorney and counselor at law is a valuable right or privilege, but it must also be conceded that it is a right or privilege which the Legislature had the power to bestow, or to empower the judicial department of the state government to bestow, upon such terms as would be consistent with the nature and purpose of the right or privilege to be exercised; and that, this being so, the Legislature had the undoubted right to prescribe the possession of a good moral character in the applicant, for the grant of the right or privilege of entering and of exercising the legal profession, and also, of necessity, to prescribe the continued possession of such good moral character in the individual receiving such grant."

In Re Chapelle, supra, the power of the Legislature to require an applicant for admission to first apply to the board of bar examiners, as provided by section 276 of the Code of Civil Procedure, was recognized and declared.

[6] The sum total of this matter is that the Legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions. This power has been described as follows: "* * * The mere procedure by which jurisdiction is to be exercised may be prescribed by the Legislature, unless, indeed, such regulations should be found to substantially impair the constitutional powers of the Courts or practically defeat their exercise." Ex parte Harker, 49 Cal. 465, 467. See, also, In re Garner, supra. And this power, to this extent, we must concede to the Legislature in the regulation of admissions to the bar. Happily, however, as above noted, we are not in this proceeding required to set the stakes along the common boundary between these zones of power. For, as above noted, the statute in question goes no further in the matter of regulation than previous statutes, the provisions of which have met the approval of this court.

We are now prepared to approach more

closely the provisions of said section 24. At the outset, the conclusion we shall reach has been foreshadowed by our consideration of section 26 of this act (St. 1927, p. 41) relating to the powers of this board respecting discipline and disbarment, when, speaking through Mr. Justice Richards in the case of In re Shattuck (Cal. Sup.) 279 P. 998, 1000, we said: "If the foregoing is to be held, as we clearly think it is, to express the full measure of the legislative intent in the formulation of said section, it follows necessarily that the Board of Bar Governors created under the provisions of the act have not thereby been invested with any powers which can be said to possess the finality and effect of judicial orders, and that in that respect, at least, the Legislature in the passing of the act cannot be held to have in any degree violated the inhibition of section 1 of article 3 of the state Constitution relative to the distribution of governmental powers." See, also, In re Petersen (Cal. Sup.) 280 P. 124.

[7] If, then, the board exercises no judicial powers in the consideration of matters of disbarment or discipline, how much less reason there is for finding such powers to exist respecting admissions to practice. In all fairness to the legislative intent, said section under consideration does not in the least purport to give finality to any act of the board of bar examiners respecting admissions. The qualifications to be met are not fixed except with the consent of this court, which is but an indirect way of saying that in effect the qualifications for admission are fixed by the authority having power to make orders of admission. The making of orders of admission is, as already observed, clearly a judicial act of this court. Again, the function of the committee is but to investigate and to recommend for admission those found by it to be of the prescribed standards. The question as to whether or not a given applicant has met the test, in fact, the statute does not purport to allow the bar examiners to settle. A body possessing only the power to investigate and make recommendations cannot for a moment be conceded the power of final control, which would enable it to do indirectly what it is forbidden to accomplish directly.

Our conclusion, then, is that the Legislature in its wisdom has placed at the disposal of this court a competent and effective body to aid it in the important function of admissions to the bar. The applicants are to first submit themselves to this bureau for investigation, and after this is done the power in this court is plenary to admit those who have in our opinion met the prescribed test, whether the investigators do or do not agree with this conclusion.

The enactment of this statute was the opening of a new field for action, and the refusal of the bar examiners in this case to recommend the petitioner and to fail to make findings on the issues involved must not be taken as a reflection to any extent upon their judgment or efficiency, for they undoubtedly acted in the utmost good faith in the matter. Indeed, we have observed with satisfaction the efficiency displayed in the handling of the large and ever-increasing number of applications for admission, and but for the effective assistance of this body the work could scarcely be accomplished at all. In further fairness to said committee, it should be said that they doubtless are anxious to have the limit of their authority set so that they may know how to govern their action as to future applications. This is manifest from the fact that the insufficiency of the evidence offered by petitioner is not argued nor is any specific contention made that the evidence is in any respect sufficient. The matter is by them rested solely upon the question of the power of this court to admit applicants to the practice of the law in the absence of their recommendation.

It suffices to say that the applicant here comes highly recommended, not only as to ability and legal attainment, but as to moral character as well. He has declared his intention to become a citizen of the United States and has tendered evidence all-sufficient of his admission to practice by the highest court of his native country and of his present good standing at the bar, together with all other qualifications prescribed by the Code and the rules of this court.

[8] Our attention has been called to the fact that said section 24 was amended in 1929 (St. 1929, p. 1965), but the construction of this later enactment is not here involved, as petitioner's application was lodged with the court prior to the effective date of said amendment. In re Cate (Cal. Sup.) 279 P. 131.

[9] The question tendered as to the effectiveness of the writ of review sought here need not be considered, as it is our view, as above indicated, that a motion, oral or written, if entertained, would be sufficient to bring before us for consideration the application of any person who claims to have met all the prescribed tests for admission and who has submitted himself to the board of bar examiners for investigation and recommendation prior to such application. Such a motion constitutes the proceeding a cause pending in this court. In re Stevens, 197 Cal. 408, 241 P. 88.

It is therefore, the order of this court that petitioner be and he is hereby admitted to practice as an attorney and counselor at law, authorized to practice in all the courts of this state, and the clerk will deliver him a certificate of such authority upon his taking the prescribed oath and signing the roll of attorneys.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

208 Cal. 453

MUSTO v. GROSJEAN et al. (S. F. 12623.)*

Supreme Court of California. Oct. 30, 1929.

Rehearing Denied Nov. 25, 1929.

1. Bills and notes 🔑166—Note which recited it was secured by mortgage and subject to provisions thereof held nonnegotiable.

Where note recited "this note is secured by mortgage and is subject to provisions of such mortgage," such note *held* nonnegotiable instrument subject in hands of assignee of mortgagee to any set-off or other defense existing in favor of mortgagor.

2. Mortgages 🔑105—Contract, note, and mortgage held parts of same transaction, where mortgage and note referred to each other and to contract.

Where note recited that note was secured by mortgage and subject to provisions of mortgage, and that note and mortgage in hands of assignee of mortgagee should be subject to setoff which maker might have by virtue of provisions respecting certain improvements by mortgagee contained in certain contract, contract, note, and mortgage *held* parts of same transaction.

3. Mortgages 🔑105—Whether parties intended that performance of certain work should be condition precedent to recovery on mortgage must be gathered from entire contract.

Where contract provided that mortgagee was to grade and pave certain streets, and that, in case mortgagee failed to do so, mortgagor might complete work and apply cost thereof as payment on indebtedness, whether parties intended performance of work to be condition precedent to recovery on mortgage is to be gathered from entire contract, limited by rule that courts cannot make new or different contract for parties, but must be guided by what parties actually contracted to do.

4. Mortgages 🔑299—Where mortgage provided that, if mortgagee failed to complete work, mortgagor might apply cost thereof on indebtedness, mortgagee held to have lien, although he failed to make improvements.

Where mortgage provided that mortgagee was to grade and pave certain streets, and that, if he failed to do so, mortgagor had right to perform work and apply cost thereof on indebtedness, parties *held* to have intended that mortgagee should have his lien, even though he failed to make improvements.

5. Mortgages 🔑299—Mortgagor held entitled under contract to credit on indebtedness for cost of uncompleted work, although mortgagor had not completed work.

Where mortgage provided that, in case mortgagee should fail to grade and pave certain streets, mortgagor might perform work and apply cost thereof on indebtedness, and mortgagee failed to complete work, mortgagor *held* entitled to have credit on principal sum for cost of uncompleted work, although mortgagor had not completed such work.

6. Mortgages 🔑122—Interest on principal note held payable when mortgagor recovered judgment for uncompleted work, although mortgagee had agreed that interest should be postponed until work was completed.

Where mortgagee was to grade and pave certain streets, and, if mortgagee failed to do so, mortgagor had right to perform work and apply cost thereof on indebtedness, and mortgagee thereafter agreed to postpone payment of interest until work was completed, interest on principal note *held* payable at time judgment was awarded in favor of mortgagor for amount of uncompleted work, although mortgagee never completed the work.

7. Mortgages 🔑122—Mortgagee held not entitled to interest on amount allowed mortgagor for uncompleted work which mortgagee had agreed to perform (Civ. Code, § 3287).

Where mortgagor had right to grade and pave streets and apply cost thereof on indebtedness, if mortgagee failed to do such work in action to foreclose mortgage, where mortgagee had failed to complete such work, interest *held* not payable on amount allowed mortgagor for uncompleted work, although it was contended that damages were not capable of being ascertained within meaning of Civ. Code, § 3287, as to allow deduction at date of judgment would be to allow mortgagee double interest on amount he should have expended in improvements.

8. Executors and administrators 🔑224—Where no claim for attorneys' fees for suit pending at time of decease was filed against estate of deceased, such fees held barred by statute (Code Civ. Proc. § 1500).

Where defendant died after commencement of action, and plaintiff subsequently filed supplemental complaint against administratrix, but did not file claim against estate of defendant for attorneys' fees, such fees *held* barred by provision of Code Civ. Proc. § 1500.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Foreclosure action by Marie A. Musto against C. E. Grosjean and others. From a judgment of foreclosure and from the order of the trial court denying defendants' motion to vacate judgment and to grant new trial, defendants Grosjean appeal. Plaintiff and certain defendants cross-appeal from the judgment. Judgment affirmed, as modified; appeal from order dismissed.

Superseding opinion in 273 P. 1070.

George Clark Sargent, of San Francisco (Aaron M. Sargent, of San Francisco, of counsel), for appellants Grosjean.

Alexander McCulloch and C. J. Goodell, both of San Francisco, for respondent and appellant Musto.

Robert H. Borland, of San Francisco, for appellants and respondents Newell.

★Rehearing denied.

PER CURIAM. Plaintiff brought this action to foreclose a purchase-money mortgage.

On March 8, 1919, E. W. Newell entered into a written contract for the sale to the defendant C. E. Grosjean, of a tract of unimproved land in the Islais creek district in San Francisco for a total purchase price of $135,000, payable $15,000 in cash and the balance by promissory notes (including the note in suit for $60,000), due in five years and two months from the date of the contract, with interest at the rate of 6 per cent. per annum, payable monthly, secured by first and second mortgages on the tract so contracted to be sold. The contract of sale provided that the vendor, Newell, should prior to May 10, 1919, perform or cause to be performed certain conditions precedent which consisted of procuring the city and county of San Francisco to alter and extend Tulare street and abandon another street, as specified in the contract; and that the vendor would grant to the state of California a strip of land for the purpose of enabling the state to enlarge the wharfage facilities for said tract. The conditions precedent mentioned were performed, the cash payment of $15,000 was made, title delivered, and the notes and mortgages executed in accordance with the terms of the contract. Payment of the note in suit was secured by the second mortgage mentioned in the contract of sale.

By paragraph 6 thereof the contract of sale further provided that the vendor should grade and pave certain streets surrounding said tract; grade and fill said tract with earth and rock to one foot above city base; and obtain a permit for and construct a railway spur track on said property, all at his own cost and expense. The contract contained the following provision: "The work above mentioned shall all be commenced not later than June 15, 1919, and shall be fully completed not later than December 15, 1919. In case the first party fails to fulfill the provisions of this paragraph 6, the second party shall have and he is hereby granted the right to do or to cause said work to be done and to credit and apply the cost thereof as a payment on account of the amount of the indebtedness on the promissory note secured to be paid by the mortgage hereinabove referred to as the second mortgage, or to otherwise recover the cost of said work from the first party. * * *" Paragraph 5 of said contract provided in part: "Reference shall be made in said second mortgage to the promises and agreements of the first party set forth in the sixth paragraph hereof respecting the grading, paving, and railway spur track construction work described in said paragraph, and to the provisions of said paragraph respecting the right of the second party to do or cause said work to be done in case of the failure of the first party to fulfill said promises, and to credit and apply the cost thereof * * * as payments on account of the amount of the indebtedness on the promissory note secured to be paid by said second mortgage, in order that any owner or holder of said note and mortgage may be charged with knowledge of the provisions of said paragraph."

All of the above agreements and provisions of the contract of sale were recited in said second mortgage, and said mortgage contained the agreement of the mortgagee "for and on behalf of himself, his heirs, legal representatives, assigns, and all persons who may have or claim any interest through him or them in this mortgage, or any renewal or extension thereof, that in case the mortgagee fails to fulfill the said promises and agreements, and the mortgagors, or either of them, or the heirs, legal representatives or assigns of the mortgagors, or either of them, do or cause said work to be done, they may credit and apply the cost thereof as a payment on account of the amount of the indebtedness secured to be paid by this mortgage or any renewal or extension thereof, or they may, at their election, otherwise recover the cost of said work from the mortgagee, his heirs, legal representatives or assigns. * * *"

The vendor and mortgagee, E. W. Newell, assigned said note and second mortgage to S. W. Newell, who in turn assigned said note and mortgage to the plaintiff, Marie A. Musto, who brought this action. The defendant Ellen S. M. Grosjean joined in said mortgage, and was joined in this action, as the wife of the defendant C. E. Grosjean.

The action was resisted by the defendants Grosjean on the ground that the covenants and conditions of said mortgage had not been fully kept and performed. The defendants sought to recover by way of cross-action damages, including the cost of completing the work provided for by the contract and the mortgage. The trial court found that the principal sum of $60,000, with interest from January 31, 1921, together with $600 attorney fees, was due to the plaintiff; that the note and mortgage sued on and the contract of March 8, 1919, were parts of the same transaction, and that the conditions and covenants of paragraph 6 of the contract of sale were a part of the consideration moving to C. E. Grosjean; that none of the work agreed to be done was done on the 15th day of December, 1919, but that a portion thereof was performed thereafter; that the only damage suffered by the defendants Grosjean was the reasonable cost of completing said work which the court found to be the sum of $21,573.63, and which was allowed as a deduction from the sum found to be due to plaintiff. Foreclosure was decreed accordingly.

Cross-appeals were taken from the judgment—by the plaintiff and her predecessors in interest, who were made defendants in the action, from that portion of the judgment which awarded damages to the defendants Grosjean, and by the defendants Grosjean from the whole judgment and from the order of the trial court denying defendants' motion to vacate the judgment and grant a new trial.

It is claimed by the appellants Grosjean that the plaintiff's predecessors in interest, not having performed the stipulated conditions precedent, are in default, and cannot therefore prove performance as a condition of recovery in the action. The appellant Musto contends that the obligation to do the work was independent of the obligation to pay the note, and therefore was not a condition precedent to the right to foreclose the mortgage; and, furthermore, that the defendants Grosjean are not entitled to a deduction from the principal sum, for the reason that the contract provides that such deduction may be made only in the event that Grosjean himself perform the work or cause it to be done, neither of which events ever transpired.

[1, 2] The note sued on in the present action contains the following: "This note is secured by a mortgage of even date herewith, and is subject to the provisions of said mortgage, respecting the credits or allowances to be made on this note in the cases provided for in said mortgage, as fully as if said provisions were set forth in this note." It is not questioned, therefore, that the note is not a negotiable instrument, but rather is subject in the hands of an assignee to any set-off or other defense existing in favor of the defendants Grosjean. See Meyer v. Weber, 133 Cal. 681, 685, 65 P. 1110; Briggs v. Crawford, 162 Cal. 124, 129, 121 P. 381; National Hardware v. Sherwood, 165 Cal. 1, 7, 130 P. 881; Taylor v. Jones, 165 Cal. 108, 131 P. 114. Irrespective of any fundamental rule, it is plain that the parties specifically provided that the note and mortgage in the hands of an assignee thereof should be subject to any set-off or deduction which the maker might properly claim by virtue of the provisions respecting the making of the improvements by the mortgagee contained in the contract and in the mortgage. The trial court therefore correctly concluded that the contract and the note and mortgage sued on were parts of the same transaction.

It must be determined then, first, whether nonperformance of the conditions and promises contained in paragraph 6 of the contract which are recited in the mortgage precludes the right to recover on the note and mortgage; and, if the answer is in the negative, second, whether the defendants Grosjean may in this action claim a deduction for the cost of the work not performed by the plaintiff's assignor.

[3] Did the parties to the contract and the mortgage intend that performance of the work specified should be a condition precedent to a recovery on the note and mortgage? The parties to this controversy and amici curiæ have cited numerous authorities, and have referred us to much legal lore on the subject of conditions precedent and covenants dependent and independent. While ordinarily the order of time in which covenants are to be performed prevails and is controlling as to the mutual rights and obligations of the parties (see 13 C. J. p. 568), and failure to fulfill a condition or promise made or given as part of the consideration for the mortgage may preclude the right of the mortgagee to a recovery (see 41 C. J. p. 876), nevertheless the courts in modern times, rather than attempting to arrive at finely drawn distinctions based on the particular forms of expression used by the parties, have applied the test of intent as gathered from the common sense of the entire contract, limited necessarily by the rule that courts cannot make a new or different contract for the parties, but must be guided by what the parties actually contracted to do. See Roach v. Dickinson, 9 Grat. (50 Va.) 154, 156; Allemong v. Augusta Nat. Bank, 103 Va. 243, 48 S. E. 897; McCormick v. Badham, 191 Ala. 339, 343, 67 So. 609; Griggs v. Moors, 168 Mass. 354, 47 N. E. 128, 129; Mill Dam Foundery v. Hovey, 21 Pick. (38 Mass.) 417, pp. 438, 439; Pacific Mill Co. v. Inman, Poulsen & Co., 46 Or. 352, 80 P. 424, 427; Loud v. Pomona Land, etc., Co., 153 U. S. 564, 576, 14 S. Ct. 928, 38 L. Ed. 822; Union Pac. Ry. Co. v. Travelers' Ins. Co. (C. C. A.) 83 F. 676. It has been well stated in Roach v. Dickinson, supra (page 156 of 9 Grat.): "There is perhaps no branch of the law in which is to be found a larger number of decisions or a greater apparent conflict of authorities than that in which the effort has been made to define the dependence and independence of covenants, and to designate the class to which any given case in dispute is to be referred. The great effort, however, in the more recent decisions, has been to discard, as far as possible, all rules of construction founded on nice and artificial reasoning, and to make the meaning and intention of the parties, collected from all the parts of the instrument rather than from a few technical expressions, the guide in determining the character and force of their respective undertakings."

[4, 5] In the present case the parties contracted that the mortgagee should have his lien for whatever balance of the principal sum there might be after deducting the cost to the mortgagors of making the improvements to the tract should the mortgagee fail to perform and the mortgagors themselves cause and pay for the doing of the work. Undoubtedly the parties estimated that the cost of the work at the most would not exceed the principal sum of the second mortgage, and it was therefore only that mortgage in which were incorporated the provisions of paragraph 6 of the contract of sale. Plainly, the improvements to be made by the mortgagee, or the deduction from the principal sum of the cost thereof to the mortgagors, were a part

of the consideration for the note and mortgage. By providing for such an alternative, however, it would seem that the parties contemplated that the mortgagee should have his lien, even though the mortgagee defaulted, and that in that event there should be credited on the principal sum the cost to the mortgagors of completing the work. Of course, there is no promise of the mortgagors to make the improvements in the event the mortgagee fails to perform. They have that privilege, which they may exercise or not. The fact that they do not do so, however, does not permit the mortgagee to have his recovery without complying with the clear intention that the mortgagors should receive a credit for the cost of completing the work should the mortgagee default. In other words, the breach by the mortgagee does not preclude the right of the mortgagors to receive from the mortgagee the promised consideration or its equivalent before the mortgagee may pursue his recovery for the default of the mortgagors. The parties have, by their contract, themselves suggested an equivalent, or, in other words, a measure of damages for the partial failure of consideration, viz., the cost of completing the stipulated improvements. That provision in their contract makes it apparent that the parties did not intend performance by the mortgagee to be a condition precedent to any recovery by him, but that the intent was that the mortgagors could adequately be compensated for the mortgagee's breach by a credit for the cost of completing the work. We conclude, therefore, that the parties intended that the mortgagee should have his lien, even though he failed to perform the promise to make the improvements, but that at all events the mortgagors were to have credit on the principal sum for the cost of the uncompleted work. The trial court's judgment and decree in accordance with the foregoing was therefore proper.

[6] A further question is presented as to whether the trial court properly concluded that interest at 6 per cent. on the principal sum of the note and mortgage from January 31, 1921, was due to the plaintiff. The last payment of interest under the mortgage was made by the defendants Grosjean on January 31, 1921. On March 31, 1921, the mortgagee, who was then in default as to the improvements to be made, wrote a letter to C. E. Grosjean wherein he agreed "that the payment of the interest now unpaid and the interest accruing on your promissory note * * * for * * * $60,000, pending the completion of the work, shall be postponed and not be payable by you until this work is completed by me; that the nonpayment of said interest by you pending the completion of the work shall not constitute a default on your part in respect to the interest provided in said note to be paid. * * * Nothing herein shall be construed to deprive you of your right under the agreement dated March 8, 1919, to do or cause said work to be done at any time, and to exercise all other rights in regard thereto given to you in said agreement." It is contended by the appellants Grosjean that, the improvements not having been made or completed by the mortgagee, interest was not payable at all. It must be noted from the writing last hereinabove quoted that payment of the interest was not excused, but was merely postponed until the improvements should be completed. The statement by Newell that Grosjean still had the right to complete the work himself, etc., indicates clearly that it was within the contemplation of the parties only that payment of interest should be postponed until either the work was completed by the mortgagee or the equivalent of that portion of the consideration was received by the mortgagors. The postponed interest therefore became payable at the time judgment was awarded in favor of the mortgagors.

[7] We are of the opinion, however, that the trial court erred in awarding interest to the plaintiff on the entire principal sum of the mortgage without first deducting the sum which it awarded to the defendants Grosjean. It is claimed that to make the deduction before computing the interest is in effect to award interest to the defendants Grosjean on damages which were unliquidated and not capable of being made certain by calculation within the meaning of section 3287 of the Civil Code. Whether or not the sum awarded as a deduction and which represents the cost to the mortgagors of completing the stipulated improvements be liquidated or unliquidated damages, we are of the opinion that to make the deduction at the date of the judgment is to allow the mortgagee double interest on the sum which he should have expended for the mortgagors' benefit at a much earlier date, while to make the deduction from the principal sum before computing the interest has the effect only of awarding to the defendants what is their due under the terms of the contract. The mortgagors were entitled to receive that sum from the mortgagee at the earlier date either in the form of improvements to the land or as a credit on the principal sum of the note and mortgage, as a part of the consideration therefor. In such a situation it is not necessary to determine whether the "damages" are liquidated or unliquidated. It is inconceivable that the mortgagee should be permitted to default at a profit to himself. The situation is the same as though a mortgagee had failed to advance a part of the principal sum contracted for by the terms of the mortgage and then claimed interest on the entire principal sum. In such a case he would not be entitled to recover interest on the portion of the consideration which he retained in his own hands. We think, however, that the acceptance by Gros-

jean of the agreement to postpone payment of interest constituted a waiver on the part of the mortgagors of the default of the mortgagee to the date thereof, and that interest should be computed on the basis of the full sum of the principal to March 31, 1921, and thereafter on the basis of the principal sum of the note and mortgage, less the amount awarded to the defendants Grosjean as the cost of making the improvements.

[8] It is also claimed that the plaintiff was not entitled to judgment for attorneys' fees. The defendant C. E. Grosjean died after the commencement of the action, and subsequently the plaintiff filed a supplemental complaint alleging that fact and the appointment of the defendant Ellen S. M. Grosjean, as administratrix with the will annexed of the estate of C. E. Grosjean, and waiving recourse against any property of the estate, with the exception of the property in suit. The plaintiff did not, however, file a claim against the estate of C. E. Grosjean for attorneys' fees in this action. The claim for attorneys' fees is therefore barred by the provisions of section 1500 of the Code of Civil Procedure.

No other points require discussion.

The judgment is modified by omitting therefrom the allowance of $600 counsel fees and by making the deduction therefrom of said sum of $21,753.63 as of March 31, 1921, instead of as of the date of the judgment. As so modified the judgment is affirmed.

The appeal of the defendants Grosjean from the order denying their motion to vacate the judgment and for a new trial is dismissed, the same being an appeal from a nonappealable order.

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208 Cal. 468

HUTCHINS v. SECURITY TRUST & SAVINGS BANK. (L. A. 9139.)

Supreme Court of California. Oct. 31, 1929.

1. Executors and administrators 🔑438(10)—In suit by administrator of one settler involving validity of trust instrument, trustee cannot represent all parties concerned.

In suit by administrator of one settler involving validity of trust instrument, trustee could not represent all parties concerned, since statute giving trustee right to sue in execution of powers conferred without joining beneficiaries applies only as against strangers to instrument.

2. Executors and administrators 🔑438(10)—In suit by administrator of one settler involving validity of trust instrument, representative of the other deceased settler and cestui que trustent should have been made parties.

In suit by administrator of one settler against trustee involving validity of trust instrument, personal representative of the other deceased settler and cestui que trustent should have been made parties, and no lack of interpleading, omission, or negligence of trustee would excuse omission.

3. Perpetuities 🔑9(6)—Statute providing express trust may be created to lease property to satisfy charge thereon creates exception to rule prohibiting accumulation of income (Civ. Code, §§ 723, 724, 857, subd. 2).

Under Civ. Code, § 857, subd. 2, to effect that express trust may be created to lease real property for purpose of satisfying any charge thereon, creates exception to rule prohibiting accumulation of incomes declared by sections 723 and 724.

4. Perpetuities 🔑9(6)—Trust provision directing application of trust income to pay mortgages on trust property before paying income to beneficiaries held not void as unlawful accumulation (Civ. Code, §§ 723, 724, 857, subd. 2).

Where trust instrument executed by husband and wife authorized trustee to lease property and provided for payments of part of net income to wife, and provided that balance of net income at end of each quarter should be applied by trustee in discharge of incumbrances affecting trust estate and after discharge of incumbrances and until demise of wife each quarterly balance of net income and after discharge of incumbrances and demise of wife then whole quarterly income should be distributed to beneficiaries named, direction to pay income on mortgage indebtedness was not void under Civ. Code, §§ 723, 724, as directing unlawful accumulation, in view of section 857, subd. 2, providing that express trust may be created to lease real property for purpose of satisfying any charge thereon.

5. Husband and wife 🔑73—Wife accepting fruits of trust created by herself and husband, but claiming it was induced by fraud, ratified terms.

Where husband and wife executed trust instrument relating to their real property, but wife claimed her signature was induced by fraud and undue influence of her husband, wife, by accepting fruits of trust for several years after husband's death, ratified its terms.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action to quiet title by Burtis L. Hutchins, as administrator with the will annexed of the estate of Caroline L. Hutchins, against the Security Trust & Savings Bank. From the judgment, both parties appeal. Reversed.

Superseding opinion, 270 P. 219.

W. W. Middlecoff and Milton K. Young, both of Los Angeles, for plaintiff.

Lucius K. Chase, of Los Angeles (Alan Nichols and Lucius F. Chase, both of Los Angeles, of counsel), for defendant.

PRESTON, J. This cause is a by-product of a controversy said to have existed between a man and his wife, who lived together as such for a period of 64 years. The scene opened with an ordinary simple action to quiet title to an undivided half interest in certain Los Angeles property known as the Spokane Hotel. The defendant replied with a general denial of all claims made, and rested its possession and right to possession of the property in suit upon a conveyance thereof to it in trust executed by the plaintiff's testate, Caroline L. Hutchins and her husband, John S. Hutchins, on December 24, 1913. The answer was verified, and plaintiff failed to deny the genuineness and due execution of this instrument.

The action was begun on December 11, 1923. On these pleadings the cause went to trial on November 9, 1925, and it soon developed that the sole issue was the claim of the right to rescind said instrument and annul it in so far as it applied to the decedent, Caroline L. Hutchins upon the ground that her signature thereto was induced by the fraud and undue influence of her husband the cograntor therein. Plaintiff demanded and received, over the vigorous objections of defendant, the right of a jury trial. Some nineteen alleged material issues of fact were submitted to said jury and answered by it favorably to plaintiff. A general verdict was also rendered for plaintiff. At this juncture plaintiff advanced the position that said conveyance was void in toto on its face, and asked for a decree awarding him possession of the whole property. The court, however, adopted the verdicts of the jury, both general and special, and embodied them as part of its judgment, but it did not give plaintiff the right of possession of the whole property. From the judgment in this respect, plaintiff has himself appealed. Defendant bank, however, has appealed from the whole of said judgment.

As we have found defendant's appeal to be meritorious and to require a reversal of the judgment in toto, plaintiff's appeal necessarily aborts. All the legal phrases of the controversy have their root in the conveyance above mentioned, and we here epitomize the material provisions thereof, as follows:

The first parties, said John S. and Caroline L. Hutchins, reserve to themselves during their joint lives the possession, use, occupation, rents, issues, and profits of the premises but provided that "said premises are hereby conveyed in trust nevertheless, subject to the reservation aforesaid for the following uses, purposes and trusts." Then follows subdivision 1, to the effect that, on the termination of the life estate and until the end of the term of the trust, the second party, defendant Security Trust & Savings Bank, shall have full possession, control, custody, and management of the property conveyed and shall lease and re-lease it for such times, to such persons and upon such terms and conditions as to it may seem best; shall collect all rents, issues, profits, and income accruing from said property, and, after the payment of all costs, charges, assessments, taxes, and every other cost, charge, or expense including the expense of care, management, repair and protection of said property, shall distribute the net income therefrom as follows:

"Second: The entire net income derived or received from said trust property shall be applied and disposed of as follows: (a) There shall be paid to said Caroline L. Hutchins, if still living, quarterly on the first days of January, April, July and October of each year to and until the end or termination of this trust, or until her death, whichever event shall happen first, the sum of nine hundred dollars ($900), or such lesser sum as she may by writing delivered to the said trustee elect to accept. (b) The balance of net income on hand at the end of each such quarter shall be by said trustee applied and paid as rapidly as allowable in discharging and satisfying, in whole or in part, any and all mortgages or like incumbrances then affecting said trust estate. (c) After the discharge of all such incumbrances and until the demise of said Caroline L. Hutchins, each such quarterly balance of net income, and after the discharge of such incumbrances and the demise of said Caroline L. Hutchins then the whole quarterly amount of such income, shall be by said trustee distributed and paid, on said quarterly dates, to our sons Day S. Hutchins, Ray Hutchins and Burtis L. Hutchins and our great-grandson Reason D. Hardesty, in the following parts or shares: Day S. Hutchins, five-twentieths ($5/20$); Ray Hutchins, eight-twentieths ($8/20$); Burtis L. Hutchins, six-twentieths ($6/20$); Reason D. Hardesty, one-twentieth ($1/20$)." Further contingencies were provided in the event of the death of the above-named beneficiaries, which said conditions are not material here.

[1] At the threshold, we observe that the settlers of this trust were John S. Hutchins and Caroline L. Hutchins, his wife; that the immediate beneficiaries upon the death of the settlers were their three children and a great grandson, and upon certain contingencies other lineal descendants were to participate. Neither the personal representative of the deceased settler, John S. Hutchins, nor any of the cestui que trustent were made parties to this action. The validity of the trust is assailed, and the trustee is made the sole reputed representative of all the parties concerned. In other words, while alleging there is no trust, the trustee is admitted to be such to the extent of having power to represent the beneficiaries as well as the heirs at law or legatees of one of the settlers. Plaintiff several times called the attention of the court to this absence of parties. It is manifest that, in a controversy by one settler with the other settler and/or beneficiaries, the trustee is in no sense the representative of either faction. A trustee is given by statute the right to sue in execution of the powers conferred without joining beneficiaries as plaintiffs, but this ap-

plies only as against strangers to the instrument, and has no application to suits by or against makers and beneficiaries thereunder involving the validity of the trust instrument.

[2] This principle was carefully explained and section 369 of the Code of Civil Procedure interpreted in the case of Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275. In fact, the identical point here involved was before us in the recent case of Lake v. Dowd (Cal. Sup.) 270 P. 212[1], and the cause was reversed for failure of the court to order of its own motion, certain of the settlers, who were also beneficiaries, made parties to the action. This doctrine was again confirmed in Title Guar. & Tr. Co. v. Henry et al. (Cal. Sup.) 280 P. 959. No lack of interpleading, omission, or negligence of the trustee will excuse this omission. O'Connor v. Irvine, 74 Cal. 444, 16 P. 236; Lake v. Dowd, supra. The theory of this principle doubtless is that no decree should be entered affecting the rights of a party without giving him an opportunity to be heard, and the negligence or failure of another will not justify his absence from the case.

But it is contended that this trust is structurally defective, in that it contains certain provisions which are void, which void provisions are so interwoven with the other provisions that the whole instrument must fail as a matter of law, and for that reason no legal harm can result to the absent parties; hence a court of equity may be excused for failure to order in otherwise material parties. Much thought and research has been given by counsel to the legal structure of this trust conveyance and amici curiæ have aided us in our labors.

Plaintiff points to the provisions respecting the amortization of incumbrances on property from a portion of the net income therefrom received from time to time by the trustee and then points confidently to the provisions of sections 723 and 724 of the Civil Code, which are to the effect, that all directions for the accumulation of the income of property, except such as are allowed by that title, are void. The trusts allowed generally by the title are found in section 724, which provides that accumulations of income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing sufficient to pass the property out of which the fund is to arise, provided that, if such accumulations are directed to commence on the creation of the interest out of which the income is to arise, they must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or, if such accumulations are directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, they must commence within the time permitted by the title for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority. The beneficiaries so far as named in this instrument are adults, except perhaps the great grandson.

Defendant replies by pointing to subdivision 2 of section 857 of said Code, under the title "Uses and Trusts," which section at all times here involved in this connection read: "Express trusts may be created for any of the following purposes: * * * 2. To mortgage or lease real property for the benefit of annuitants, or devisees or legatees, or other beneficiaries, or for the purpose of satisfying any charge thereon."

Plaintiff rejoins by citing the fact that these three sections were taken almost in toto from sections 37, 38, and 55, of the Revised Statutes of the state of New York (Rev. St. [1st Ed.] pp. 726, 728), and points to the case of Hascall v. King, 162 N. Y. 134, 56 N. E. 515, 76 Am. St. Rep. 302, decided in the year 1900, where these sections are considered and interpreted so as to compel the conclusion that the instrument before us is void. Defendant, practically admitting the action of the New York court, rallies and replies that, when our Code sections on the subject were adopted, the case of Parks v. Parks, 9 Paige, 111, later affirmed by the Court of Errors, gave the authoritative and contrary interpretation of these sections of the New York statutes, and that, under the ruling laid down in Estate of Potter, 188 Cal. 68, 204 P. 826, to the effect that, where a statute is borrowed from another state, it should be given the construction placed upon it by the highest court of that state, we must presume that our Legislature intended to adopt the then and not the later interpretation of them. Lastly, defendant insists that our own court in Re Dolan, 79 Cal. 65, 21 P. 545, settled the question in accord with its contention.

[3] If the language of subdivision 2 of said section 857, Civil Code, to the effect that an express trust "may be created * * * to * * * lease real property * * * of the purpose of satisfying any charge thereon," is given its ordinary meaning, it follows that an exception is thereby created to the rule prohibiting the accumulation of incomes declared by said sections 723 and 724. It will be noted that this proviso restricts the trust to one to satisfy liens on the property itself, and does not purport to grant power to create a trust to mortgage or lease one piece of property to provide income for the purpose of satisfying liens upon another specific property as was the case in part at least in Hascall v. King, supra. In other words, the apparent intent of section 857, subd. 2, was to create an exception in favor of a conveyance in trust when made

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[1] Opinion adopted by the court in bank. See 277 P. 1047.

for the sole purpose of satisfying liens upon property, the subject thereof.

That this was the legislative intent appears persuasively from a reference to the English enactment in 1800 of the Statute of 39 and 40, George III, c. 98, commonly called the Thelusson Act, wherein provisions may be found similar to our sections 723, 724, 725, and 857, Civil Code, but wherein it is noted that a trust to convey, mortgage, or lease property may be made for the accumulation of income to discharge the "debts of the grantor, settler, testator or other person or persons." This proviso was omitted from sections 37, 38, and 55 of the Revised Statutes of New York and a provision substantially the same as the one here under consideration was substituted therefor; California having followed New York in this respect. This is some evidence at least of the legislative intent to so narrow the English provision as to confine it to a trust for the satisfaction of liens alone upon the property itself. We realize that in the later case of Hascall v. King, supra, an attempt was made to give the word "lease" in this connection a different significance than that word ordinarily has. But the reasoning employed is difficult to follow and to our minds is unsatisfactory. It is explained there by a quotation from Cowen v. Rinaldo, 82 Hun, 479-485, 31 N. Y. S. 554, 557, as follows: "The evident intention of the statute was the creation of a trust to sell land and receive the proceeds thereof for the benefit of creditors, or for the benefit of legatees, or for the purpose of satisfying any charge thereon; to mortgage land and receive the proceeds thereof for the benefit of legatees, or for the purpose of satisfying any charge thereon; and to lease lands for a given sum, which the trustee is to receive for the benefit of legatees, or for the purpose of satisfying any charge on said land, the fee of the land descending."

How leasing the property for a given term at a fixed definite lump amount and using the fund to discharge a lien on the property is any less a violation than a lease upon periodical payments and the application of the payments as made to a pro tanto discharge of the lien is hard to discern, as the transactions are in legal effect the same. We are more content with the reasoning of Parks v. Parks, supra, on this subject and, as counsel points out, this was the latest expression of the New York court on the subject at the time of the adoption of our Code. In that cause it is said: "The revised statutes also have authorized the creation of an express trust to lease lands for the purpose of satisfying a charge thereon. The authority of the trustee, therefore, to pay the interest of the incumbrances out of the rents and profits of these lots in the first place, and to apply so much of those rents and profits as might be spared from the support of the cestuis que trust, to reduce the principal of the incumbrance of their respective lots, was therefore valid; * * *"

This interpretation was followed in Re Dolan, supra, where, at page 67 of 79 Cal., 21 P. 545, it is said: "As we read the will, it gave the property to Michael Dolan in trust to collect and receive the rents and profits thereof, and to use them,—1. To pay the mortgage on the property; 2. To pay the legacies to Celia Jordan and Margaret Platt; 3. To pay the legacy to Sister Frances McEnnis; and 4. To pay all the residue thereof to James Dolan during his natural life. This was an express trust, and was authorized by law."

[4] We are satisfied that the court in the Dolan Case had the question here considered squarely before it. It is true that it did not receive extended discussion, but nevertheless it was there involved. Said case was decided in 1889 and for a period of forty years that doctrine has been a fixed rule of property in this state. We are therefore satisfied with the pronouncement of that case, and from it and the other considerations we conclude that the trust before us was not void upon the ground urged and here considered.

Moreover, even the case of Hascall v. King, 162 N. Y. 134, 56 N. E. 515, 521, 76 Am. St. Rep. 315, supra, recognizes that in an action of this character the entire trust should not be held void because of this provision, were its invalidity conceded, for, in referring to the facts of that case, the following language is there used: "That rule is applicable to this situation, and should govern it. The primary object of this testator, by the creation of this trust, was to provide an income for his wife, the accumulation for the purpose of paying the mortgages being secondary. Indeed, nothing was to be applied in payment of the mortgages until after the sum named by the testator should in each year be paid in full to his wife, the disposition of the balance being a mere ulterior contingent direction, entirely distinct from the primary trust. That being so, the former is separable from the primary trust, and will not be allowed to invalidate it; and, after the purposes of the primary trust have been satisfied, the surplus income must be distributed among those entitled to the next eventual estate." The above doctrine has uniformly met with approval in this state. Estate of Yates, 170 Cal. 254, 149 P. 555; Estate of Duffill, 180 Cal. 748, 183 P. 337, and perhaps other cases.

The primary purpose of the trust before us is to make a testamentary disposition of the property while reserving to the settlers a life enjoyment of the net income. If the provision respecting accumulation of income were to be held void, the provisions of section 733 of the Civil Code would attach and the income would go to the "persons presumptively entitled to the next eventual interest." It should be noted, although without effect here, that the Legislature of 1929 (St. 1929, p. 276) has amended section 724 of the Civil Code to extend rather than curtail the doctrine of accumulation of income.

We also deem it our duty to express our conclusion upon the challenge of defendant to the sufficiency of the evidence as it now stands to support the general and special verdicts and the decree thereon rescinding said instrument as to Caroline L. Hutchins at the instance of her personal representative. The showing of undue influence and coercion is exceptionally weak, and, even if its sufficiency as an original proposition be assumed, the evidence of ratification of the instrument after the effect of the undue influence and coercion had abated by the death of her husband is overwhelming and uncontradicted.

These spouses were of equal age, both being born in 1833. They were at all times herein advanced in years, feeble in step, but vigorous in mind. The property in question was acquired in 1905 and was community property. The parties at about the time in question were possessed of several other pieces of property. They had three adult sons surviving and a great grandson and perhaps other lineal descendants. They made a series of five trusts similar in character to the one above described, disposing of all their property upon the plan of retaining life estates in themselves, with remainders over to others, principally their children. During a period of about four years next prior to the execution of the instrument in question, this so-called testamentary trust method of disposition of their property was the subject of repeated discussion between them. The husband espoused the plan of executing the said trust; the wife opposed it. The husband admittedly had no object in deceiving his wife in any way. Attorneys were consulted. The opposition of the wife persisted and was openly and freely expressed. When the instrument in question was drafted, she admittedly understood its contents, but was opposed to its execution. She nevertheless did execute it upon the day it bears date. But her state of mind was disclosed to the attorney, and the document was not delivered to the trustee until March 19, 1914, nor until she had upon that date joined with her husband in executing a separate instrument requesting the attorney, Mr. E. E. Millikin, to deliver said trust document to the defendant "so that the same shall immediately upon said delivery being made become fully operative according to its terms." Mr. Millikin consulted with her privately, and we see no reason why he may not have appropriately advised both her husband and herself.

She had, however, theretofore, and on February 24, 1914, addressed a letter to the trustee and secretly delivered it to one of her sons, in which she recited that she had signed said trust deed "under force and duress and severe threats," and which ended with the following words: "I shall, if I outlive John S. Hutchins, fight this deed to my utmost." In her oral testimony she freely admitted concealing her true state of mind from her husband, and described in detail the special precautions she took to keep him in ignorance of the fact that she had not in reality changed her views on the subject.

The only threat employed by the husband was that he would separate the community property, giving her her one-half and disposing separately of his one-half. How this can be called a threat, we do not see, as it would not have been an act against her interest. Indeed, the execution of the deed in question was not in derogation of any present interest in the property, as she had none, but, on the contrary, by the terms of the instrument, she acquired an interest in the property. The most that could be said of the situation is that she was induced to make a testamentary disposition of one-half of the community property in a way and manner she might not have later approved of. Whether this creates a cause of action in her personal representative, we need not pause to learn. She, according to her own testimony, after 1914 continued to act so as to seem at least to ratify this conveyance.

For example, on January 14, 1916, she executed a writing addressed "To whom it may concern," reciting in part the following: "I have freely, voluntarily and willingly joined with my said husband in the execution of various trust indentures, wherein we conveyed various parcels of our property in trust for the use and benefit of our children, retaining to ourselves a life estate in the property so conveyed, for the purpose of avoiding the delay, expense and annoyance of probating upon our estate." Then, after further reciting that she fully understood the contents and legal effect of all such trust indentures and deeds, the instrument ended with these words: "I join therein freely, voluntarily, and for the purpose of accomplishing the ends set forth in each trust deed which I have signed. I thoroughly approve of the course my husband and I have taken, and requested that it be accomplished in the manner in which it was done."

Upon being questioned about this writing, she said she was sick and signed it, although she knew it contained a "big lie." Before her husband's death in 1919, she signed another writing with him addressed to the trustee, directing that during the remainder of her husband's life it pay the whole of the income of said trust to her. She had also theretofore joined in establishing a joint account with him at defendant bank. She knew fully the contents of the conveyance. She admitted having a copy of it and having read and studied it often. While it undoubtedly is a fact that the true state of her mind is a debatable proposition, at the same time the evidence of coercion or undue influence is unsatisfactory. Besides she allowed her husband to die in the belief that he had made a testamentary disposition of their property satisfactory in every way to her. Had he known her state of mind was in fact as she later testified it to have been, he doubtless would have altered his last will accordingly. She left a will preferring two of her sons and excluding the other beneficiaries under the trust. We thus have some of the beneficiaries put to a disadvantage by reason of a state of mind on her part concealed by her from her husband. There is no evidence in the record of a substantial character that shows that she was in any wise afraid at any time to speak her mind upon this subject, and she freely did so. We see nothing that really reflects upon the honesty of purpose or upon the soundness of the judgment of John S. Hutchins.

[5] But we need not dwell further upon this branch of the case nor base our conclusion on it, for said Caroline L. Hutchins lived until June 27, 1923, and, during the excess of her span of life over that of her husband, a period of four years, she received and accepted the fruits of this trust, accepting thereunder the sum of $10,895.68, and she must be held to have ratified its terms. She signed vouchers for the payments thereunder and gave directions to the trustee with respect to the monthly sums desired by her from said funds. For example, on August 1, 1919, which was some three months after the death of her husband, she addressed a letter to the trustee referring to the trust conveyance and to the fact that it provided for a quarterly payment to her of $900, or such lesser sum as she might in writing elect to accept, and advised the trustee that she elected to accept $150 per month to be paid monthly and to continue until she notified it in writing of her election to accept some other sum or to accept the full amount provided for under the terms of the trust. On June 8, 1921, she wrote a similar letter requesting $250 per month, and by a letter dated November 25, 1922, she directed the payment to her of $300 per month. During all this period of time she was under no possible duress or compulsion. Indeed, on April 5, 1923, she for the first time gave notice of rescission and filed a suit in the superior court of Los Angeles county against said trustee, seeking to quiet title to the whole of the property, the subject of this trust, and to rescind said agreement. A nonsuit was granted in this case on November 26, 1923. No reason appears why the suit might not at least have been started soon after the death of John S. Hutchins, which occurred on May 7, 1919. These acts, with full knowledge of the terms and conditions of the trust, are unmistakable evidences of ratification and the record presents no showing whatsoever to counteract their force. Bancroft v. Woodward, 183 Cal. 99, 190 P. 445; Matteson v. Wagoner, 147 Cal. 739, 82 P. 436; Montgomery v. Laury, 143 Cal. 83, 76 P. 964; Harrington v. Paterson, 124 Cal. 542, 57 P. 476; Ruhl v. Mott, 120 Cal. 668, 53 P. 304.

For these several reasons the appeal of defendant trustee must be sustained, and the judgment reversed, and it is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

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101 Cal. App. 619

GULICK v. JUSTICE COURT OF INDIO TP., RIVERSIDE COUNTY et al.★

(Civ. 13.)

District Court of Appeal, Fourth District, California. Oct. 31, 1929.

Rehearing Denied Nov. 27, 1929. Hearing Denied by Supreme Court Dec. 30, 1929.

1. Justices of the peace ⚷72—Check on which payment was stopped held not "special contract," requiring action to be brought in township where check was payable (Code Civ. Proc. § 832, subd. 7).

Where defendant incurred indebtedness in one township, and gave check payable in another, and then stopped payment on check, such check was not "special contract," which of itself would require action to be brought at place where it was payable within Code Civ. Proc. § 832, subd. 7, since "special contract" is one in which there is definite promise to pay at certain place named therein, such as is found in some forms of promissory notes.

2. Justices of the peace ⚷84(1)—Justice court gained jurisdiction over person of defendant whose demurrer presented law question vital to defense besides question of jurisdiction of person (Code Civ. Proc. §§ 848, 1014).

Where defendant's demurrer in justice court did not confine itself to question of jurisdiction of his person, but went further and presented question of law vital to his defense, he must be held to have appeared generally, and court gained jurisdiction over his person under Code Civ. Proc. §§ 848, 1014.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Application for writ of prohibition by D. C. Gulick against the Justice Court of the Township of Indio, Riverside County, and Hon. Thomas E. Allen, Justice of the Peace of such Township, to prevent proceedings in a certain action. From judgment denying the application, plaintiff appeals. Affirmed.

Howell W. Richardson and Thomas E. Parke, both of Los Angeles, for appellant.

MARKS, J. On April 8, 1927, one Thomas J. Casey filed an action in the respondent court praying judgment against D. C. Gulick,

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★Rehearing denied. Hearing denied by Supreme Court.

defendant there, and appellant here, in the sum of $150.

It appears that appellant incurred an indebtedness in the township of Indio in Riverside county to Casey, and on March 30, 1927, in the same township and county, gave him his check in the sum of $150, made payable to Thos. J. Casey, dated at Los Angeles, Cal., and drawn on the Pacific National Bank, Los Angeles, Cal. The check was sent through the usual channels for collection, and, when it reached the Pacific National Bank, payment had been stopped by appellant. While the return on the summons is not in the record, it appears elsewhere that the summons was served on appellant in Los Angeles. Defendant appeared by demurrer in words and figures as follows: "In the Justice's Court of Indio Township, County of Riverside, State of California. Thos. J. Casey, plaintiff, vs. D. C. Gulick, defendant. No. Demurrer. Now comes the defendant and demurs to the complaint in this action and for cause of demurrer alleges: That the Court has no jurisdiction of the person of the defendant because the defendant is a non-resident of the County of Riverside, and resides in the City of Los Angeles, County of Los Angeles, and there is a special contract in writing, to-wit, the alleged check sued on herein, drawn on the Pacific National Bank of Los Angeles, and payable there, and was not payable or to be performed in said Township of Indio. Dated this 21st day of April 1927. Howell W. Richardson. Thomas E. Parke." The demurrer came on regularly to be heard, and was overruled, and appellant given ten days in which to file his answer.

Appellant filed his petition in the superior court of the county of Riverside, seeking a writ of prohibition against respondent, alleging his residence in Los Angeles and the service of summons upon him there. Attached to the petition were copies of the complaint, summons, without the return, and the demurrer. An alternative writ of prohibition was issued, and thereafter, after a hearing, the writ of prohibition was denied by the trial court. The respondent has made no appearance in this court, and the action is submitted on the transcript on appeal and the brief of appellant.

Section 832 of the Code of Civil Procedure provides in part as follows:

"*Actions, Where Must Be Commenced.* Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried:

"5. When the defendant is a non-resident of the county—in any township or city wherein he may be found;

"7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary;

"8. When the parties voluntarily appear and plead without summons—in any township or city in the state;

"9. In all other cases—in the township or city in which the defendant resides."

Section 848 of the Code of Civil Procedure provides in part as follows:

"*Service of Summons Out of County.* The summons cannot be served out of the county wherein the action is brought except in the following cases:

"2. When the action is brought against a party who has contracted in writing to perform an obligation * * * at a particular place, and resides in a different county, in which case the summons may be served in the county wherein he may be found."

[1] At the hearing of the demurrer in the respondent court apparently the only files before the court were the complaint and demurrer. As far as the record here goes, the summons had not been returned. There was nothing offered by appellant in support of his demurrer to show that the defendant was a resident of Los Angeles county, or that summons was served on him there. As far as the record showed at that time, summons might have been served on defendant in the township of Indio. The complaint stated a cause of action, and there was nothing upon which the respondent court could base an order sustaining the demurrer, unless the check set forth in the complaint was a special contract which brought the case under the provisions of the last sentence of subdivision 7 of section 832, Code of Civil Procedure. In using the words "Special Contract" in this sentence, the Legislature must have had in mind some contract other than one ordinarily and usually used in every-day transactions of business life, otherwise the word "Special" could have no significance, and need not have been inserted in the section. We believe that in the use of this word the Legislature had in mind those contracts in which there is a direct and definite promise to pay at a certain place named therein such as is found in some forms of promissory notes.

The case before us presents no feature of a special or unusual contract. In fact, the transaction is very usual and ordinary. Appellant apparently contracted a debt to Casey in Indio, and gave him his check on a Los Angeles bank in payment of the same. We do not believe that this check was a "special contract" that of itself would require the suit to be brought in Los Angeles. To hold otherwise would require merchants accepting checks from customers living in distant parts of the state, in payment for goods sold, to follow these debtors to their homes or the homes of their banks, in case the checks be not paid. We do not believe the Legislature contemplated any such procedure in adopting section 832, Code of Civil Procedure, in its present form. We therefore believe that the ruling of the respondent justice of the peace was correct on the record before him.

[2] The record in the superior court presented two facts in addition to those before the justice's court, namely: That the appellant was a resident of the city of Los Angeles, and that the summons was served on him there. Upon the record presented, the trial court held that the respondent court had jurisdiction of the person of appellant.

Jurisdiction of the person is obtained by the legal service of a valid process issued out of a court of competent jurisdiction in a case or proceeding properly pending, or by a party voluntarily appearing, or by his seeking, taking, or agreeing to some act or step in the proceeding or action to his benefit, or to the detriment of the other party, other than by one contesting the jurisdiction over his person only. Section 1014, Code Civ. Proc.; Chaplin v. Superior Court, 81 Cal. App. 367, 253 P. 954; Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635.

In the case before the court appellant demurred to Casey's complaint on the ground of lack of jurisdiction of his person because of his residence in Los Angeles, to which he added the further ground that the check given constituted a special contract in writing payable, and to be performed in Los Angeles, and not in the township of Indio. The first specification was in effect an attack upon the service of summons in Los Angeles under the provision of subdivision 2, § 848, Code of Civil Procedure. The second specification went to the right of court to entertain the action under the provisions of subdivision 7, § 832, Code of Civil Procedure, and presented to the respondent court the question of the construction of the statute and the determination of the question of whether or not the check was a "Special Contract" within the meaning of the section last cited. It presented a question of law independent of and beyond the one involving the bringing the person of the appellant into court by the service of process upon him. It went to the point of the right of the court to entertain the action. In other words, if appellant's contention was correct, not only the person of the appellant had not been brought into court properly, but the action itself had been instituted in the wrong court.

In the case of Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317, 318, Mr. Justice Henshaw has clearly stated the law as follows: "Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement, and find no especial favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea; and, when a defendant seeks to avail himself of it, he must, for very obvious reasons, stand upon his naked legal right, and seek nothing further from the court than the enforcement of that right. He will not be heard to ask of the court anything further than an adjudication upon his plea, and if he does ask anything further, then, by logic of the fact, he must necessarily have waived the irregularity of his summons before the court. Here is one reason for the well-settled rule that, if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. Another reason, equally valid, is that if such defendant shall ask for any relief other than that addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary, whereby, if the determination of the court be in his favor, he may avail himself of it, while if it be against him, he may fall back upon his plea of lack of jurisdiction of the person. So it is well settled that, if a defendant, under such circumstances, raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons."

The demurrer of appellant did not confine itself to the question of jurisdiction of his person alone, but went further, and presented another question of law vital to his defense. As he did this, he must be held to have appeared generally in the action, and that therefore the respondent court gained jurisdiction over his person. Vance v. Superior Court, 48 Cal. App. 327, 191 P. 945.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

101 Cal. App. 605

RAPP v. HORGAN et al. (Civ. 7102.)★

District Court of Appeal, First District, Division 2, California. Oct. 30, 1929.

Rehearing Denied Nov. 26, 1929. Hearing Denied by Supreme Court Dec. 26, 1929.

1. Pleading ⟹245(3)—Court could permit plaintiff to amend complaint at trial, where there was no surprise or motion for continuance, and defendants were not prejudiced.

Court did not err in permitting amendment of complaint at trial over defendants' objection, where there was no surprise and no motion for continuance, and record did not disclose that defendants were prejudiced.

2. Mechanics' liens ⟹290(2)—Where facts found showed that plaintiff was original contractor, it was not necessary to make finding expressly stating that fact.

Failure of trial court to make finding in so many words that plaintiff, in action to foreclose mechanic's lien, was original contractor, was not fatal, where facts found by the trial court showed that such was the case.

3. Mechanics' liens ⟹86—Plaintiff's status was not changed to materialman in mechanic's foreclosure suit by fact that sum paid corresponded with amount due for labor.

Fact that sum of money had been paid which corresponded with amount due for labor did not establish status as materialman of plaintiff suing for foreclosure of mechanic's lien, where contract showed otherwise.

4. Mechanics' liens ⟹290(2)—In mechanic's lien foreclosure suit, finding that no notice of completion of plaintiff's contract was recorded was unnecessary, where plaintiff filed lien within 60 days (Code Civ. Proc. § 1187).

In mechanic's lien foreclosure suit, finding that no notice of completion of plaintiff's contract was recorded was unnecessary, where plaintiff filed lien within 60 days after completing contract within Code Civ. Proc. § 1187.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by W. F. Rapp, doing business under the fictitious firm name and style of the West Hollywood Plumbing Company, against D. F. Horgan and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John Schlegel, of Los Angeles, for appellant Josephine Horgan.

O. H. Myrick, of Los Angeles, for appellants A. McNally and Susana Land Co.

John F. Poole and William Dellamore, both of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to foreclose a mechanic's lien. The owners appeared and answered. A trial was had before the court sitting without a jury. The trial court made findings of fact in favor of the plaintiff and from a judgment entered thereon the defendants have appealed under section 953a of the Code of Civil Procedure.

[1] Before any evidence was introduced the defendants objected to the taking of evidence on the ground that the complaint did not state a cause of action. The trial court allowed the plaintiff to amend and thereupon overruled the objection. The defendants complain that they were taken by surprise. In making this contention they are not supported by the record. After their objection had been overruled the defendants did not move for a continuance and the record does not disclose any fact showing that the defendants were prejudiced.

[2] Prior to the 14th of March, 1924, Harry Brannan was lessee of the real estate and the improvements thereon which are involved in this litigation. The improvements consisted of a building known as Ladora Hotel. Brannan employed the plaintiff to make certain alterations, repairs, and additions to the property. Later Brannan assigned his lease to the defendant Neal Woods. After he became lessee, Neal Woods continued the same arrangement. In response to the allegations contained in the pleadings, the trial court found that the defendants owned the property against which a lien was sought; that Neal Woods ordered the labor and material; that Neal Woods was the lessee of the property; that the plaintiff was the contractor for furnishing all of the rough and finished plumbing materials and for performing labor in installing of said rough and finished plumbing materials used in the construction, alteration, and repair of the upper floor of the Ladora Hotel; that on the 14th day of March, 1924, Neal Woods and the plaintiff entered into the contract; that the materials and labor were of the agreed price, $5,541.82, and that said sum was also the reasonable value; that between the 1st day of March, 1924, and the 5th day of June, 1924, the plaintiff furnished the materials and performed the labor which were actually used and employed in the construction of the alterations and repairs; that the total amount of plaintiff's claim was $5,541.82, of which $2,500 has been paid, and that $3,041.82 has not been paid; that on the 23d day of July, 1924, the plaintiff verified his claim of lien, and the same was recorded on the 25th day of July, 1924, and paid therefor $1.70; the plaintiff completed his contract June 5, 1924; that no notice of completion of plaintiff's contract was recorded; and that, within ten days after the defendant owners had notice and knowledge that the alterations and repairs were being made, and that plaintiff was furnishing the labor and materials, they did not file or record a notice of nonresponsibility. These defendants complain that the trial court did not make a finding that the plaintiff was an original contractor. Although it did not make a finding in those identical words, the facts found by the trial court were to the effect that the plaintiff was an

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★Rehearing denied. Hearing denied by Supreme Court.

original contractor. La Grill v. Mallard, 90 Cal. 373, 27 P. 294; Pugh v. Moxley, 164 Cal. 374, 379, 128 P. 1037; Perazzi v. Doe Estate Co., 40 Cal. App. 617, 622, 181 P. 398.

[3] The defendants also attack the findings to the effect that the plaintiff furnished materials and labor. This attack is based on the fact that, as the plaintiff's work proceeded, the then lessee paid the laborers their hire. Stressing that fact, the defendants contend that the plaintiff was only a materialman. However, the proper test depends on the terms of his contract. If for any particular period the labor had not been paid, the defendants would not even assert the point. The facts show the plaintiff was a contractor for furnishing materials and doing labor, but that a sum of money has been paid, and said sum happens to correspond with the amount of the labor. That fact does not change the status of the plaintiff from that of a contractor to a materialman.

[4] It is claimed that the finding that no notice of completion of plaintiff's contract was recorded was a finding on a fact not within the issues made by the pleadings. Conceding the contention to be well founded, nevertheless the finding was on an immaterial matter. The plaintiff as an original contractor had the option of filing his lien within 60 days after completing his contract. Code Civ. Proc., § 1187. The court found that he completed his contract on or about June 5, 1924, and that he filed his lien July 25, 1924. It was filed in time.

By reason of the views hereinabove expressed, it would only be repetition to discuss other points presented by the defendants.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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101 Cal. App. 530

SOURISSEAU et ux. v. MOORE. (Civ. 5594.)

District Court of Appeal, Second District, Division 2, California. Oct. 28, 1929.

Costs ⚷260(4)—Penalty for frivolous appeal must be imposed, where appellants' brief showed testimony in striking conflict, and portion relied on to be adverse.

Where, as stated in closing brief of appellants, testimony was in striking conflict, there was no ground for appeal, where cross-examination of respondent, relied on as justification therefor, showed that respondent, who recovered on note given for land, did not know value of land, and so stated to appellants, suing to cancel note, so that penalty for frivolous appeal must be imposed.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by George Sourisseau and wife against A. P. Moore, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiffs appeal. Affirmed.

Ewell D. Moore, of Los Angeles, for appellants.

Gerald Willis Myers, of Los Angeles, for respondent.

IRA F. THOMPSON, J. The plaintiff and defendant entered into an agreement of exchange whereby the plaintiff agreed to convey to the defendant a contract of purchase of a lot at Clearwater, Cal., and deliver to defendant a promissory note, executed by himself and his wife, Mae Sourisseau, in the sum of $600, and in return to receive title to 12 lots in El Centro, Imperial county, Cal. Soon after the exchange was perfected, the plaintiff attempted to rescind the contract on the ground of misrepresentations claimed by him to have been made by respondent, consisting of statements that the El Centro lots were worth from $150 to $200 each. He filed his action, based upon similar allegations of fraudulent representations, to cancel the note and recover back the Clearwater lot. Defendant answered, and filed a cross-complaint upon the promissory note. The trial court denied plaintiff any relief, but awarded the defendant and cross-complainant judgment for the face of the note, interest, costs, and attorney's fees. This appeal is from the judgment so entered.

The court found that the respondent "made no false or fraudulent representation of any kind or character whatsoever to the plaintiff respecting either the value of or location of said property in the city of El Centro. * * *" The substance of appellants' argument is that the evidence is insufficient to support this finding. There were only two witnesses who testified concerning the representations. The plaintiff and appellant George Sourisseau testified that the representations were made and the respondent swore that they were not. In fact, we find a very significant sentence in appellants' closing brief relating to this matter, as follows: "The testimony of appellant and respondent is in striking conflict." With this confession of the groundless nature of the appeal before us, necessarily indicated by the language just quoted, the only manner in which we could avoid assessing a penalty for a frivolous appeal would be to find, as counsel seeks to do, some justification for it in the cross-examination of the respondent. But here, also, we can find no comfort for appellants. The entire effect of the cross-examination may be summed up in this wise: That respondent had never seen the El Centro lots; that he did not know their value, and so informed the plaintiff-appellant. Under such circumstances, we have no alternative.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Judgment affirmed, and appellants are fined the sum of $75 for the prosecution of a frivolous appeal.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 482

PRAY et al. v. TROWER LUMBER CO.★
(Civ. 6877.)

District Court of Appeal, First District, Division 1, California. Oct. 26, 1929.

Rehearing Denied Nov. 25, 1929. Hearing Denied by Supreme Court Dec. 23, 1929.

1. Sales ⇨61—Contract for sale of lumber held "agreement of sale" because of letters "f. o. b." in connection with destination, provision for sample car, and sellers' lack of ownership and possession; "sale."

Agreement for sale and delivery of lumber *held* intended as agreement of sale rather than present sale because of letters "f. o. b." in connection with place of destination, provision for sample car, and lack of ownership and possession of lumber by sellers; fundamental difference between "sale" and "agreement of sale" being that in case of sale title passes.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Sale.]

2. Sales ⇨384(1)—As respects measure of damages for buyer's fault, delivery to person specified in agreement held delivery to buyer (Civ. Code, §§ 1141, 2130d, 3310).

In determining whether title was transferred under agreement of sale within Civ. Code, § 1141, so that measure of damages recoverable by sellers would be contract price within section 3310, delivery to person specified in agreement was delivery to defendant buyer, and consignment to person named in agreement and delivery of bills of lading naming such person to defendant indicated intent to transfer title to defendant, within section 2130d.

3. Sales ⇨271—Persons agreeing to sell lumber by sample warranted quality would equal that of sample (Civ. Code, § 1766).

Where sellers of lumber agreed to sell by sample, they warranted that quality of lumber in last four cars would equal that of sample car, under Civ. Code, § 1766.

4. Sales ⇨176(4)—Buyer's failure to inspect lumber warranted finding that it waived right of inspection (Civ. Code, § 1785).

Where defendant buyer failed to inspect lumber, as authorized under Civ. Code, § 1785, jury was warranted in finding that it had waived right of inspection notwithstanding that inspection was made by person buying from defendant and by company buying from such person.

5. Sales ⇨201(7)—Title to lumber equaling sample in quality would pass to buyer, even though buyer rejected it.

Where sale of lumber was by sample with right of inspection, title to lumber equaling sample car in quality would pass even though buyer rejected it.

6. Sales ⇨445(4)—Conformity of lumber to quality of sample car held for jury under conflicting evidence.

Where evidence as to conformity of last cars of lumber shipped to buyer to quality of sample car was conflicting, it presented question for jury's determination.

7. Sales ⇨441(3)—Evidence supported finding that quality of last four cars of lumber delivered equaled that of sample, in seller's action for price (Code Civ. Proc. § 1963, par. 32).

In seller's action for price of lumber, evidence that witness found quality of all cars the same, and that another witness on inspection after rejection found quality of rejected cars equal to sample, *held* sufficient to support finding that quality of last four cars of lumber equaled that of sample, under Code Civ. Proc. § 1963, par. 32.

8. Customs and usages ⇨18—General customs need not be pleaded, but customs or usages relating to particular locality or trade must be pleaded.

In seller's action for price of lumber, it is not necessary to plead customs or usages of which court will take judicial notice, so that general customs need not be pleaded, but particular customs or usages relating to particular locality or trade must be pleaded.

9. Appeal and error ⇨1040(10)—Error in overruling demurrer to complaint for uncertainty in pleading custom of particular business held harmless, where defendant was not misled.

In seller's action for price of lumber, error in overruling demurrer to complaint for uncertainty as to custom relating to particular business *held* not reversible, where correspondence and depositions showed defendant was informed as to such custom and was not misled, since overruling of demurrer for uncertainty or ambiguity is not reversible, unless ruling affects substantial rights of demurrant.

10. Appeal and error ⇨1047(3)—Refusal to strike plaintiff's testimony as to custom of business on ground he was unfamiliar with custom at place of performance held cured by testimony of defendant's witness that custom existed there (Civ. Code, § 1646).

In seller's action for price of lumber, any error in refusal to strike testimony of plaintiff as to custom of lumber business on ground that he testified he was unfamiliar with custom at place of performance and that contract should be interpreted according to usage at such place, under Civ. Code, § 1646, *held* cured by testimony of defendant's witness that such custom existed at place of performance.

11. Sales ⇨82(1)—Clause "usual terms" in contract for sale of lumber held to deal with question of credit, not manner of inspection.

In contract for sale and delivery of lumber, clause "usual terms" *held* to deal with question

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★Rehearing denied. Hearing denied by Supreme Court.

of credit and time of payment, and to have nothing to do with manner of inspection on delivery.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Usual Terms.]

12. Customs and usages ⚷15(1), 16—Persons carrying on trade are deemed to have contracted with reference to known usage, and usage is admissible to supply deficiency or aid in interpretation unless it varies terms of contract (Civ. Code, § 1655).

It is general rule that, when there is known usage of trade, persons carrying on such trade are deemed to have contracted in reference to such usage unless contrary appears, and usage is admissible to supply deficiency or as means of interpretation where it does not alter or vary terms of contract, under Civ. Code, § 1655.

13. Appeal and error ⚷1170(10)—Failure to advise jury to correct uncertain verdict held not reversible error, where modification of judgment in accord with jury's obvious intent would prevent injury to substantial rights (Code Civ. Proc. §§ 475, 619, 626; Const. art. 6, § 4½).

In seller's action for price of lumber, in which defendant objected to uncertainty of verdict under Code Civ. Proc. § 626, failure of court to advise jury to correct verdict under section 619 *held* not reversible error under section 475 and Const. art. 6, § 4½, since modification of judgment in accord with obvious intent of jury would prevent injury to defendant's substantial rights.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action on contract for sale and delivery of lumber brought by Reuel Ford Pray and another, copartners doing business as the Lumbermen's Exchange, against the Trower Lumber Company. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

H. W. Hutton, of San Francisco, for appellant.

Albert A. Rosenshine and Jacob H. Hoffman, both of San Francisco, for respondents.

GRAY, Justice pro tem. From a judgment based upon a verdict awarding plaintiffs (the sellers) the price of five carloads of lumber, defendant (the buyer) appeals, claiming (1) that, as title to the lumber did not pass, the verdict erroneously awarded the contract price in accordance with section 3310 of the Civil Code instead of the excess of the contract price over either the net proceeds of resale or the value to the seller, as specified in section 3311 of the same Code; and (2) that the verdict lacks the certainty or definiteness required by section 626 of the Code of Civil Procedure. The complaint, in the first count, alleges that the parties entered into a written agreement for the sale of "six carloads of lumber of 6/4 No. 2 pine box rough lumber at the price of $25 per M feet, f. o. b., car Los Angeles, terms usual"; that, "*in accordance with the custom of the lumber business*" and the terms of the agreement, plaintiffs delivered to defendant six carloads of lumber of the quality and quantity and at the times and place specified in the agreement; that plaintiffs have fully performed said agreement, and defendant has paid for one carload and refuses to pay for the other five, to plaintiffs' damage in the sum of $2,500.59. In the second count, it is alleged that plaintiffs sold and delivered to defendant lumber at an agreed price of $3,002.59, of which defendant has paid $501.80, leaving due and unpaid $2,500.39. The amended answer first denies the agreement in the form pleaded, the delivery of the last five cars, the performance by plaintiffs, and the sale at any price in excess of $939.15, of which it has paid $670.15, and offers to pay the balance, and then affirmatively pleads an agreement of sale by sample upon other terms, stated in the complaint, the delivery and acceptance of the first carload as a sample, the delivery and acceptance of the second carload, although not equal to sample, and the rejection of the last four carloads because not equal to sample. The answer pleads the nonconformity of last four cars to sample only as a complete defense and not by way of counterclaim or rescission. The answer also tendered an issue as to location of the mill from which the lumber was to be shipped, but under the testimony this issue became immaterial.

An examination of the evidence discloses no material conflict except as to the quality of the lumber delivered. Defendant's written order literally, and plaintiff's written acceptance substantially, which together created the agreement between the parties (Tuso v. Green, 194 Cal. 574, 229 P. 327; Martyn v. Western Pac. Ry. Co., 21 Cal. App. 589, 132 P. 602), contained the following pertinent terms: "Ship to J. O. Means, Los Angeles, price $25.00 per M. f. o. b. car Los Angeles. Usual terms five cars 6/4 No. 2 Pine Box Rough. Only one minimum carload to be shipped as sample. If first car is not satisfactory balance of order to be canceled." The quantity subsequently was increased to six carloads. The figures "6/4" designated the thickness of the individual board (i. e., one and one-half inches thick) and "No. 2" its grade. Six days subsequent to date of order J. O. Means received from a box company an order for six to eight cars of 6/4 box lumber rough, subject to acceptance of sample car and on the same day gave an order in the same language, except that it was for five to eight cars, to the defendant. Neither of these last two orders specified "No. 2" grade, as did defendant's order to plaintiffs, which omission probably was a cause for the subsequent dispute. To fill defendant's order, plaintiffs ordered from the mills, without mention as to sample, one car and subsequently five cars of 6/4 No. 2 pine box rough. The mills shipped all cars to J. O. Means under bills of lading, naming him as consignee. These bills were mailed by plaintiffs to defendant and forwarded by the latter to J. O. Means, who reconsigned to the box company. The bills were never returned to plaintiffs, but at the trial were in Means' possession.

The first or sample car was accepted by the box company and paid for by the defendant. In its answer defendant offered to pay for the second car, which was finally accepted by the box company after its rejection. The remaining four cars were rejected by the box company on the ground of nonconformity to sample and returned to the carrier, who sold two of them in partial satisfaction of its lien for freight.

The acts and conduct of the parties, with reference to the dispute as to the quality of the last four carloads, is more accurately and completely pictured by their correspondence than it is by their verbal testimony as to conversations, because the correspondence, by its terms, was intended to confirm, summarize, and reduce to permanent form those conversations. About one month after the date of its order, defendant wrote plaintiffs, complaining that the grade of lumber in the second and later cars was not nearly up to that of the first car, suggesting that this complaint be taken up with the mill, and expressing a willingness to amicably adjust the difficulty. The next day plaintiffs replied that they had sold No. 2 grade lumber, that they had advised mill as to the complaint and requested that the latter inspect the lumber, and that the most satisfactory way would be to have the "rejects" laid aside and held for official inspection. Defendant, upon the day following, answered, stating that the sale was by sample, requesting that a representative of the mill call on Means, advising that demurrage was accruing, and that it had asked Means to urge the box company to unload the cars, accept the lumber, which was up to grade, and lay aside the balance for inspection. A week later, plaintiffs wrote that the mill advised that the lumber was of the grade ordered and that it was "up to you to have your customer or yourselves unload this stock and, if dissatisfied, will gladly have same officially inspected by a representative of the California White & Sugar Pine Manufacturers' Association." After three days, defendant responded that plaintiffs should examine and compare the first two cars, that it had a just complaint and "we are not responsible for any expense in connection with the refusal of these five carloads and we hope you and your mill folks will not delay any longer the making of an effort to adjust this difficulty."

[1, 2] Although the express language of the agreement does not show their intent as whether it was a present sale or an agreement of sale, yet as a matter of law (Todd v. Lyon, 55 Cal. App. 67, 202 P. 899; Turner, Kuhn & Fraser, Inc., v. Jones, 61 Cal. App. 732, 215 P. 1033), we are satisfied that the parties intended an agreement of sale because the letters "F. O. B." in connection with the place of destination (24 R. C. L. 45), the provision for a sample car (Wanee v. Thomas, 75 Cal. App. 231, 242 P. 509; Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964), and the then lack of ownership and possession of the lumber by plaintiffs (Rosenberg Bros. & Co. v. Beales, 56 Cal. App. 212, 205 P. 18; Nye & Nissen v. Weed Lumber Co. [Cal. App.] 268 P. 659), all indicate an intention to pass title subsequent to the execution of the agreement. "The fundamental difference between a sale, properly so called, and an agreement to sell is, that in the former case title passes, while in the latter case it does not." Blackwood v. Cutting Packing Co., 76 Cal. 212, 215, 18 P. 248, 9 Am. St. Rep. 199; Rosenberg Bros. & Co. v. Beales, supra, at page 214, of 56 Cal. App. 205 P. 18. If title to the last four carloads vested in the defendant, the measure of damages recoverable by plaintiffs is the contract price. Civ. Code, § 3310. "Title is transferred by an executory agreement for the sale * * * of personal property only * * * when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon offer of performance." Civ. Code, § 1141. Delivery to Means, as specified in the agreement, was delivery to the defendant. Francis v. Merkley, 59 Cal. App. 196, 210 P. 437. The consignment to Means in the bills of lading and their delivery to the defendant indicate an intent to transfer title to the defendant. Civ. Code, § 2130d.

[3-7] By its objections as to the sufficiency of the evidence to support the verdict and as to instructions given and refused, defendant has clearly presented for decision the question whether a buyer's rejection of goods delivered under an agreement of sale by sample prevents the passage of title, even if the goods so delivered equal the sample as to quality. The plaintiffs having agreed to sell by sample, they warranted that the quality of the lumber in the last four cars would equal that of the sample car. Civ. Code, § 1766. The defendant had a right to inspect the last four cars before accepting them. Civ. Code, § 1785. The defendant never exercised this right of inspection, but, in its rejection, relied wholly upon the inspection of Means, its buyer, and of the box company, the latter's buyer. There is nothing in the agreement which would expressly or impliedly confer a right of inspection upon the two last-named persons, or which provides that delivery was subject to their inspection. Defendant does not contend that they acted in his behalf. In fact

the evidence clearly shows that they were acting on their own behalf, which, because of the difference in the orders as to grade and the adverse relations of buyer and seller, was antagonistic. Because of defendant's utter failure to inspect, the jury was warranted in finding, as its verdict clearly implies that it did, that defendant had waived its right of inspection. Assuming that defendant did inspect the lumber, yet, if in fact the quality of the lumber in the last four cars equaled that of the sample car, title would pass, although defendant rejected them. Brigham v. Hibbard, 28 Or. 386, 43 P. 383; Weil v. Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. Rep. 243; 24 R. C. L. 20; 35 Cyc. 256. The evidence as to the conformity of the last cars to the quality of the sample car is conflicting and therefore presented a question for the jury's determination. 24 R. C. L. 218; 35 Cyc. 234. Its determination that the quality of the last four cars equaled that of the sample is amply supported by the testimony of two witnesses for the plaintiff, the first of whom testified that, upon inspection at the loading at the mill, he found the quality of all the cars the same (Code Civ. Proc. § 1963, par. 32; Western Forest Products Co. v. Woodhead Lumber Co. [Cal. App.] 267 P. 901), and the second of whom testified, that upon inspection after rejection he found that the quality of the rejected cars equaled the sample.

[8-12] Defendant further complains of the overruling of its special demurrer for uncertainty as to what the custom was or is which is referred to in the allegation that delivery was "in accordance with the custom of the lumber business." Over its objection that such testimony was not within the issues pleaded, plaintiffs were permitted to introduce testimony that it was the custom of the lumber trade, when dispute arose between buyer and seller as to quality of lumber delivered, to decide it by an inspection according to the grading rules of the association, mentioned in the correspondence. "It is not necessary to plead customs or usages of which the court will take judicial notice. Hence the rule that general customs need not be pleaded (citing Goldsmith v. Sawyer, 46 Cal. 209; Colman v. Clements, 23 Cal. 245; Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561). Particular customs or usages relating to a particular locality or trade must, however, according to the general rule be pleaded (citing Swift v. Occidental Min., etc., Co., 141 Cal. 161, 74 P. 700; Goldsmith v. Sawyer, supra; Dutch Flat Water Co. v. Mooney, 12 Cal. 534)." 17 C. J. 516. To the same effect, 27 R. C. L. 195; Bancroft's Code Pleading, vol. 1, pp. 124 and 455. "The overruling of a demurrer to a complaint on the ground of uncertainty or ambiguity affords no ground for reversal when it is apparent from the record that the defendant was not thereby misled or embarrassed in making his defense. To warrant a reversal, it must appear that the ruling of the court affects the substantial rights of the demurrant." 2 Cal. Jur. 1014. While the court erred in overruling the demurrer, because the custom related to a particular business, yet a reversal is not warranted because an inspection of the above correspondence and of the first deposition offered by defendant, in which it interrogated its own witness as to such custom and of several other depositions offered by it, in which plaintiffs cross-examined as to such custom, shows that defendant was informed as to such custom and was not misled thereby. Defendant also moved to strike all of the testimony of one plaintiff as to this custom on the ground that he testified he was unfamiliar with the custom at the place of performance. This witness, however, also testified that this custom was general in the business. Of course, the contract was to be interpreted according to the usage of the place of performance. Civ. Code, § 1646. The error, if any, was cured by the testimony of Butterick, defendant's witness, who, on direct examination, stated this custom existed at Los Angeles. Lastly, it objected to evidence as to this custom on the ground that it attempted to vary the clause "usual terms" in the agreement. This clause clearly dealt with the question of credit (that is, the time of payment), and had nothing to do with the manner of inspection upon delivery. "Stipulations which are necessary to make a contract * * * conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention." Civ. Code, § 1655. "It is the general rule that when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears; that the usage * * * is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract (citing cases)." Hind v. Oriental Products Co., Inc., 195 Cal. 655, 667, 235 P. 438, 443. Under somewhat analogous facts, testimony as to a trade custom of inspection was held admissible in Turlock M. & G., Inc., v. Smith, 80 Cal. App. 263, 251 P. 683. See, also, Merehin v. Ball, 68 Cal. 205, 8 P. 886.

[13] Defendant seeks a reversal of the judgment, literally following the language of the verdict, which awarded plaintiffs the sum of $2,500.59, "*out of which plaintiff is to pay actual railroad transportation charges as shown by R. R. expense bills* but not any demurrage or other charges," on the ground that the italicized provision renders the verdict too uncertain and indefinite to comply with section 626 of the Code of Civil Procedure. Defendant having objected to the uncertainty after poll of jury, the court properly should have advised the jury to correct it. Code Civ. Proc. § 619. But we are satisfied from an examination of the entire record that this error of procedure did not cause a miscarriage of justice (Const. art. 6, § 4½; Code Civ. Proc. § 475), and that a modification of the judgment in accord with the obvious intent of the jury, will prevent injury to defendant's substantial rights (2 Cal. Jur. 989). No issue was made by either party at the trial as to defendant's right to deduct freight from the price, but the issue tried was as to its liability for the price at all. The verdict therefore was decisive of the only issue presented for the jury's determination. Hutchinson v. Inyo County, 61 Cal. 119; Redmond v. Weissman, 77 Cal. 423, 20 P. 544; Meyer v. Parsons, 129 Cal. 653, 62 P. 216. Obviously, not to deduct the freight would make the defendant pay more than it was obligated to pay under the agreement and would nullify as surplusage the italicized portion of the verdict. The only testimony as to the amount of the freight is given by a witness for defendant on direct examination as $160 per car. The accuracy of this figure is vouched for by defendant's failure to prove the freight bills under its control and unknown to plaintiffs and also by the fact that the difference between the gross price, as shown by the bill of particulars and defendant's offer to pay, contained in its amended answer, shows the freight on the second car amounted to $168.71. The judgment is therefore modified by deducting from the sum of $2,500.95 the sum of $800, being freight on five cars at $160 per car, leaving a balance due under the judgment of $1,700.95.

As modified, the judgment is affirmed, each party to pay own costs.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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101 Cal. App. 646

CALIFORNIA RESTAURANT EQUIPMENT CO. v. WEBER (CRESSE et al., Intervener). (Civ. 3898.)

District Court of Appeal, Third District, California. Nov. 1, 1929.

1. Sales 🔑111—Seller taking possession of restaurant equipment when purchaser's executrix abandoned business after default in payment of installments terminated contract.

Seller taking possession of restaurant equipment, pursuant to provisions of executory contract for sale thereof, when executrix of estate closed restaurant and abandoned purchaser's business after default in payment of deferred installments of price, terminated contract.

2. Sales 🔑110(2)—Evidence held to support finding that seller repossessed property before executing new contract for sale thereof to purchaser's widow.

In replevin by seller for restaurant equipment purchased by defendant, evidence *held* sufficient to support implied finding that plaintiff repossessed property, pursuant to provisions of prior contract for sale thereof to defendant's husband, since deceased, thereby terminating such contract, before executing new contract with defendant.

3. Sales 🔑196—Default in payment of installments on price of property resold to purchaser's widow after seller took possession, held not waived by subsequent acceptance of deferred payments.

Widow's default in payment of installments on price of restaurant equipment, sold to her after seller took possession thereof pursuant to provisions of prior contract with her husband, *held* not waived by subsequent acceptance of deferred payments, even if execution of new contract waived delay in payment of installments then due, especially in view of express contrary provision of contract.

4. Sales 🔑111—Seller held entitled to apply payments after resale of restaurant equipment to purchaser's widow on indebtedness for remodeling building, instead of original price (Civ. Code, § 1479).

Seller executing new contract to sell restaurant equipment to original purchaser's widow for unpaid balance of price and additional sum for remodeling restaurant at her request had right, under Civ. Code, § 1479, to apply all subsequent payments by her on latter account, instead of original purchase price.

5. Sales 🔑111—Contract to resell property to purchaser's widow held valid and binding, so as to entitle seller to possession on her breach thereof.

Contract for sale of restaurant equipment being terminated by default in payment of deferred installments of price and seller's repossession of property on abandonment of business by purchaser's widow as executrix, subsequent executory contract for resale thereof to widow as an individual was valid and binding, and seller was entitled to possession on her breach thereof.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the California Restaurant Equipment Company against Grace E. Weber, in which defendant, as executrix of the estate of Frederick H. Weber, deceased, and Arthur Cresse intervened. From a judgment for plaintiff, defendant, individually and as executrix, appeals. Affirmed.

Lyle Pendegast, of Los Angeles, for appellant.

McClure, Griffin & Yokum, of Los Angeles, for respondent.

Davis & Thorne, of Los Angeles, for intervener respondent.

THOMPSON, J. This is an appeal from a judgment for plaintiff in an action in replevin. July 10, 1924, the plaintiff and Frederick H. Weber entered into an executory contract by the terms of which certain equipment was purchased for a restaurant in Los

Angeles for the sum of $2,136.82, which was partially paid on delivery of the personal property. The balance of the purchase price was to be paid, together with interest thereon, in specified installments. It was provided that the title to the property should remain in the vendor until the purchase price was fully paid, and that, upon default in the payment of any installment when due, the entire unpaid balance should thereupon automatically become due without notice, and the vendor was then authorized to repossess the property without process of law, in which event the money which had been paid upon the purchase price was deemed to have been applied in compensation for the use and depreciation of the property. It was further stipulated that "time is expressly made the essence of this contract, but the acceptance by the vendor of any payment past due shall not be considered a waiver of this clause." The principal purchase price had been reduced to about $700. The vendee was in default of payments of several installments.

[1, 2] Subsequently, on December 9, 1924, the vendee died. Upon proceedings duly had, his wife, Grace E. Weber, was appointed and qualified as executrix of his estate, and as such took charge of the restaurant with the equipment which is involved in this action. Although the executrix made payments on the purchase price of said property aggregating the sum of $285, the estate was still in default. The restaurant business did not prosper. The executrix was unable to pay the deferred installments on the contract or the rent for the building. She closed the restaurant and abandoned the business. The plaintiff then took possession of the property involved in this action, pursuant to the provisions of the contract. The contract was thereby terminated. Northern A. Co. of London v. Stout, 16 Cal. App. 548, 117 P. 617. A controversy exists as to whether the plaintiff then actually repossessed the property. While there is a conflict of testimony in that regard, we are of the opinion there is substantial evidence to support the implied finding that it did so.

The executrix testified:

"Q. Did you discontinue the operation of the restaurant? A. Yes, I did. Q. How many days before the plaintiff— A. Just a few. Q. Then the plaintiff came and took possession of the restaurant and equipment? A. Yes, that is correct."

With respect to taking possession of the property for a default in payments, Mr. Alkire, the credit manager of the plaintiff, testified: "The Court: Q. You say you repossessed this property? A. Yes, sir. * * * Q. Then she had closed it (the restaurant) up? A. Yes. Q. How many days before? A. Probably between three days and a week. * * * The landlord having called us two or three times to say the place was some five or six hundred (dollars) behind in rent, he wanted possession of it and I went to his place and got permission to leave the equipment in there until I could make some satisfactory arrangement to rearrange it and sell to Mrs. Weber or someone else. * * * She gave me the key to the place. * * * (She said) If I would rearrange the place economically * * * (she would) rebuy the place if I could stretch the payments over a long period of time and make the payments small. * * * She gave me the keys to the place and I went and got a cabinetmaker and * * * told her of the terms that we would rearrange the place and resell it to her, namely $110 down and $50 a month. * * * Three or four days later she phoned me * * * she had arranged to get the money. * * * Then I took the cabinetmaker out there and on completion of the work turned the keys over to her, and the possession of the place. I had possession all the time these changes were being made, by permission of the landlord, and she took the old name off the window and put on the new (name), Weber's Coffee Shop."

The foregoing demonstrates an exercise of ownership over the property on the part of plaintiff with an evident purpose of forfeiting the contract with the estate of the deceased and reorganizing the business on a more economical basis in order to resell the same property "to the widow or someone else," giving her the benefit of all previous payments in the hope that she might succeed in operating the restaurant. Subsequent to this repossession of the property, on May 29, 1925, a new executory sale contract was made between the plaintiff and Grace E. Weber, individually, for the same property, in the exact form in which the original document was drawn, except that the amount of the installments was reduced. By the terms of this second contract Mrs. Weber was credited with the payments which had been previously made by her husband, and she assumed similar obligations to those of her deceased husband under the former agreement, together with an additional indebtedness of $360 for the improvements in the store fixtures which were added by the plaintiff at the request of Mrs. Weber, as above stated.

Upon repossessing the property, the original contract was canceled. Mr. Alkire testified in this regard: "As far as our books were concerned there was (then) no old contract." A new account was opened May 28, 1925, against Grace E. Weber, in the name of Weber's Coffee Shop, which she adopted as the designation for her restaurant business. For a period of time she operated the restaurant in her individual capacity, making payments under the second contract, which were credited to her account, in the aggregate sum of $336. Misfortune continued to follow her enterprise. The business was not a success. Again she defaulted in the payment of her installments. She testified:

"Was a balance due on the contract? A. Yes, I think there was. Q. And it had not been paid? A. That is correct." Mr. Alkire also testified in that regard: "The last payment was made toward that contract on October 6th. Q. How much? A. $20. Q. How much should have been paid? A. $50."

In December, 1925, the plaintiff instituted this action and again repossessed the restaurant equipment by means of a writ of replevin. The defendant, Grace E. Weber, answered and filed a complaint in intervention in her individual capacity and also as a representative of her husband's estate, affirmatively charging the plaintiff with a breach of the contract and praying for reimbursement for the money paid on account of the purchase price of the property. Arthur Cresse also intervened as a creditor of the estate. Upon trial, the court found that the plaintiff was the owner and entitled to the possession of the property in question, and accordingly rendered a judgment in its favor without assessing any damages.

[3] The defendant, Grace E. Weber, has appealed as an individual and also in her representative capacity. She challenges the sufficiency of the evidence to support the findings of plaintiff's ownership and right of possession of the property chiefly on the ground that the default in the payment of installments on the purchase price was waived by subsequent acceptance of deferred payments.

There is no merit in this contention. Even though it be conceded, that the execution of the new contract constituted a waiver of the delay in the payments of the installments then due, default in the payment of subsequent installments occurred. Assuming that the plaintiff lawfully repossessed the property before the execution of the new contract of sale, Grace E. Weber, individually, as the succeeding vendee of the property, was in default. If the property was not so repossessed and the estate of the deceased vendee still retained its equitable interest in the property, Grace E. Weber, in her representative capacity, was in default of payments of subsequent stipulated installments. The interest of the estate in the property was thereby forfeited.

The contract provided that "time is expressly made the essence of this contract, but the acceptance by the vendor of any payments past due shall not be considered a waiver of this clause." Under this express provision of the contract the acceptance of installments after they had become due did not constitute a waiver of the right to repossess the property for default in subsequent payments. Pacific Finance & Investment Co. v. Pierce, 48 Cal. App. 600, 191 P. 1115; McConnell v. Redd, 86 Cal. App. 785, 790, 261 P. 506.

[4, 5] The appellant now claims that the plaintiff never actually repossessed the property before assuming to transfer it to her individually, and that the estate therefore retained an interest therein which it could not be thus deprived of; that, if all the money which she paid plaintiff subsequent to the execution of the second contract were applied on the first contract, it would fully pay the entire original purchase price, and the estate would then be entitled to the property. Upon the execution of the second contract, however, a new obligation for $360 additional was incurred by Grace E. Weber. She claimed to have made the payments on this last contract from her own earnings. Section 1479 of the Civil Code provides in part:

"Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

* * * * * *

"Two. If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of [the] debtor."

After the incurring of the new obligation to pay $360 for remodeling the restaurant at the request of Grace E. Weber individually, she was personally charged in an entirely different account with this sum together with the unpaid balance of the purchase price of the equipment. The plaintiff elected to credit all her payments which were made subsequent to the execution of the new contract to this last account, which he had a right to do pursuant to section 1479, supra. She made no request to apply these payments upon the old contract. Upon the contrary, the entire transaction which resulted in the cancellation of the old contract and the execution of the new one was with her consent and at her request. In view of the fact that the first contract was terminated by the breach thereof and that the property was repossessed by the vendor, it was empowered to make a subsequent valid contract to resell the equipment to any purchaser obtainable and upon any terms which were acceptable. The subsequent executory sale contract with Grace E. Weber as an individual was valid and binding. For the breach of this latter contract, her interest in the property was forfeited, and the plaintiff was entitled to the possession thereof. A sufficient prima facie showing of plaintiff's ownership of the property was shown.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

BURGESS v. CALIFORNIA MUTUAL BUILDING & LOAN ASS'N et al.★

(Civ. 6869.)

District Court of Appeal, First District, Division 1, California. Oct. 25, 1929.

Rehearing Denied Nov. 23, 1929. Hearing Granted by Supreme Court Dec. 23, 1929.

1. Appeal and error 🔑154(1)—Beneficiary of second deed of trust suing to compel release from first trust deed did not waive right to appeal from judgment by purchasing at sale under first deed for an increased price.

Where beneficiary of first deed of trust agreed to release part of property on payment of $6,000, and beneficiary of second deed of trust covering property agreed to be released brought action to obtain reconveyance of such property on terms of such agreement, such beneficiary *held* not to have waived his right to prosecute appeal from judgment denying conveyance by purchasing property at sale under first deed of trust for $10,000, in that he had obtained all he was seeking by his complaint, as beneficiary under second trust deed was placed by such sale in a position where he had to protect his rights.

2. Compromise and settlement 🔑11—Court cannot make contract of compromise and satisfaction for parties.

Court cannot make contract of compromise and satisfaction for parties when they themselves have not done so.

3. Appeal and error 🔑1071(6)—Failure to find on immaterial issue is not ground for reversal.

Failure to find on immaterial issue is not ground for reversal.

4. Appeal and error 🔑1071(5)—If material findings are supported by evidence, finding on immaterial issue will not cause reversal.

Finding on an immaterial issue will not cause a reversal, if material findings are supported by evidence.

5. Mortgages 🔑315(3)—Where property was covered by first and second deed of trust, reconveyance to grantor of property covered by first trust deed, not covered by second, did not deprive beneficiary of second trust deed of any right.

Where, on completion of certain work to satisfaction of beneficiary of first deed of trust, grantor became entitled to reconveyance of part of property, reconveyance of such property did not deprive beneficiary of second deed of trust, which covered other property covered by first deed of trust, of any right.

6. Appeal and error 🔑989—Appellate court's inquiry is limited to question whether there is substantial evidence to support finding.

Where finding is attacked for insufficiency of evidence, power of appellate court begins and ends in inquiry whether there is substantial evidence which will support findings of court.

7. Appeal and error 🔑931(1)—Appellate court must assume that conflicting evidence was resolved in favor of prevailing party.

If evidence conflicts on material points, appellate court must assume that trial court resolved such conflict in favor of prevailing party.

8. Appeal and error 🔑758(3)—Assignments of error in brief without reasons for claim could not be considered on appeal.

Where appellant's brief failed to point out reasons for claim of error, and stated no authority to support claim, such assignments could not be considered, as appellate court will not search record to find error.

9. Evidence 🔑432—Showing circumstances surrounding written agreement to release part of property covered by trust deed to prove lack of consideration held proper.

Where beneficiary of first trust deed gave letter agreeing to release certain part of property covered on payment of $6,000, it was proper, in action to compel reconveyance as agreed, for such beneficiary to show circumstances surrounding giving of letter to prove lack of consideration.

10. Estoppel 🔑54—Beneficiary of first trust deed held not estopped, as against beneficiary of second deed, from claiming agreement to release part of property was without consideration.

Where beneficiary of first trust deed was ignorant of fact that grantor was negotiating second loan, and beneficiary of second deed did not see letter given by beneficiary of first deed, wherein beneficiary agreed to release part of property on payment of $6,000, first beneficiary *held* not estopped from claiming letter was without consideration.

11. Specific performance 🔑49(1)—Reconveyance of property covered by trust deed could not be compelled, where agreement to reconvey was without consideration (Civ. Code, § 3391, subd. 1).

Where no adequate consideration moved to beneficiary of first trust deed in support of agreement to reconvey part of property covered by such deed, in view of Civ. Code, § 3391, subd. 1, such beneficiary could not be compelled to reconvey property.

12. Equity 🔑66—Beneficiary of second trust deed offering inadequate sum to beneficiary of first deed for reconveyance held not entitled to compel conveyance.

Where beneficiary of second trust deed asked that beneficiary of first trust deed be compelled to reconvey for sum of $6,000, and it appeared from plaintiff's own affidavit that $6,000 was an inadequate price, plaintiff *held* not entitled to compel a reconveyance, since he would not be doing equity.

★Hearing granted. 290 P. 1029.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Chandler W. Burgess against the California Mutual Building & Loan Association and another. From a judgment for the defendants, plaintiff appeals. Motion to dismiss appeal denied, and judgment affirmed.

Treat & Ogden, of San Francisco, for appellant.

Jones, Boalt, Patterson & Douglas, of San Jose, for respondents.

DEASY, Justice pro tem. On the 9th day of October, 1924, one Daniel McKillop and Josephine McKillop, his wife, executed a deed of trust, in which the respondent California Mutual Building and Loan Association was the beneficiary, to secure a promissory note in the sum of $20,000, and also future advances which said respondent should make to said McKillop, and further advances were made and other notes given. The deed of trust conveyed a tract of land, which, for convenience, will be referred to as the McKillop Heights property, and another tract which will be referred to as the Wayne street property. The descriptions of the various tracts referred to in this opinion are very lengthy, and no useful purpose will be served by setting them out in full. McKillop at that time was engaged in developing the McKillop Heights property as a subdivision, selling lots, and building homes thereon. From time to time, although there was no provision in the deed of trust to that effect, individual lots were released from the lien and reconveyed upon payments being made to said respondent. On December 2, 1925, under circumstances which will be more fully detailed hereafter, said Daniel McKillop obtained a letter from said respondent relative to the release of a portion of the McKillop Heights property, which portion, for convenience, will be referred to as the Burgess property, which letter reads as follows:

"California Mutual Building and Loan Association

"248 South First St., San Jose, Calif. December 2, 1925.

"Mr. Daniel R. McKillop, 354 Russ Bldg., San Francisco, Calif. Dear Mr. McKillop: Confirming our conversation of today, this is to advise that this Association will release the following described property from under the terms of our Deed of Trust covering property described as McKillop Heights, Oakland, for the sum of $6,000.00. [Here follows description of Burgess property.]

"Yours very truly, California Mutual Building & Loan Association, W. B. Rice, Secretary. WBR:LM"

At the time he obtained said letter, McKillop, without the knowledge of the respondents, was negotiating a loan from appellant in the sum of $12,000, to be secured by a second deed of trust on said Burgess property, and represented to appellant that the property could be released from the first deed of trust on the payment of $6,000. The letter, when obtained, was deposited with the California Pacific Title Insurance Company, and, upon the closing of the transaction between appellant and McKillop, was delivered to appellant. The deeds of trust from McKillop to Burgess were executed on the 18th of December, 1925. Some time in 1926 McKillop's financial condition became very bad. He ceased his development work on the McKillop Heights property, defaulted in his payments to respondents, and finally was adjudged a bankrupt. In October, 1926, McKillop being in default in his payments, the respondent La Motte, who had been substituted as trustee in the original deed of trust of October, 1924, gave notice of default and of an intention to sell so much of the McKillop Heights property as remained subject to the lien of the deed of trust, in accordance with law, to satisfy the claim of the respondent California Mutual Building & Loan Association. In January, 1927, appellant called at the office of the loan association, and tendered to it the sum of $6,000, and demanded of it a reconveyance of said Burgess property. The tender was not accepted, and the reconveyance was refused, and thereafter appellant commenced this action to enjoin the sale of said Burgess property and to obtain a reconveyance of the same. The case was tried before the court, which gave judgment for the defendants, and plaintiff appealed.

No stay bond having been filed, the trustee proceeded, pending the appeal, to sell said Burgess property under the terms of the deed of trust, and at the sale appellant became the purchaser, paying therefor the sum of $10,000. Subsequently respondents made a motion to dismiss the appeal upon the ground that appellant, having received from the trustee a conveyance of the property, has now all that he asked in his complaint, and that the question is now moot. The motion to dismiss and the appeal on its merits were argued and submitted together.

[1] So far as the motion to dismiss the appeal is concerned, it is hardly an accurate statement of the facts to say, as respondents do, that appellant has obtained all that he was seeking by his complaint. It is true that he has now the title to the property, free and clear of the lien of the respondents' deed of trust, but, instead of a reconveyance for $6,000, he obtained a conveyance from the trustee for $10,000. It cannot well be said that he voluntarily became a purchaser, because the proceedings for the trustee's sale were inaugurated by the respondents, and appellant was by such act of the respondents placed in a position where he had to do something to protect his rights. He might have chosen some other means, perhaps, but he has not

waived his right to prosecute his appeal by doing what he did. The situation is analogous to a case where, pending an appeal, the appellant, in order to prevent an execution sale, pays the amount of the judgment. In such case, unless there is some agreement of compromise, or an understanding that the appeal will not be prosecuted, the mere payment does not operate to deprive the appellant of his rights. Warner Bros. Co. v. Freud, 131 Cal. 639, 63 P. 1017, 82 Am. St. Rep. 400; Knight v. Marks, 183 Cal. 354, 191 P. 531.

In the case of Sunset Lumber Co. v. Bachelder, 167 Cal. 512, 140 P. 35, 36, Ann. Cas. 1916B, 664, a mechanic's lien had been held to be prior to that of a mortgagee. Pending an appeal by the mortgagee, the mechanic's lien was foreclosed, and the mortgagee bid in the property and paid the amount of the judgment to the lien claimant. On the appeal it was contended that by so acting he had waived his right to appeal, but the Supreme Court held otherwise, saying:

"In order to protect his own interests, in the absence of a stay of proceedings, Rankin (the mortgagee) was compelled to appear at the foreclosure sale and make such bid as might be necessary to make the property bring its reasonable value. The case is governed by the same principles as where a defendant against whom a judgment is rendered has appealed after execution has been taken out and enforced against him. In such cases the rule is said to be that 'a forced payment by execution sale against a nonconsenting judgment debtor cannot be held to abridge any of his rights upon or under appeal.' Vermont Marble Co. v. Black, 123 Cal. 23, 55 P. 599; Kenney v. Parks, 120 Cal. 24, 52 P. 40; Warner Bros. Co. v. Freud, 131 Cal. 639, 63 P. 1017, 82 Am. St. Rep. 400. The same principle applies here. The defendant Rankin was compelled to submit to the sale and protect his interest by bidding thereat, and he is not thereby estopped from availing himself of an appeal from the part of the judgment which is to his prejudice, and upon the reversal of which the remaining parts of the judgment will stand unaffected."

Counsel for respondents, in support of the motion to dismiss the appeal, rely to a large extent upon the case of Preluzsky v. Pacific Co-operative C. Co., 195 Cal. 290, 232 P. 970, 971. That case lays down the rule quoted by respondents as follows: "It is the general rule that a voluntary satisfaction of a judgment by a party estops him to prosecute an appeal therefrom." But the court continues in the same sentence: "But where such satisfaction is involuntary and enforced by process, the mere circumstance that the judgment has been so satisfied does not of itself alone deprive a party aggrieved of his right to appeal therefrom."

Respondents' contention that the act of appellant in the case at bar was a voluntary one is, we think, completely answered by the ruling in Sunset Lumber Co. v. Bachelder, supra.

[2] Respondents also advance the theory that, as appellant bid $10,000 for the property instead of $6,000, the amount he sought to pay for the reconveyance, and as respondents permitted appellant to purchase for $10,000 instead of requiring him to pay the sum of $19,984.33, the balance found to be due to them, the situation must be regarded as in the nature of a compromise. It is a sufficient answer to this contention to say that, outside of the mere facts so mentioned, there is no showing in the record on the motion to dismiss of any compromise in the matter, and we are not at liberty to make a contract of compromise or satisfaction for the parties when they themselves have not done so.

The motion to dismiss the appeal should be denied.

Coming to the appeal on its merits, there are many assignments of error which do not require separate attention, as they may be grouped under a few general topics and so considered.

[3-5] Appellant contends that all of the findings relative to the Wayne street property are not supported by competent evidence. As to many of the findings thus attacked this contention is undoubtedly correct. But as to the finding that the Wayne street property was included in the deed of trust merely as additional security for the performance of certain street work on the McKillop Heights property, and was to be reconveyed when that work was completed, and that the street work was actually completed prior to October 9, 1925, the evidence is more than sufficient to support it. This being so, all questions as to whether the security of the Wayne street property was worthless to respondents, or whether there were prior deeds of trust or other liens upon it, or whether it was sold on foreclosure of a prior lien, become immaterial to a decision of the case, and the findings as to those matters may be disregarded. It is well settled that failure to find upon an immaterial issue is not a ground for reversal, and similarly a finding on an immaterial issue becomes mere surplusage, and will not cause a reversal, if the material findings are supported by the evidence. It was established as a fact in the case by competent evidence that, upon the completion of the street work to the satisfaction of respondents, McKillop became entitled to a reconveyance of the Wayne street property, and therefore its reconveyance did not operate to deprive appellant of any right, or give rise to any cause of action in his favor.

For the same reason many of the assignments of error as to the admission of evidence are immaterial and require no further discussion.

Aside from the findings just referred to, an examination of the record discloses that the evidence is ample to support all of the other findings of the trial court.

[6, 7] Where findings are attacked for insufficiency of evidence to support them, the power of the appellate court begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which will in and of itself support the findings of the trial court, and if on any material point the testimony is in conflict, the appellate court must assume that the trial court resolved the conflict in favor of the prevailing party. Mercantile Investment Co. v. How (Cal. App.) 278 P. 243; Treadwell v. Nickell, 194 Cal. 243, 228 P. 25; Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111.

[8] Many of the assignments of error as to the evidence are merely stated in appellant's brief, and no attempt is made to point out the reasons for the claim of error. Error will not be presumed, and must be shown; therefore all such assignments must be disregarded. It is the duty of counsel to point out the error and to cite the authorities in support of their position, and, where they fail to do it, we will not search the record to find the error. People v. Chutnacut, 141 Cal. 682, 75 P. 340; People v. Schlosser (Cal. App.) 278 P. 898.

[9] Many of the specified errors in the admission of evidence are claimed by appellant to be violations of the parol evidence rule, as tending to vary the terms of the letter by which respondents agreed to reconvey the Burgess property to McKillop. Respondents urge in regard to this letter that it was based upon no consideration. Appellant claims that, being an instrument in writing, the letter imports a consideration. None being recited in the instrument, it was competent for respondents to show the true state of facts.

With certain exceptions, not material here, it is the rule that parol evidence may be given to show just what the consideration was, even though the transaction be evidenced by a writing. This being so, it was certainly proper in the case at bar for the respondents, in endeavoring to prove lack of consideration, to show the circumstances surrounding the giving of the letter to McKillop. They showed by ample evidence that before McKillop was entitled to demand a reconveyance of the Burgess property his loan must be in good standing, the building operations and the development of the tract must be proceeding, and the security of respondents must, generally speaking, be unaffected by any act of the borrower. All of this was reasonable and not at all improbable. It clearly appeared from the evidence that respondent loan association, as the promisor in the letter, received no benefit by giving it to McKillop, and that he suffered no detriment by reason of its receipt. After he defaulted, McKillop could not have demanded the reconveyance, and appellant's position is no better than that of the original borrower. The trial court found on ample evidence that this was the true state of the matter, and correctly concluded that there was no consideration for the letter.

[10] Appellant urges, however, that respondents are estopped from claiming that there was no consideration for the letter, because by their negligence in giving it to McKillop they made it possible for him to deceive appellant. There is no merit in this contention. The record shows clearly that the respondents were entirely ignorant of the fact that McKillop was negotiating, or intended to negotiate, a second loan on the property, and that the only purpose they had in mind in dealing with him was to aid in the improvement of the property so that their security would be enhanced. In view of the pleadings and the evidence, there is no justification in this case for the application of the doctrine of estoppel. Under the rule of caveat emptor, appellant, knowing that he was lending money on a second mortgage, was bound to find out all of the conditions surrounding the matter of the reconveyance. The record shows that he did not even see the letter in question until some time after he had paid over his money to the title insurance company. Appellant, under these circumstances, is not shown to have relied upon any statements contained in the letter, but upon the promise of McKillop to obtain the letter. He was not deceived or misled by anything contained in the letter, and therefore cannot claim any estoppel by reason of anything that respondents did in the matter.

[11] In its final analysis this case is in the nature of an action in specific performance. There being no adequate consideration moving to respondents, they cannot be compelled to reconvey the Burgess property. Section 3391, subd. 1, Civ. Code; Stein v. Archibald, 151 Cal. 220, at page 226, 90 P. 536.

[12] In this connection a very significant matter that should be noticed is the following: Appellant has come into a court of equity asking that respondents be compelled to reconvey certain property to him for the sum of $6,000. In his affidavit filed in opposition to the motion to dismiss the appeal, appellant swears as follows:

"That there was no other person than this plaintiff present willing to bid on said real property, save and excepting the said defendant California Mutual Building and Loan Association, which said California Mutual Building and Loan Association did offer to purchase said real property for the inadequate price of $6,000.00 and no more, and that this plaintiff was threatened by the said intended sale with the loss of the property to which he did then and does now claim an interest in, for a price entirely inadequate to its real value."

In view of the foregoing statement, it can hardly be said that he is doing equity in offering what he so solemnly declares to be an inadequate sum to obtain the reconveyance, and therefore he cannot be heard to ask equity.

There are no other matters requiring notice in connection with the appeal, and for the reasons stated the judgment should be affirmed.

It is therefore ordered that the motion to dismiss the appeal be denied, and that the judgment be affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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101 Cal. App. 548

KIRCHER v. HUNTER. (Civ. 5610.)★

District Court of Appeal, Second District, Division 2, California. Oct. 29, 1929.

Rehearing Denied Nov. 27, 1929. Hearing Denied by Supreme Court Dec. 26, 1929.

1. Appeal and error ⚿110—Order denying new trial is not appealable.

Appeal does not lie from an order denying new trial.

2. Contracts ⚿188—Subcontractor held not liable to owner for defective work, where owner's contract was solely with general contractor.

Where owner's contract with contractor provided that contractor would be held to provide all labor and material for entire completion of work, and entire consideration was paid to contractor, and contractor employed subcontractor, *held* subcontractor was not liable to owner for reconstruction work caused by subcontractor's defective work, as there was no privity of contract between owner and subcontractor.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Anna Kircher against V. O. Hunter. From a judgment for plaintiff, defendant appeals. Reversed.

Hilton & Critchley, of Los Angeles, for appellant.

Haas & Dunnigan and C. H. Veale, all of Los Angeles, for respondent.

CRAIG, J. [1] The respondent contracted in writing with one James H. Aye, as general contractor, to construct a dwelling house. The latter obtained appellant's services to construct certain tile work in two bathrooms, which later proved defective, whereupon respondent demanded that appellant perform necessary reconstruction work, which he declined to do. It was done by another, whom respondent paid, and thereafter instituted this action against the appellant for the cost of such extra work. Judgment was rendered in favor of the plaintiff, a motion for a new trial was prosecuted, which was denied, and this is an appeal from the judgment and from the ruling upon said motion. Since no appeal lies from an order denying a new trial, the proceeding last mentioned must be dismissed.

The parties agree upon the facts, and mutually submit for determination the question of law whether respondent, the owner, should recover from appellant or the general contractor. The contract first mentioned provided, in part, as follows: "(1) The said builder agrees to build for the said owner, * * * a two-story frame and stucco dwelling, also a frame and stucco garage, all in accordance with plan and specifications * * * The owner agrees to pay the said builder the sum of $14,875. no/100 to include the full cost of construction, labor and materials. The payment of said sum is to be as follows: Once each week there shall be an accounting between the said builder and the said owner, at which time receipted vouchers for labor and petty items will be tendered to the owner by the builder in return for the owner's check to cover such total amounts. All bills for material shall be paid to the dealers direct by the owner. Any and all sums remaining within the total amount of the cost price, namely $14,875. no/100 plus all sums for extras, if any, at the completion of the building shall be paid to said builder, provided that a period of thirty-five (35) days shall elapse and it is found that no liens have been filed."

The plans and specifications required that: "The floors in the bathrooms are to be one inch hexagonal Eastern tile, with clover leaf in blue border, well laid in cement, making an absolutely water-tight job.

"The side wall of the bathrooms and shower on the second floor to be tiled with 3″ x 6″ glazed Eastern tile to a height of 5′ 6″ with blue border and panel border.

"The above tile work to have 6″ base on bottom and 1″ cap mould at the top; both to be of design selected by the owner."

It appears that the general contractor negotiated with and employed appellant to perform the work of which complaint was made, and that he also made out a bill therefor, upon a billhead of the appellant, directly to the owner, received respondent's check payable to appellant, and delivered the same. Appellant testified that he had no conversation with respondent or his wife regarding the employment, and did not consult the plans and specifications, but acted entirely under the directions of the general contractor. Aye also testified that he personally selected Hunter for the work, that he instructed him as to what was wanted, and did not submit to him the specifications agreed upon by the owner. Respondent testified that Mrs. Hunter paid all bills, and she testified the general contractor gave her the bill; that she "checked up the bill with Mr. Aye, and then he gave me the bill, and I checked it up with him, and I give him the check, and he in turn gave it

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★Rehearing denied. Hearing denied by Supreme Court.

to Mr. Hunter"; that Aye acted as her agent "in this building." Respondent stresses the fact that the owners made suggestions to the subcontractor, but it is observed that this was expressly agreed upon between them and the contractor. The original specifications also provided that all materials and workmanship should be of the best, and that "the contractor will be held to provide all labor and material necessary for the entire completion of the work."

[2] It has been held that there is no privity of contract between an owner and a subcontractor. Bowen v. Aubrey, 22 Cal. 566; Walsh v. McMenomy, 74 Cal. 356, 16 P. 17. Respondent attempts to reply upon the general rule that privity of contract may be implied between a promissor and one to whom the consideration flows, and that a beneficiary who furnishes consideration may enforce a contract which has been obtained for him by a third person. However, the authorities cited in his briefs differ as to facts but not in principle with those above mentioned. For instance, Rossman v. Townsend, 17 Wis. 95, 84 Am. Dec. 733, was an action for the price of flour, and it was there expressly held that, since there was no privity of contract between the plaintiff and the defendant, the former must look to the agent with whom he dealt. So, in the instant case, the whole amount of the contract price was made payable to Aye, who employed the appellant herein, and by the terms of the specifications the contractor was expressly responsible for "all labor and material necessary for the entire completion of the work." The courts cannot contract for parties, nor is there room for construction of this contract and specifications otherwise than as the parties plainly expressed their intentions.

The appeal from the order denying a new trial is dismissed, and the judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

GORDON v. HARBOLT et al. (Civ. 5419.)★

District Court of Appeal, Second District, Division 2, California. Oct. 17, 1929.

Hearing Granted by Supreme Court Nov. 14, 1929.

1. Appeal and error ⚿865—Sufficiency of complaint to state cause of action held not presented for review on appeal from order vacating default judgment (Code Civ. Proc. § 473).

Question of sufficiency of complaint to state cause of action *held* not presented for determination of reviewing court on appeal from order vacating default judgment on application for relief under Code Civ. Proc. § 473.

2. Appeal and error ⚿865—Only issue presented for determination of reviewing court on appeal from order vacating default is whether order constituted abuse of discretion (Code Civ. Proc. § 473).

Only issue presented for determination of reviewing court on appeal from an order vacating default under Code Civ. Proc. § 473, is whether or not trial court abused its discretion in making the order upon the ground of excusable negligence of defendant.

3. Appeal and error ⚿193(9)—Objection that complaint fails to state cause of action may be raised for first time on defendant's appeal from default judgment (Code Civ. Proc. § 434).

Objection that complaint fails to state cause of action may be raised for first time on defendant's appeal from judgment for plaintiff under Code Civ. Proc. § 434, though judgment was taken by default.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

On petition for rehearing. Petition denied. For original opinion, see 280 P. 701.

Thomas A. Wood and O. B. DeCamp, both of Los Angeles (F. Britton McConnell, of Los Angeles, of counsel), for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

PER CURIAM. Respondent bases its petition for a rehearing very largely upon the asserted fact that the complaint fails to state a cause of action in so far as it alleges that the bond furnished by itself covered two licensed real estate brokers, and fails to allege that any wrongful act has been performed by one of them and upon the claim that we have ignored "the absolute defense disclosed by the uncontradicted affidavits of appellee on file (in support of its motion to set aside its default), viz.: That appellee never became surety upon the bond of G. C. Harbolt, the only broker against whom an attempt is made to state a cause of action."

[1-3] These matters were not before us on this appeal from an order vacating a default. The only issue presented for our determination or which we had jurisdiction to decide was whether or not the court below had abused its discretion in making the order setting aside the default upon the ground of excusable neglect in failing to appear in response to the summons served on it. This point we have determined after a careful examination of the affidavits upon which the petitioner respondent based its motion in the court below and upon the theory that all the facts stated therein were true (Corgiat v. Realty Mortgage Corp., 86 Cal. App. 37, 260 P. 573), but that they failed to disclose any excuse or justification for the failure of respondent to obey the summons. The question of the sufficiency of the complaint to state a

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★Hearing granted by Supreme Court.

cause of action was not germane to the matter presented to the court below on application for relief under section 473 of the Code of Civil Procedure. Respondent might have raised it either by demurrer or answer had it not, by its own inexcusable negligence, permitted its default to be taken; it may still raise it by an appeal from the judgment which, from the record before us, we do not understand has been entered, but which will probably follow upon the going down of the remittitur herein, since an objection that the complaint fails to state a cause of action may be raised at any stage of the proceedings and even for the first time on appeal (Code Civ. Proc. § 434; Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Bell v. Thompson, 147 Cal. 689, 82 P. 327), and this is true, although the judgment was by default. Ryan v. Holliday, 110 Cal. 335, 42 P. 891.

The petition for rehearing is denied.

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101 Cal. App. 492

SMITH v. MOORE MILL & LUMBER CO.
(Civ. 6870.)

District Court of Appeal, First District, Division 1, California. Oct. 28, 1929.

1. Process 🔑166—Where nonresident's acknowledgment of service evidences intention to waive further service, it confers jurisdiction over defendant's person, provided court has jurisdiction over subject-matter.

Where acknowledgment of service made upon nonresident defendant in foreign state is so worded as to evidence an intention to waive further service, it partakes of nature of waiver and is legally sufficient to confer jurisdiction over person of defendant, provided court has jurisdiction over subject-matter.

2. Process 🔑166—Nonresident's acceptance of service reading, "Service of * * * summons is hereby accepted," conferred jurisdiction over person, though order for publication of service was not obtained as required.

Defendant's written acceptance in state of service in suit commenced in Oregon, reading as follows: "Service of within and foregoing summons is hereby accepted this 3rd day of October, 1922," *held* to imply an approval of form and sufficiency of service and an intention to submit to jurisdiction of court and to thus confer jurisdiction over person so that judgment in such suit was not void, though order for publication of service was not obtained as required.

3. Judgment 🔑818(1)—Foreign judgment is entitled to same presumptions of regularity in jurisdiction as domestic judgment.

Foreign judgment is entitled to same presumptions of regularity in jurisdiction as domestic judgment, and, unless it be shown by clear and convincing evidence that there has been want of jurisdiction, presumption that judgment is valid must prevail.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action for damages for conversion of logging equipment by Francis E. Smith against Moore Mill & Lumber Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

C. K. Bonestell, Walter S. Brann, and Edgar H. Rowe, all of San Francisco, for appellant.

K. C. Partridge, of San Francisco, for respondent.

KNIGHT, J. Appellant brought this action upon an assigned claim of the Fyfe-Wilson Lumber Company to recover damages for the alleged conversion of certain logging equipment located in the state of Oregon. Judgment of nonsuit was entered, and the appeal is taken therefrom.

The respondent Moore Mill & Lumber Company is an Oregon corporation, and the Fyfe-Wilson Lumber Company is incorporated under the laws of California. Some time prior to September, 1922, the latter company delivered to respondent in Coos county, Or., the logging equipment in question for the purpose of enabling respondent to get out logs. At the time of such delivery the Fyfe-Wilson Lumber Company owed respondent $50,000, which was evidenced in part by promissory notes, one being for the sum of $3,000. On September 22, 1922, respondent commenced suit on the note last mentioned in the circuit court of Coos county, Or., and caused a writ of attachment to be issued and levied upon the property in question. Thereafter, and on January 8, 1924, judgment by default was entered and the property was sold under execution and bid in by respondent. More than two years thereafter the present action was commenced in the superior court in and for the city and county of San Francisco, upon the theory that the judgment rendered in the Oregon court and the execution sale based thereon were void, appellant claiming that there was an attempted personal service of summons on the Fyfe-Wilson Lumber Company outside the state of Oregon without first having obtained an order for the publication of the summons as required by the laws of that state, and that therefore the Oregon court did not acquire jurisdiction of the person of said company as the defendant in the action.

The laws of Oregon relating to the service of summons upon nonresidents of that state are admittedly similar to those of California in providing that in certain classes of cases, where service is to be made upon a defendant without the state, it is essential to a valid service that an order of court be first obtained, based on affidavit, for the publication of the summons, and that after such order is obtained personal service out of the state is equivalent to publication, etc. Here, admittedly, no such affidavit was made nor any such order obtained. But the record shows that the judgment was entered upon the strength of a written acceptance of service of summons signed by the Fyfe-Wilson Lumber Company, the terms of which represented that such service was made in Coos county, Or. It read as follows: "State of Oregon, County of Coos.—ss. Service of the within and foregoing summons is hereby accepted this 3rd day of October, 1922, by delivery to me of a duly certified copy of the complaint herein together with a true copy of the foregoing summons. [signed] Fyfe-Wilson Lumber Co., By Joseph Fyfe, Jr., V. P." Appellant omitted to insert in the bill of exceptions herein a copy of the complaint filed in the Oregon action, and consequently there is nothing in the record before us to show that prior to the entry of judgment the Oregon court was apprised of the fact that the Fyfe-Wilson Lumber Company was a California corporation, or, if so, that its principal place of business was not in Oregon; and moreover, the recitals in the judgment are to the effect that service of the summons was duly made within the court's jurisdiction. However, in the present action, appellant introduced evidence to prove, in contradiction of the terms of the written acceptance of service, that such service was in fact not made in Oregon but in California. Therefore, the determinative question presented by the appeal relates to the legal effect of such written acceptance of service.

[1] In this connection it may be stated generally that, although an acknowledgment of service when made upon a nonresident defendant has the effect merely of personal service without the state, such acknowledgment by its terms may amount to something more than a mere acknowledgment of service and constitute a waiver of want of jurisdiction of the person of the defendant. 32 Cyc., p. 450. Such was declared to be the law as early as 1834, for in the case of Dunn v. Dunn, 4 Paige (N. Y.) 425, it was said: "In all cases, however, when the court has jurisdiction over the subject matter of the suit, if the defendant who is beyond the limits of the state thinks proper to waive that objection by a voluntary appearance, or by consenting to accept as regular the service of process upon him at the place where he resides or is found, he cannot afterwards object to the regularity of the proceedings against him, founded on such service." And although the weight of authority seems to hold that a bare acknowledgment of the fact of service beyond the territorial jurisdiction of the court does not amount to a waiver (see Allured v. Voller, 107 Mich. 476, 65 N. W. 285), it is well established that, if the acknowledgment is so worded as to evidence an intention to waive further service, it partakes of the nature of a waiver and is legally sufficient to confer jurisdiction over the person of the defendant, provided, of course, the court has jurisdiction over the subject-matter. Jones v. Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475. The written admission of service considered in the case last cited bears a strong analogy to the written acceptance involved in the present case. It reads as follows: "'I hereby admit due personal service upon me of the within subpœna this eleventh day of September, 1894. (signed) Melissa C. Livermore.'" and the same was held to be a waiver and therefore legally sufficient to confer jurisdiction over the person of the party signing it. As already shown, the written acceptance of service in the present case reads: "* * * Service of the within and foregoing summons is hereby accepted this 3rd day of October, 1922. * * *"

[2] It will thus be observed that, as in the case of Jones v. Merrill, supra, the language used goes beyond the mere admission of the fact of service and the bare acknowledgment of the receipt of copies of the complaint and summons, and expressly states that service of summons "is hereby accepted," clearly implying an approval of the form and sufficiency of the service and an intention to submit to the jurisdiction of the court. Furthermore, the fact that the Fyfe-Wilson Lumber Company made it appear by the caption of the written acceptance that summons was served within the state of Oregon, when in fact it was served in California, tends strongly to fortify the conclusion that thereby the company intended to waive any defect of service, because evidently, if the truth had been set forth therein, to wit, that the service was made in California, the Oregon court doubtless would have refused to enter judgment in the state of the record before it, that is, in the absence of an affidavit and order for publication of the summons. And the further fact that more than two years were allowed to elapse before any steps were taken to assail the validity of the judgment is also persuasive of the belief that, irrespective of the condition of the record in the case, said company was willing that judgment should be entered against it without further proceedings being had.

[3] It is doubtless the law, as appellant contends, that a judgment of a court of record of another state differs in its conclusive effect from such a domestic judgment in one material respect, namely, that it may always be shown by evidence outside the record and even in opposition to the recitals that the court was without jurisdiction either of the subject matter, or of the parties, and that consequently it may be shown by extrinsic evidence that summons was not in fact served. Greenzweig v. Strelinger, 103 Cal. 278, 37 P. 398; 15 Cal. Jur. 245. Neverthe-

less, such a judgment is entitled to the same presumptions of regularity in jurisdiction as a domestic judgment, and, unless it be shown by clear and convincing evidence that there has been a want of jurisdiction, the presumption that its judgment is valid must prevail. 15 Cal. Jur. 246; Estate of Wiechers, 199 Cal. 523, 250 P. 397; Estate of Pusey, 177 Cal. 367, 170 P. 846.

For the reasons stated the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

101 Cal. App. 365

BURLINGAME v. TRAEGER et al.

(Civ. 6240.)

District Court of Appeal, Second District, Division 2, California. Oct. 21, 1929.

1. False imprisonment 🔑20(1)—Demurrer to complaint for illegal arrest held properly sustained for failure to give facts showing insufficiency of affidavit or order of arrest and failure to show irregularity on face of order or lack of jurisdiction.

In action for illegal arrest, demurrer to complaint *held* properly sustained because of failure to allege any facts indicating order of arrest or affidavit on which it was based were insufficient, and because of failure to show any irregularity on face of order of arrest or any lack of jurisdiction of court to issue it; allegations that order was "illegal," "unauthorized," and "void," and that affidavit was insufficient, being conclusions of law.

2. Pleadings 🔑216(1)—On general demurrer court considers merely facts pleaded in complaint.

Court in passing on sufficiency of complaint alleging illegal arrest, attacked by general demurrer, was required to consider merely the facts pleaded therein.

3. Pleadings 🔑8(6)—Allegation that instrument is "illegal," "unauthorized," or "void," is but conclusion of law.

Allegation, in complaint for illegal arrest, that instrument was "illegal," "unauthorized," or "void," is but a conclusion of law, and such words, when used in connection with issuable facts, are to be regarded as surplusage, not obviating necessity of alleging facts showing the illegality, lack of authorization, or invalidity.

4. False imprisonment 🔑7(3)—Officer is not required to look behind order of arrest, regular on face, delivered to him after issuance by court of competent jurisdiction (Pol. Code, § 4168).

Officer to whom order of arrest has been delivered for execution is not required at his peril to look behind order, if it appears to be regular on face and issued by court of competent jurisdiction, under Pol. Code, § 4168).

5. Arrest 🔑9—Women held subject to civil arrest in superior court action (Code Civ. Proc. §§ 4, 17, 478, 480–504, 861; Pol. Code, §§ 4468, 4480).

Women *held* subject to civil arrest in superior court action under Code Civ. Proc. §§ 4, 17, 478, 480–504, and Pol. Code, § 4468, in view of common-law rule which distinguished between married and unmarried women, since Code Civ. Proc. § 861, exempting females from civil arrest, applies only to actions in justices' courts under Pol. Code, § 4480.

6. Common law 🔑12—Codes establish law of state respecting the subjects to which they relate (Pol. Code, § 4468).

Codes were intended to establish the law of the state respecting the subjects to which they relate, so that it is only when Code and other statutes are silent that common law governs under Pol. Code, § 4468.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Dolores K. Burlingame against William I. Traeger and another for damages of illegal arrest. Judgment for defendants, and plaintiff appeals. Affirmed.

C. A. Stice, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and McIntyre Faries, Deputy Co. Counsel, both of Los Angeles, for respondents.

BURNELL, Justice pro tem. This appeal is taken from a judgment entered in favor of the defendants upon the failure of the plaintiff to amend her complaint after demurrers sustained, and therefore the only question before us is as to the sufficiency of the facts stated to constitute a cause of action against the defendant sheriff and his deputy.

An understandable presentation of the points involved in the discussion of this question requires us to set forth those portions of the pleading which attempt to allege the gravamen of the plaintiff's cause of action. After alleging that at the time of the acts complained of defendant Traeger was the sheriff of Los Angeles county and that his codefendant was a deputy sheriff, the complaint proceeds as follows:

"II. That on or about the 2nd day of July, 1926, the defendants were in possession of, and had a certain *illegal and unauthorized* order of arrest issued in the action of L. W. Burlingame v. Dolores K. Burlingame, in the Superior Court, in and for the county of Los Angeles, No. 199981.

"III. That the above referred to order of arrest had been issued in a civil action and was civil process *and the same was void, illegal and unauthorized for the reason that the affidavit of arrest upon which the same was issued was insufficient for the reason that it did not state facts to cause an order of arrest to issue,* and for the further reason, that the person named therein, Dolores K.

Burlingame, who was the defendant in the above referred to action, and is the plaintiff in this action, was, and is a female.

"IV. That the above mentioned order of arrest was on the 13th day of July, 1926, vacated by order of the court in the above mentioned action of L. W. Burlingame v. Dolores K. Burlingame, *for the reason that the same was illegal and unauthorized.*

"V. That the defendants *unlawfully* served the same *illegal* order of arrest above referred to on the defendant in Los Angeles county, and that pretending to act under the above referred to *illegal* order of arrest that they, the defendants herein, did on the 2nd day of July, 1926, in the county of Los Angeles, arrest the defendant and imprison her in the county jail of Los Angeles county."

We have italicized certain portions of the pleading quoted for reasons which will presently appear.

Appellant contends: First, that the complaint sets up facts sufficient to constitute a cause of action for damages for an illegal arrest because of the allegation therein that the affidavit upon which the order of arrest was based was insufficient in that facts warranting such an order were not stated therein; and, secondly, that apart from all considerations as to the sufficiency of the pleading with respect to its allegations as to the illegality of the affidavit and the order based thereon, it sufficiently stated a cause of action, in that it alleged that the plaintiff was a woman, the point being urged that under the law of California a woman is not subject to arrest in a civil action in any court.

[1] We are unable to agree with either of these contentions. The complaint fails to allege a single *fact* from which the court could draw the conclusion that either the order of arrest or the affidavit upon which it was based was insufficient. The portions thereof which we have italicized are mere conclusions of law as to the sufficiency of statements which are not set forth in the complaint. They are but the views of the pleader as to matters which it was for the court to determine upon an inspection of the affidavit referred to, or a recital of the facts alleged therein. As said in Callahan v. Broderick, 124 Cal. 80, 56 P. 782, 783: "The necessity for a statement of the facts essential to a right claimed is not obviated by averments of legal conclusions (Aurrecoechea v. Sinclair, 60 Cal. 532); for allegations of conclusions of law will be disregarded in considering objections raised by demurrer. (Ohm v. San Francisco, 92 Cal. 437, 28 P. 580.) A conclusion of law tenders no issue, and a complaint which depends upon such allegations is insufficient and demurrable. Branham v. Mayor, 24 Cal. 585. The code provision requires a concise statement of the facts constituting the cause of action, not such statements of the law governing it. (Code Civ. Proc. § 426.)"

[2, 3] The court below was required, in passing upon the sufficiency of the complaint when attacked by a general demurrer, to consider merely the facts plead therein. Its duty lay within the principle so clearly stated by the late learned Chief Justice Beatty in Ohm v. San Francisco, supra: "In considering the objections to this complaint, we remark at the outset that its allegations are accepted as true so far only as they relate to matters of fact as distinguished from matters of law. As to the latter, they will be treated as if they were not made, because, so far as they are correct, they are useless, and when erroneous, worse than useless." 92 Cal. 437, 28 P. 580, 583. The rules are elementary that an allegation that an instrument is "illegal," "unauthorized," or "void" is but a conclusion of law, and that such words, when used in connection with issuable facts, are to be regarded as mere surplusage and never obviate the necessity of alleging the *facts* showing wherein the illegality, lack of authorization or invalidity lies. Callahan v. Broderick, supra; Moffatt v. Bulson, 96 Cal. 106, 30 P. 1022, 31 Am. St. Rep. 192; Shamlian v. Wells, 197 Cal. 716, 242 P. 483; Miles v. McDermott, 31 Cal. 270, and Hedges v. Dam, 72 Cal. 520, 14 P. 133.

Stripped then of its conclusions of law and of the pleader and reduced to the recital of such *facts* as are pleaded, the complaint shows that the defendant sheriff and his deputy had an order of arrest which was a civil process, issued in an action pending in the superior court, and that, pretending to act under this order, they arrested and imprisoned the plaintiff on the day the order was issued and that the order was vacated eleven days later. There is not one word in the complaint to indicate that the order was not regular on its face.

[4] We are of the opinion that the trial court very properly sustained the demurrer, not only because of the failure of the complaint to allege any facts from which the court might determine the question of the sufficiency of the affidavit on which the order was based, but also because of its failure to show any lack of regularity on the face of the order of arrest or any lack of jurisdiction of the court to issue it. An officer to whom an order or a warrant of arrest has been delivered for execution is not required at his peril to look behind the order if it appears to be regular on its face and issued by a court of competent jurisdiction. The statutory law of this state provides that, "A sheriff or other ministerial officer is justified in the execution of, and must execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." Pol. Code, § 4168. As said in Magnaud v. Traeger, 66 Cal. App. 526, 226 P. 990, 992: "Without doubt, if a writ or an order commanding a sheriff to do or to refrain from doing an act be legal upon its face

and show an apparent jurisdiction, and if the court issuing the writ or making the order has jurisdiction of the subject matter, the officer will be protected when in good faith he acts in obedience to the writ or to the order." See, also, 3 Cal. Jur. 157 and 24 R. C. L. 993. In closing this phase of our opinion we may well adopt the language used in Pankewicz v. Jess, 27 Cal. App. 340, 149 P. 997, 998, wherein it was said: "The complaint shows that the imprisonment was made under a warrant. It is the duty of the plaintiff to set out in his complaint the fact that such warrant was irregular on its face. Barker v. Anderson, 81 Mich. 508, 45 N. W. 1108; 19 Cyc. 357; Barfield v. Turner, 101 N. C. 357, 8 S. E. 115. Every allegation in the complaint in the present case may be true, and yet it may be equally true that the arrest of the plaintiff was upon a warrant regular upon its face."

[5, 6] We have so far discussed the matter before us without reference to appellant's contention that a woman is not subject to civil arrest in this state. This was undoubtedly the rule at common law so far at least as *married* women were concerned. It had its basis in a social and legal system under which a wife was little better than a chattel, presumably under the complete domination of her lord and master and denied all contractual power and independence of legal or political action, a system from which the womanhood of this nation has long since emerged victorious in a noble fight for equality of human beings regardless of sex. But even at the common law the exemption of women from arrest on civil process applied only to *wives*. A résumé of the law on this subject may be found in 5 Corpus Juris, pp. 463 and 464, as follows:

"*Females.* At common law a wife could not be legally arrested on mesne process, and, if arrested, she may be discharged on common bail, except in cases where she has practiced a fraud in holding herself out as a married woman. In New York, notwithstanding the statute authorizing the arrest of a female for willful injury to person, character or property, the exemption from arrest of a married woman remains as at common law.

"*Unmarried females,* on the other hand, seem to have enjoyed no privilege from arrest at common law, at least for torts committed by them. Statutes in different jurisdictions variously exempt females from arrest in all civil actions, with a saving, however, in some states as to certain specified kinds of civil actions."

The complaint in this action contains no allegation that the plaintiff was a married woman at the time of her arrest.

The rule as to the applicability of the common law is thus stated in our Political Code: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, is the rule of decision in all the courts of this state." Pol. Code, § 4468. This rule, however, is to be taken in conjunction with that stated in section 4 of the Code of Civil Procedure, which reads as follows: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." It must also be borne in mind that "our codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein" (Estate of Carraghar, 181 Cal. 15, 183 P. 161, 163), and that their provisions establish the law of this state respecting the subjects to which they relate (In re Apple, 66 Cal. 432, 6 P. 7; McLean v. Blue Point Mining Co., 51 Cal. 225). It is only when the Code and other statutes are silent that the common law governs.

The law relating to civil arrest in California is purely statutory and is to be found in certain sections of the Code of Civil Procedure, which also contains the rule to be applied to the construction of its various provisions, "Words used in the masculine gender include the feminine and neuter." Section 17. Section 478 of that Code provides: "No person can be arrested in a civil action, except as prescribed in this code." The following section sets forth the classes of action in which such an arrest may be ordered, while sections 480 to and including 504 prescribe the procedure to obtain an order of arrest, deal with the matter of bail, provide a method of vacating the order of arrest, etc. In short, it may be said that chapter 1 of title 7 of the Code of Civil Procedure, in which these sections are found, prescribes a full and complete scheme of procedure, as well as establishes the rules of law governing the subject of civil arrest in actions in the superior courts of this state, while article 1 of chapter 4 of title 11 of the same Code ("Proceedings in Justices' Courts") deals with the same subject as applied to actions before justices of the peace.

It is significant that, while the sections dealing with the subject as applied to superior court actions contain nothing as to exemptions from their provisions because of sex, those relating to justices' court proceedings do specifically provide that "no female can be arrested in any action" (Section 861, Code Civ. Proc.). All of these sections were enacted as portions of the original code adopted in 1872 and while a few of them have been subsequently amended none of these amendments are relevant to the subject under discussion here. It is a familiar rule that the Codes are to be construed as a single statute. Pol. Code, § 4480; People v. Central Pacific Ry. Co., 83 Cal. 393, 23 P. 303; McKay v. McKay, 125 Cal. 65, 57 P. 677. And it is also the rule that "the expression of one excludes the other"—expressio unius est exclusio alterius. Pasadena University v. Los Angeles County, 190 Cal. 786, 214 P. 868; Ex parte Nowak, 184 Cal. 701, 195 P. 402; People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77.

Applying these rules of construction, it is evident that the exemption from civil arrest accorded "females" by section 861 of the Code of Civil Procedure applies only to actions in justices' courts, to which class of actions alone the article, chapter and "title" in which it is found relates.

The judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 625

CHASE v. SUNSET MUTUAL LIFE ASS'N.

(Civ. 18.)

District Court of Appeal, Fourth District, California. Oct. 31, 1929.

1. Insurance 🔑646(3)—Life insurer had burden of proving insured knew serious condition of his health before policy was issued.

In action on life insurance policy, insurer had burden of proving insured knowingly misrepresented his condition in application for insurance, or that he was aware before the policy was issued that he was afflicted with a serious disease, but did not inform insurance company.

2. Insurance 🔑665(3)—Evidence supported findings insured considered himself in good health when applying for insurance, and was not aware before policy was issued that he was afflicted with serious disease.

In action on life insurance policy, evidence *held* to support findings that insured, when making application for life insurance, considered himself in good health, and that he was not aware before policy was issued six days after the application that he was afflicted with serious disease.

3. Insurance 🔑291(3)—Where insured's representations regarding health were honestly made, and justified by his knowledge at time of application, fact that representations proved unfounded by subsequent events did not avoid policy.

Where insured's representations regarding his health in application for life insurance were honestly made, and were justified by his then knowledge of his physical condition, mere fact that representations of insured were proved to be unfounded by subsequent events, in absence of fraud or deceit, did not avoid policy.

4. Insurance 🔑634(1)—In action on mutual benefit life policy, complaint alleging insured had paid dues sufficiently alleged he was in good standing.

In action on mutual benefit life insurance policy, complaint showing that conditions of contract had been met by insured by payment of all dues provided for in policy up until time of death *held* to sufficiently allege that insured was in good standing in association at time of his death, though there was no express allegation to that effect.

5. Trial 🔑68(1)—Denying insurer's application after close of trial to reopen case for testimony of insured's physician held not error under circumstances.

Denial of insurer's application, made several days after conclusion of trial, to reopen case to take testimony of insured's physician, *held* not error, where physician was present in court during trial on behalf of plaintiff, but was not called to witness stand by either plaintiff or defendant, and affidavit indicated that physician would have testified, if called to stand, in support of plaintiff's case.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Action by Edith Chase against the Sunset Mutual Life Association on a mutual benefit life insurance policy. From a judgment for plaintiff, defendant appeals. Affirmed.

Le Roy B. Lorenz, of Los Angeles, for appellant.

James V. Brewer and Paul M. Wikoff, both of Los Angeles, for respondent.

SLOANE, P. J. This is an appeal by the defendant Sunset Mutual Life Association from a judgment for $1,400, with interest and costs on a mutual benefit life insurance policy. The insurance was taken out by one Henry Niel Chase, upon an application in writing made by him on the 5th day of April, 1927. The policy bears date of April 11, 1927. The insured had an attack of illness on April 7th, and, on account of a recurring attack on April 11, was taken to a hospital on the 14th of that month, and underwent an operation on April 16th, and died on April 22, 1927.

In the application for insurance of April 5th, upon which the defendant company issued the policy sued on, the applicant certified that he was in good health, and, as far as he knew, he had no disease or other condition that would prevent him from obtaining life insurance, and that he understood that the falsity of any statement as to his physical condition would bar the right to recovery on his policy. His wife, the plaintiff in this action, was named as beneficiary in the policy issued.

The issue on which the case was tried, is raised by the allegation in defendant's answer that the policy was executed in reliance on decedent's representations as to the state of his health contained in his application for insurance, and that he therein "fraudulently stated that he was in good health, knowing at the time that this statement was false, with the intent to deceive and defraud the defendant; that the said Henry Niel Chase was not at the time in good health, but was suffering, and had suffered prior to his statement made on the 5th day of April, 1927, for a considerable length of time; that said suffering was caused by a diseased gall bladder, from which he died on the 22nd day of April, 1927; that the deceased fraudulently stated in said application that he had not consulted a doctor during the last 3 years prior to the signing of said application for membership, and that said statement was false, and that said Henry Niel Chase intended to deceive, and did deceive the defendant by said statement."

Before the conclusion of the trial, the defendant by leave of court filed an amendment to its answer, in which it is alleged that "after the making of the application by the insured, to-wit, after April 5, 1927, and before the execution of said policy, i. e., before April 11, 1927, the insured became seriously ill, that he was sick; that he had an attack: that he was not in good health, that he was thereafter physically able to communicate the fact of such ill health to the defendant insurer before the date of the execution of said policy of life insurance; that the said insured knew that the insurer would not have issued the said policy herein sued upon, if the facts were brought to the attention of said insurer; that the insured fraudulently concealed the said facts from the defendant insurer for the purpose of defrauding this defendant; that if such facts as to the insured's illness during the said period were made known to this defendant that this defendant would not have issued said policy of life insurance."

The case was tried on the issue so presented, and the trial court found for the plaintiff and against the defendant as to any fraud or intentional deceit or misrepresentation on the part of the insured.

While the insured understood, and it is recited in the policy that "false statement of any material fact covered in the signed application for membership shall void this policy and limit the amount payable thereunder to the total amount paid by said member on this membership," there is nothing in the policy giving him notice that he was required to inform the insurance company of any attack of illness he might have in the interim between the submitting of his application and the issuance of the policy; and there is nothing in the pleadings to indicate that his attention was at any time called to the necessity of any such action on his part to validate his insurance. He had signed the statements of his application, paid into the company the amount of the premium called for, and performed all of the conditions prerequisite to the issuance to him of his policy of insurance, and doubtless assumed, as people usually do, that from that date on his life was insured.

[1, 2] It may be conceded, however, under the authorities cited, that, if he was aware, subsequent to the date of his application and representations as to his physical condition, and before the issuance of the policy, that he was afflicted with a serious disease, it was his duty to so inform the insurance company. Indeed, it may be conceded that if, prior to the date of the issuance of this policy, Mr. Chase was aware, or seriously apprehended, that he was suffering from any disease that was likely to seriously impair his health, his beneficiary would not be entitled to recover in this action. The material and controlling findings of the trial court in this case are those in which it is found that the insured was not in possession of knowledge as to his condition such as would lead him to apprehend that his life or his health was seriously endangered. The evidence in the record is such as to justify the conclusion that up to and including the time he made application for life insurance he considered himself a hale, hearty man. His occupation was the strenuous one of a cement worker, and his wife testified that up to the attack of illness which occurred April 7, 1927, in the several years she had been married to him, he had never been sick or had a doctor, or complained of any pain or illness. The court was justified in finding that on the 5th day of April he considered himself a well man. The only thing that occurred between that date and the 11th of April, the date of the issuance of the policy, to warn him of a different condition, was a sudden attack of illness on the night of the 7th, from which he appears to have speedily recovered, as a day or two later he visited his wife, who was temporarily in another town with relatives. At that time, his only reference to this attack seems to have been called out by some conversation relating to the taking out of insurance by some acquaintance. His wife testifies that he jokingly referred to the fact that he had taken out an insurance policy, and that he was pretty sick a night or two afterwards, and he did not know but that she would have occasion to enjoy his insurance money earlier than he had anticipated. There was nothing in the conversation to indicate that he had taken the matter seriously, or that he was still suffering from the effects of the attack. It was not until after the 11th of April that there was a recurrence of his trouble, and he received information that it would probably be necessary for him to go to the hospital for an operation. His actual condition was determined through the operation itself on the 16th of April, when it developed that he was suffering from a gall stone impacted in the passage from the kidneys to the bladder. How long this trouble had been progressing, does not appear. The medical evidence is to the effect that he might not have been conscious of any severe pain from this source until the gall stone passed from the kidney to the passage. The death certificate recites that the cause of death was "myocarditis

post operative paralytis illem impacted stone in uretur." As nearly as we can make out, this means in layman's English that he had a gall stone impacted in the passage from the kidneys to the bladder, accompanied by a condition of the heart which indicated a weakening or breaking down of the muscle cells, and that these conditions, including the operation for removal of the gall stone, caused the death of the insured.

It appears that the heart affection might have existed for some period without the patient being aware of any serious condition. It seems unlikely from the testimony of the doctors that there could have been any movement of the gall stone between the kidneys and the bladder without severe pain. The patient did have severe pain on the 7th of April, but there is no evidence that he had ever had it before, or that he knew what caused it. For all the evidence discloses, it may have been attributed to an attack of colic or indigestion. There is doubtless some point of time when these gall stones begin their painful passage from the kidney to the bladder, and it does not appear how far this stone had progressed before it became impacted.

So far as the indication of heart trouble is here involved, it appears from the testimony of Dr. Savage, the surgeon who performed the operation, that he himself did not suspect its existence until three or four days after the operation. He says:

"I began to suspect it from the very poor way his heart was acting.

"Q. Then you would not hardly believe that this man had known that himself would you? A. My honest opinion is that he probably knew nothing of it. That is only an opinion; I don't know; I never saw him before I operated on him."

This doctor also testified that, excepting the process of movement of gall stones, the disturbance might be very indefinite, probably indicating a digestive disturbance. With the exception of the single attack of April 7th, it does not appear that the patient was subject to any degree of suffering that would indicate a serious condition, until he was taken to the hospital, after which the record discloses that he was in a very serious condition, and suffered almost continuous attacks of renal colic.

While the unlikelihood of a patient in the condition the insured was in at the time of the operation having reached that stage of the disease without becoming aware of some serious ailment, is apparent, it is purely a matter of inference, as there is no direct evidence to support appellant's contention that the insured knowingly misrepresented his condition, or that the insurance company was misled by any conscious or intentional concealment on his part. On the other hand, the circumstances presented to the court are such as make it entirely possible, if not probable, that the deceased, up to the time he went to the hospital, was unaware of his condition. The burden of proof in this particular was upon the plaintiff, and, on the strength of conflicting evidence and inferences, the court found in favor of the insured. We think there was reasonable basis for such finding, and, without going further into the details of the evidence, are of the opinion that the findings in this essential particular are supported by the evidence. This is the only important point in the case.

[3] Appellant specifies finding No. X as unsupported by the evidence. The court there finds that it is not true that the defendant would never have entered into the insurance contract with the said decedent, except for the statements made by the said decedent; that it is not true that defendant relied on the statements of said decedent. We doubt if this finding is supported by the evidence, but it is not material to the decision of the case. Assuming, as is doubtless the fact, that the defendant company did rely upon the representations of the insured in his application, and would not have entered into the contract of insurance if such representations had not been made, yet if, as the court has found, such representations were honestly made, and were justified by the decedent's then knowledge of his physical condition, the mere fact that the representations of the insured were proved to be unfounded by subsequent events, in the absence of fraud or deceit, would not void the policy.

[4] As a further ground of error, appellant relies on his demurrer to the complaint, for want of facts sufficient to constitute a cause of action, for the reason that the complaint fails to expressly allege that the insured was in good standing in the association at the time of his death. The third paragraph of the policy provides that the right of the beneficiary to collect the insurance is predicated on the condition that the member is in good standing at the time of death. We think this specification of error is not deserving of much consideration. The facts of the case as set out in the complaint show that the conditions of the contract had been met by the insured by the payment of all dues provided for in the policy, up until the time of death, and no other liability is shown under the policy which could have changed his status within the few days that elapsed from the application for insurance and the death of the insured. If anything of that kind occurred, we think it would have been incumbent upon the appellant to have pleaded it by way of defense.

[5] Appellant's counsel also took exception to the denial of his application to reopen the case to take the testimony of one Dr. Wiley, who was the physician attendant upon the insured just prior to his being taken to the hospital. This application was made on affi-

davit and notice of motion, several days after the conclusion of the trial. Dr. Wiley was present in court during the trial, on behalf of the plaintiff, but was not called to the witness stand. Counsel for appellant alleges that his failure to use Dr. Wiley as a witness was because he relied upon some statement of plaintiff's counsel that he intended to call him, and counsel for appellant expected to be able to cross-examine him. However, there seems no good reason why at or before the submission of the case, when it became apparent that plaintiff was not going to use the witness, he should not have been brought into court on behalf of defendant. Furthermore, appellant, in his affidavit, fails to state what facts, if any, in his behalf, he expected to prove by this witness, or whether his testimony would be material to appellant's case. On the contrary, the affidavit indicates that the doctor would have testified, if called to the stand, in support of plaintiff's case.

For the reasons hereinbefore stated, the judgment is affirmed.

We concur: BARNARD, J.; MARKS, J.

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101 Cal. App. 479

PASQUAL v. DE VRIES. (Civ. 16.)

District Court of Appeal, Fourth District, California. Oct. 25, 1929.

1. Statutes 🔑206—Statute should be construed so as to sustain it in its entirety if language will reasonably permit (Civ. Code, § 3541).

Under Civ. Code, § 3541, statute should be so construed that all its parts are harmonized and given effect, and so that statute may stand in its entirety, if this can reasonably be done under language and purpose of the act.

2. Sales 🔑461—Conditional sales contract covering cows sold for dairy purposes held not void for failure to give marks and brands, as required in case of cattle sold for slaughter (Hide and Brand Law, § 3, subd. 6).

Conditional sales contract covering sale of cows to dairyman for dairy purposes, and not for slaughter, *held* not void for failure to give marks and brands of cows sold, as required by Hide and Brand Law (St. 1921, p. 1248), § 3, subd. 6, since statute is primarily for regulating cattle slaughterers and sellers of meat.

3. Trover and conversion 🔑40(6)—Finding of trial court as to value of cows taken held sustained in action for conversion thereof.

In action for conversion of dairy cattle, evidence *held* sufficient to sustain trial court's finding as to value of cows taken.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Joe Pasqual against George De Vries. Judgment for defendant, and plaintiff appeals. Affirmed.

A. S. Maloney, of San Bernardino, for appellant.

Hert & Mussell, of San Bernardino, for respondent.

MARKS, J. Appellant brought suit against respondent alleging conversion of seven cows of the value of $266 and damage in the sum of $500 from the conversion. Respondent denied the conversion and damage and filed a cross-complaint alleging conversion by appellant of seven of respondent's cows to his damage in the sum of $700. A trial was had before the court without a jury, and judgment was rendered against appellant on his complaint, and in favor of respondent on his cross-complaint in the sum of $400. The trial court found that appellant had converted to his own use five cows, the property of respondent, of the value of $400.

Appellant attacks the judgment of the trial court upon two grounds: First, that a certain conditional sales contract whereby one John Reeves, respondent's vendee, and appellant's vendor, acquired possession, and the right to purchase, the cows in question, was void under the provisions of subdivision 6, section 3, of the "Hide and Brand Law" (St. 1921, c. 725, p. 1248); and, second, that the findings of the trial court as to the ownership of the five cows and their value were not supported by the evidence.

The transfer of the cows from appellant to Reeves was a tripartite transaction. Respondent desired to use the Reeves contract as security in his purchase of 40 other cows from Biedebach Bros. For convenience of the parties the Reeves contract was signed by Biedebach Bros., who were to receive the payments under it, and was not signed by respondent. Title to the cows did not pass from him. Under the contract Reeves received the possession of the animals with an equitable right of purchase which, with his right of possession, was dependent upon his making specified payments. He defaulted in these payments, and his right of possession and equity of purchase were thereby terminated. In signing the Reeves contract, Biedebach Bros. acted as agents for respondent.

In this case the sale of the cows in question was between dairymen, for dairy purposes, and not for slaughter. The contract in question did not give the "marks and brands" of the cows sold as required by the "Hide and Brand Law." The act is primarily for the "Licensing and regulating of cattle slaughterers and sellers of meat," as appears from its title, as well as from the body of the act. Its provisions are regulatory and penal. Its title contains nothing to indicate that any of its provisions were intended to regulate any such sale of cows as we have here between dairymen in the ordinary course of their business.

[1, 2] The courts will, where the language will reasonably permit, so construe a statute as to sustain it, and all of it, and make it valid and operative in its entirety. Section 3541, Civ. Code; Glassell Development Co. v. Citizens' National Bank of Los Angeles, 191 Cal. 375, 216 P. 1012, 28 A. L. R. 1427. A statute should be so construed that all of its parts be harmonized and given effect, if this can be done, under the language and purpose of the act, so that it may stand in its entirety. Spreckels v. Graham, 194 Cal. 516, 228 P. 1040. To give the construction to the act urged by appellant might lead to the holding of some of its provisions unconstitutional. This is not necessary in this case, as appellant's construction of the act is not supported by its language, spirit, or purpose.

[3] Appellant's second contention that the findings of the trial court are not supported by the evidence is without merit. That appellant took the cows from the dairy of John Reeves is not disputed. There were only 31 cows at this dairy, 21 belonging to respondent and 10 belonging to Biedebach Bros., who removed theirs before appellant took the animals in question, leaving only respondent's cows on the place for appellant to take. In his testimony appellant fixed the value of the cows taken by him at $75 each, and other witnesses placed these values as high as $125 each. The trial court in its judgment fixed a value of $80 each. There is not only ample evidence to support the findings, but a contrary finding would have been without the support of any material evidence.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

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101 Cal. App. 599

VALE v. MARYLAND CASUALTY CO.★
(Civ. 6733.)

District Court of Appeal, First District, Division 2, California. Oct. 30, 1929.
Rehearing Denied Nov. 29, 1929.

Hearing Denied by Supreme Court Dec. 26, 1929.

1. Judgment ⚷363, 375—Judgment obtained by fraud or mistake may be set aside on application within reasonable time and proof of fraud or mistake (Code Civ. Proc. § 473).

A judgment or order obtained by fraud or mistake may be set aside, under Code Civ. Proc. § 473, on application made within reasonable time and proof of fraud or mistake.

2. Judgment ⚷67(2)—Superior Court had jurisdiction of timely motion, regularly submitted after proper notice, to vacate judgments by confession (Code Civ. Proc. § 473).

Where motion to vacate judgments by confession was made on proper notice under Code Civ. Proc. § 473, within three months after judgments were obtained, and submitted to superior court on affidavit of attorney for moving party and points and authorities of opposing side, court had full jurisdiction to hear and determine motion.

3. Judgment ⚷67(2)—Orders made after denial of regularly submitted motion to vacate judgments by confession were invalid (Code Civ. Proc. § 473).

Trial court having denied motion under Code Civ. Proc. § 473, to vacate judgments by confession, after regular submission thereof for decision, its power was exhausted, and all orders subsequently made by it were invalid as functus officio.

4. Judgment ⚷68(8)—Order setting aside order denying motion to vacate judgments by confession, without notice to movant or showing that first order was improvidently made or fraudulently obtained, was void (Code Civ. Proc. § 473).

Ex parte order setting aside order denying motion to vacate judgments by confession without notice to movant or showing that first order, which was not appealed from, was improvidently made or fraudulently obtained, was void; court's subsequent action not being a proceeding under Code Civ. Proc. § 473, to set aside original order.

5. Appeal and error ⚷865—Whether order denying motion to vacate judgments by confession or final order vacating them was right or wrong cannot be considered on appeal from latter order (Code Civ. Proc. § 473).

Question on appeal from order vacating judgments by confession and ex parte orders setting aside orders denying motion, under Code Civ. Proc. § 473, to vacate such judgments, is not whether first order denying motion or final order vacating judgments was right or wrong, but whether first order was valid and final, in which case all subsequent orders were void.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Baldwin Vale against the Maryland Casualty Company, a corporation. From an order vacating judgments by confession and ex parte orders setting aside orders denying the motion to vacate, plaintiff appeals. Reversed.

Roy L. Daily, of San Francisco, for appellant.

John Ralph Wilson, of San Francisco, for respondent.

PRESTON, Justice pro tem. This is an appeal by the plaintiff from an order of the superior court in and for the city and county of San Francisco, vacating four separate judgments in a consolidated action involving 11 different mechanics' lien cases; also, an appeal from two other ex parte orders of the trial judge.

The facts are not in serious dispute and are

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

briefly these: On February 20, 1926, Alexander G. Mattson, a contractor and builder, entered into a written contract with one G. P. Anderson, wherein and whereby Alexander G. Mattson agreed to construct a building for said G. P. Anderson on the southwest corner of Mission and Santa Marina streets, in the city and county of San Francisco, for the sum of $17,200; said sum to be paid in installments as the work progressed.

The usual contractor's statutory bond, in the sum of $8,600, was furnished by respondent, Maryland Casualty Company, and the contract and bond were filed of record and the work begun. Thereafter, the building was completed and accepted by the owner, but the contractor failed to pay for all the labor performed and materials furnished in the erection of said building as provided in said contract.

Several claims of liens were filed in due time, and eleven separate actions were commenced against the contractor, the owner, and the respondent Maryland Casualty Company, to foreclose said liens. The contractor permitted default to be taken against him in all of the cases. The owner and the respondent Maryland Casualty Company filed separate answers in all the cases.

On December 13, 1927, the owner and the Maryland Casualty Company filed judgments by confession in open court. Thereafter, and on December 22, 1927, the court granted a stay of execution for 30 days on said judgments.

On February 15, 1928, the attorney for the Maryland Casualty Company served and filed a notice of motion under section 473, Code of Civil Procedure, to vacate said judgments on the grounds: First, that the judgments were entered in violation of the stipulation between the attorneys in said cause; second, "Surprise." This motion was accompanied by the affidavit of the attorney for the bonding company, and came on regularly to be heard in open court on February 29, 1928, at 10 o'clock a. m. The attorney for the assignee of plaintiffs filed points and authorities in opposition to said motion and also appeared at the hearing and opposed the granting of said motion. The attorney for the bonding company, the moving party, did not appear at the hearing, and the court made and entered the following order, to-wit, "Motion to vacate judgment denied." After the entry of this order, and in the afternoon of the same day, the trial judge, in chambers, ex parte, *and without notice to the attorney for the opposing side,* and without any additional affidavits or other evidence, made an order setting aside the order made in the morning, and set the original motion for argument on March 8, 1928, at 2 o'clock p. m.

Thereafter, on March 1, 1928, the attorney for respondent served written notice upon the attorney for the assignee of plaintiffs that the court had vacated the previous order made in the morning of the same day, denying the Maryland Casualty Company's motion to vacate said judgments, and that the original motion would be heard again on March 8, 1928, at two o'clock p. m.

On March 8, 1928, the second hearing on the motion to vacate said judgments by confession was argued by counsel on both sides, and an amended affidavit was filed by the attorney for respondent, and an affidavit in opposition thereto was filed by the attorney for the assignee of plaintiffs, and the motion was again submitted to the court for decision.

Thereafter, and on April 10, 1928, the court again (the second time) denied said motion of Maryland Casualty Company to have the judgments vacated. On the next day, April 11, 1928, the trial judge, in chambers, *ex parte, and without notice to the adverse party or his attorney,* made another order setting aside and vacating the order made on April 10, 1928, and again gave respondent five days' additional time to reply. On April 16, 1928, the attorney for respondent filed another affidavit in support of the motion to set aside said judgments. Thereafter, and on April 18, 1928, after hearing the matter again, the trial court made an order overruling his two previous orders, and granted the original motion of respondent, Maryland Casualty Company, and entered an order setting aside and vacating the judgments taken by confession.

From this last order vacating said judgments by confession, the assignee of plaintiffs appeals. He also appeals from the order of April 11, 1928, setting aside the order of April 10, 1928. He also appeals from the order made on the afternoon of February 29, 1928.

[1] The law is well established that a judgment or order obtained by fraud or mistake may be set aside under section 473 of the Code of Civil Procedure, when the application is made within a reasonable time and the fraud or mistake proved.

[2] In the case at bar, the motion to vacate the judgments was made under section 473, Code of Civil Procedure, and was made within three months after the judgments by confession had been obtained, and was made on proper notice and submitted to the court upon the affidavit of the attorney for the moving party, and upon the points and authorities submitted by the opposing side. Therefore, the court had full jurisdiction to hear and determine the motion, and the court did, as above stated, on the morning of February 29, 1928, at 10 o'clock a. m., hear said motion and did make an order denying the said motion of Maryland Casualty Company to vacate said judgments.

[3] We think that all orders made subsequent to this first order are invalid. The trial court having denied the motion after it had been regularly submitted for decision, its power is exhausted; its subsequent orders are functus officio. Lang v. Superior Court, 71 Cal. 491, 12 P. 306, 416; Carpenter v. Su-

perior Court, 75 Cal. 596, 19 P. 174; Holtum v. Greif, 144 Cal. 521, 78 P. 11; United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199; Gill v. Peppin, 41 Cal. App. 487, 182 P. 815; Dolon v. Superior Court, 47 Cal. App. 237, 240, 190 P. 469; Stanton v. Superior Court, 202 Cal. 478, 489, 261 P. 1001; Estate of Grivel (Cal. Sup.) 280 P. 122.

In Dolon v. Superior Court, supra, the court, in considering a similar situation as we have in the case at bar, said: "Assuming the validity of the first order, it was subject only to be set aside on appeal or under proper proceedings under section 473 of the Code of Civil Procedure. After a court has acted judicially it may not seek to correct its own errors by changing its judgments and orders *without notice to the parties affected.* Such action would very shortly deprive all judgments of their character of finality (citing many cases). If the order was improvidently made, upon a proper showing *and on notice*, it may be set aside, but the court cannot *without notice* and upon no showing justify a review of its own judicial act by a mere recital that it made the first order inadvertently. In this case there does not appear to have been either notice given the petitioner of the contemplated action of the court, or any showing of inadvertence other than that the trial court determined on second thought that it was in error when it first acted. If the first order was a valid exercise of the power of the court, * * * the second order was beyond the jurisdiction of the court."

[4] No appeal was taken from the first order of February 29, 1928, and no proceeding to set it aside under section 473, Code of Civil Procedure, was instituted. The court's action in the afternoon of February 29, 1928, cannot be considered a proceeding under section 473 of the Code of Civil Procedure, because that section provides, in effect, that the relief therein specified may not be given until *after notice* to the adverse party. (Gill v. Peppin, supra.) *No notice was given.* Said order made on the afternoon of February 29, 1928, purporting to set aside the order made in the morning, was made by the trial judge, *ex parte, and without any showing that the first order was improvidently made or fraudulently obtained, and without notice to the adverse party.* It was, therefore, clearly void. The three other orders made subsequent to February 29, 1928, were equally unauthorized by law.

[5] It is argued by respondent that as it charged the attorney for the assignee of plaintiffs with fraud in procuring the confession of judgments, and that the court finally, upon conflicting evidence, upheld its contention, therefore, the last and final order made by the court, vacating the judgments by confession, should be affirmed. This argument is entirely beside the question; the question here is not whether the first or last order made by the trial court was *right or wrong*, but the question is, Was the first order made on February 29, 1928, a valid and final order? If it was, that ends this case. See Lamb v. Wahlenmaier, 144 Cal. 95, 77 P. 765, 103 Am. St. Rep. 66; Gill v. Peppin, supra.

We are of the opinion that the first order of February 29, 1928, was a valid and final order, and that all subsequent orders were void.

In view of the conclusions we have reached, it becomes unnecessary to discuss the other questions presented in the briefs.

Therefore, the three orders appealed from should be reversed, and it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

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101 Cal. App. 526

BANK OF ITALY v. WELBILT AUTO BODY COMPANY et al. (Civ. 5669.) ★

District Court of Appeal, Second District, Division 1, California. Oct. 28, 1929.

Rehearing Denied Nov. 15, 1929. Hearing Denied by Supreme Court Dec. 26, 1929.

Bills and notes ⟹359—Where payee transferred trade acceptance as payment on outlawed debt, transferee, not giving immediate credit, held not holder in due course (Civ. Code, § 3133).

Where payee of trade acceptance indorsed it to bank before maturity, in attempted part payment of debt from which he had been relieved in bankruptcy and against which limitations had run, and bank, which had charged off such debt as loss, gave no immediate credit, intending to collect on trade acceptance, if possible, and then apply proceeds as credit on debt, bank *held* not holder in due course as against drawer, having given no value within Civ. Code, § 3133, so that defense, good as between original parties, was good as against bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action on a trade acceptance, brought by the Bank of Italy against the Welbilt Auto Body Company and others. Judgment for plaintiff, and defendant named appeals. Reversed.

Page, Nolan, Rohe & Freston and Ralph E. Lewis, all of Los Angeles, for appellant.

A. S. Goldflam, of Los Angeles, for respondent.

HOUSER, J. The facts upon which this appeal is predicated are that the defendant bought some lumber from a man by the name of Bergman, in payment of which the defendant gave its trade acceptance to Bergman, payable about 67 days from date thereof. Some years preceding such transaction Bergman, who theretofore had become indebted

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★Rehearing denied. Hearing denied by Supreme Court.

to the plaintiff bank, was adjudicated a bankrupt. The debt owing by Bergman to the bank, although listed by Bergman in his schedule of liabilities in the bankruptcy proceeding, was not paid either in whole or in part, but on his discharge in bankruptcy Bergman was legally relieved from the necessity of paying such debt. In addition thereto, at the time the transaction here involved occurred, the statute of limitations had run against the debt. After Bergman had received the trade acceptance, but before its maturity, he indorsed it to the bank in attempted part payment of the said debt theretofore contracted by him in favor of the bank, and the trade acceptance was received by the bank without notice of any defense by the drawer (defendant) thereto. As testified by an officer of the bank, no immediate credit was given Bergman's former account by reason of the receipt by the bank of the trade acceptance—its intention being to collect on the trade acceptance, if possible, and then to apply the proceeds thus collected to a credit on Bergman's debt, which, however, theretofore had been "charged off" its books as a loss. As between the original parties to the trade acceptance, it appears that the drawer (defendant herein) had a good defense. On the trial of the action, judgment was rendered in favor of the plaintiff, and the defendant has appealed therefrom.

Appellant's statement of the question involved is, first, whether an indorsee of a trade acceptance, who has no actual notice of the drawee's defenses thereto, is a holder in due course and for value, where he takes that instrument with the intention of collecting the same, and, if successful, to apply the proceeds in satisfaction, or partial satisfaction, of a prior debt, in the meantime giving the indorser no credit at all; and, second, even if specifically applied in partial satisfaction of a prior debt, which had been discharged in bankruptcy and against which the statute of limitations had run, where there was no promise to pay or acknowledgment of the debt ever made in writing, is such an indorsee a holder in due course and for value?

Section 3133 of the Civil Code is as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Appellant concedes that, with the exception of the question of whether "value" was given, all the elements necessary to constitute the bank a holder of the trade acceptance in "due course" were present in the transaction. The only legal question, therefore, with which this court is concerned, is whether in the circumstances presented herein it may be declared that the Bank of Italy gave value for the trade acceptance in question.

In the case of Lambert v. Schmalz, 118 Cal. 33, 35, 50 P. 13, it is said: "When a debt has been discharged by proceedings in insolvency, or has become barred by the statute of limitations, the remedy to enforce the payment of the debt is gone, but the moral obligation to pay it still remains and is a good consideration for a new promise to make such payment" (citing cases).

In Hoover v. Wasson, 11 Cal. App. 589, 595, 105 P. 945, where several authorities are cited, the principle is laid down that, although a debt be barred by the statute of limitations, it will constitute a good and valuable consideration for a promissory note. See, also, Feeny v. Daly, 8 Cal. 84; McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Chabot v. Tucker, 39 Cal. 434, 437; Mull v. Van Trees, 50 Cal. 547; Booth v. Hoskins, 75 Cal. 271, 17 P. 225; Baxter v. Brandenburg, 137 Minn. 25, 163 N. W. 516; Merchants' Protective Ass'n v. Popper, 59 Utah, 470, 204 P. 107; Mutual Reserve F. L. Assn. v. Beatty (C. C. A. Cal.) 93 F. 747; Winbourn v. Crump, 77 Colo. 574, 238 P. 58.

It would therefore appear that ordinarily, as between the debtor and the creditor, a new obligation will be sufficiently supported by an antecedent debt, even though at the time the new obligation be created the statute of limitations has run against the original debt, or, by an order in bankruptcy proceedings, the debtor has been discharged from liability. However, at least when the rights of third persons are injected into the controversy, a different situation is presented. In the latter contingency it must appear that the new obligation was unconditionally accepted in lieu and in payment, in whole or in part, of the old one, so that whatever befall the new obligation the creditor may not, at his pleasure, disregard it and thereafter reinstate the old debt. The principle is positively asserted and illustrated in the case of Pacific Acceptance Corporation v. Goodman, 72 Cal. App. 143, 236 P. 964; and, to the same effect, see Merchants' National Bank v. Bentel, 166 Cal. 473, 137 P. 25, and authorities there cited.

In the instant case the evidence is to the effect that at the time the trade acceptance passed to the plaintiff bank Bergman received nothing; his former account with the bank was not credited in any amount; nor was it ever to be credited until the trade acceptance matured and was paid. So far as the bank was concerned it gave no new consideration for the trade acceptance; its position remained unchanged; the effect on the bank was that, if the trade acceptance were paid, the bank would be the gainer, in that an outlawed claim held by it would be liquidated; but if the trade acceptance were not paid, no present loss would result to the bank by reason of the transaction. As an officer of the bank testified: "We didn't even credit his (Bergman's) account. * * * We took it (the trade acceptance) and at its maturity we were to give Bergman credit. * * * I took it to cover the loss that had already been charged off to our profit and loss account, and we are still holding it with the hope that we will be able to liquidate part of the $472.60 with the proceeds when we get a judgment. * * *"

As is said in the case of Pacific Acceptance Corporation v. Goodman, 72 Cal. App. 143, 147, 236 P. 964, 965: "The consideration for the transfer of the check by the payee to plaintiff was purely conditional. It amounted to nothing more than an agreement at a future date to credit the account of the payee with the payment of $3,000; said date being concurrent with and dependent upon the collection of the Goodman check."

In the instant case it results that, as far as the defendant was concerned, the plaintiff gave no value for the trade acceptance, and, consequently, that it was not a holder in "due course."

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

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101 Cal. App. 470

HARBOR CONST. CO. v. WALTERS.

(Civ. 12.)

District Court of Appeal, Fourth District, California. Oct. 25, 1929.

1. Corporations 🔑406(1)—Agent's authority to make contract binding corporation does not carry authority to modify or abrogate contract.

Generally, authority of agent to enter into contract binding on corporation does not imply nor carry with it authority to modify or abrogate a contract once duly executed.

2. Corporations 🔑432(12)—Holding that corporation was estopped to dispute agent's authority to modify written contract by oral agreement held not warranted by evidence.

Defendant's testimony as to having talked over agent's oral agreement with manager of corporation suing for price of services rendered under written contract alleged to have been modified by such agreement *held* not to warrant holding that corporation was estopped to dispute agent's authority to modify contract, where record did not show what manager said.

3. Evidence 🔑445(7)—Evidence of agent's oral agreement that party to written contract for building plans would owe nothing unless agent procured building loan held inadmissible (Civ. Code, § 1698).

Evidence of oral agreement by corporation's agent after executing written contract for preparation of building plans that other party would owe corporation nothing, unless agent procured building loan or plans were used, *held* inadmissible as attempt to vary terms of written contract by unexecuted oral agreement in contravention of Civ. Code, § 1698.

4. Contracts 🔑238(1)—Novation 🔑1—Agent's oral agreement that party contracting for building plans need not pay therefor unless agent procured loan held unenforceable, whether mere modification of written contract or novation (Civ. Code, §§ 1531, 1532, 1541).

Alleged oral agreement by agent executing written contract for preparation of building plans by corporation that other party need not pay therefor, unless agent secured building loan, *held* unenforceable under Civ. Code, §§ 1531, 1532, 1541, whether considered as mere modification of written contract or as novation.

5. Evidence 🔑445(7)—Agent's oral agreement that building plans need not be paid for unless agent procured loan held not executed agreement admissible to alter written contract for plans.

Oral agreement by agent executing written contract for preparation of building plans by corporation that other party need not pay therefor unless agent procured building loan or plans were used, neither of which conditions were fulfilled, *held* not executed agreement, admissible to alter written contract, where such contract was completely fulfilled to point of entitling corporation to half of stipulated price for services.

6. Contracts 🔑237(1)—Corporation agent's offer to negotiate building loan and suspend liability to pay for plans until procured held unenforceable as without consideration.

Offer of corporation agent executing written contract for preparation of building plans to negotiate building loan and suspend other party's liability to pay for plans until money was procured *held* unenforceable as without consideration, where plans were completed in compliance with contract and not accepted solely because of other party's inability to finance building; she having neither undertaken to do anything not within terms of written contract, nor subjected herself to any new burden or liability.

7. Contracts 🔑316(5)—Long delay in demanding payment for building plans held not to defeat recovery, in view of explanatory testimony.

Failure to demand payment of amount claimed for preparation of building plans under written contract during long period from date of agent's alleged oral agreement suspending liability until commencement of action for price *held* not to defeat recovery thereof, in view of corporation manager's testimony as to why matter was allowed to rest.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by the Harbor Construction Company, a corporation, against Mrs. A. G. Walters. Judgment for defendant, and plaintiff appeals. Reversed.

John A. Jorgenson, of Los Angeles, for appellant.

Scarborough, Forgy & Reinhaus, of Santa Ana, for respondent.

SLOANE, P. J. This appeal was taken by the plaintiff from a judgment of the superior court of Orange county denying plaintiff's demand for recovery of $625 with interest, the contract price for services rendered in preparing building plans and specifications.

The contract was in writing, dated June 18, 1924, and in words and figures as follows:

"Agreement.

"This Agreement, made and entered into this 18 day of June, 1924, by and between the Harbor Construction Company, hereinafter referred to as the Designers, and Mrs. A. G. Walters, hereinafter referred to as the owner

"Witnesseth: That the said Harbor Construction Company, for and in consideration of the payments to be made to them by the Owner, as hereinafter provided, do hereby covenant and agree to furnish preliminary sketches, working plans and specifications, details and any other drawings that may be necessary in connection with the building operations for the erection of the building referred to.

"The building herein referred to is to be erected upon property of the Owner, located on Dana Point Calif. and is to consist of a 2 story Reinforced Concrete Hotel and store Bldg.

"The stipulated cost or estimate is to be about $25,000.00 due allowance being made for the difficulty of estimating cost before the completion of the plans and specifications, and for a greater or lower cost caused by the requirements, either as to size or number of rooms, materials used or other items of specifications or detail provided by the Designers, in their endeavor to meet the wishes or follow the instruction of the Owner.

"The Owner shall give the Designers a reasonable opportunity to redraw the sketches, plans or revise the specifications, at any or all times, and it shall not constitute a breach of this agreement if the building designed shall exceed the stipulated cost or estimate, unless the Architects unreasonably refuse to alter the plans and specifications for the purpose of reducing the cost.

"The Owner, for and in consideration of said Harbor Construction Company performing the said covenants and agreements above specified, hereby agrees to pay the said Harbor Construction Company, a total aggregating 2½% of the estimated cost of the building, 50% of said sum when preliminary sketches are approved and the balance upon the completion of the plans and specifications.

"Should the Harbor Construction Company be awarded the contract for the erection and completion of said building, it is understood that this payment of 2½%, covering cost of plans and specifications, is to be deducted from the first payment of the total contract price.

"[Signed] Mrs. A. G. Walters, Owner.
"Harbor Construction Co.,
"By Wm. J. McCormack,
"Architecture-Engineering.
"Witness: ————"

It is not disputed that the plaintiff prepared and submitted to defendant in due time preliminary plans and specifications, in full compliance with the written contract, or that these were afterwards completed in all details.

Defendant, however, pleaded as a defense to plaintiff's recovery, a subsequent oral agreement, entered into between herself and one William J. McCormack, acting for and in the name of the plaintiff company, in which it was agreed, on account of defendant's inability to finance the proposed building, that the plaintiff company would undertake to procure for defendant the necessary funds for the enterprise, and that, in the event of failure to procure the necessary amount, the defendant would owe the plaintiff nothing, unless she actually used said plans and specifications. It appears from the evidence that the money was not procured and the building not constructed or the plans used. No demand was made upon the defendant for payment therefor, until made by instituting this suit in December, 1926.

The trial court, over plaintiff's objections, admitted evidence of the oral agreement for modification of the written contract, after its execution, and found that it constituted a valid postponement of defendant's liability to pay for the plans, until such time as the building was financed, or until the defendant otherwise made use of the plans and specifications, neither of which events has ever happened.

Plaintiff's appeal rests on the contention that it was reversible error for the trial court to admit in evidence testimony of the subsequent oral agreement modifying and changing the terms of the written contract, or to hold such agreement binding on the plaintiff; and that the evidence of McCormack's relations to the plaintiff corporation was insufficient, in any event, to support the finding that he was an authorized agent of the corporation to enter into such an agreement.

The only testimony shown by the record, as to the agency of McCormack, is that of one Stephen Cope, who described himself as having been, at the time of these transactions, manager of the Harbor Construction Company. He testified that McCormack was an employee and head draftsman of the plaintiff corporation, and that the written contract was signed for the company by McCormack because of this position, and because he had prepared the contract, and that McCormack had authority to sign on behalf of the company, and had authority to make contracts in its behalf.

[1] Counsel contends that authority to enter into a contract binding on the corporation does not imply, nor carry with it authority to modify a contract or abrogate it, when once duly executed.

This general proposition is sustained by the authorities cited.

In Thomas v. Anthony, 30 Cal. App. 217, 222, 157 P. 823, 824, it is said (quoting from 31 Cyc. 1387): " 'Presumptively an agent is employed to make contracts, not to rescind or modify them; to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal * * * unless the principal knew or approved of such modifications by the agent.' "

In Jones v. Title Guaranty & Trust Co., 178 Cal. 376, 379, 173 P. 586, 588, where the agent who executed a contract in the name of his principal, undertook to change or modify it, the court quotes the rule as laid down in 31 Cyc., and adds: "When Jones authorized Wood to make a certain contract for him, and deposited his check and notes to be turned over in accordance with such contract, he did not thereby authorize Wood or the defendant to dispose of the check and notes under a different and less favorable contract. Certainly it would not be contended that Wood had ostensible authority to so change the terms of the deposit as to substitute for the lease originally contemplated a lease of other property upon other terms. No more can it be said that Wood had ostensible authority to alter the material provision regarding the obtaining of subleases."

In Morton v. Albers Bros. Milling Co., 66 Cal. App. pages 391, 398, 226 P. 809, 812, where one Prenot, assistant manager of the corporation, one of the parties to the contract, undertook by oral agreement to modify the terms of a written contract, the court says: "Prenot was not a general officer. He was only an assistant manager for appellant at one of its branch offices. It possibly may be inferred from the evidence that he was authorized to do certain things which were necessarily incident to the performance of the written contract, such, for example, as seeing to it that proper tests were made to determine whether the milo measured up to the requirements of the contract. But authority in an agent to carry out or to perform a contract already made by his principal does not include authority to change the contract or to waive any of its provisions, especially where, as here, the provision is one which was intended for the benefit of the principal. Presumptively, an agent is employed to acquire interests, not to give them up."

[2] There is some contention on the part of respondent that the oral agreement in this case was called to the attention of Mr. Cope, the manager of plaintiff corporation, and that he subsequently had a conversation with the defendant with regard thereto, and it is contended that he did not repudiate McCormack's authority to enter into such modifying agreement. It is true that the defendant did testify to having talked over the agreement of McCormack with Mr. Cope, but respondent is mistaken in assuming that anything was said calculated to estop the corporation from disputing McCormack's authority. In fact it does not appear from the record what was said by Mr. Cope in response to Mrs. Walters' statement of the oral agreement.

[3] Even if McCormack had authority to enter into a valid agreement modifying the written contract by creating new conditions under which defendant is liable to pay for the services rendered, we have then an attempt to vary the terms of a written contract by an unexecuted *oral* agreement, and in contravention of section 1698 of the Civil Code. That the agreement with McCormack was not in writing is not disputed. The testimony of Mrs. Walters, the defendant, and her niece, Margaret Walters, the only evidence given on this point, was to the effect that after the contract was signed, and at the time of the presentation of the preliminary drawings by Mr. McCormack, Mrs. Walters stated that she had seen her bankers "and they absolutely refused to loan any money at Dana Point at that time, so that there was no use in going ahead with the plans and specifications, and that McCormack then said he was sure that he could secure such a loan, and that if he failed there was to be no charge to me until such time as I used his plans and specifications, and was able to get a loan to put up the building."

And she further stated that there was no one present at the time of such conversation but McCormack, herself, and her niece, Margaret.

This verbal agreement was not only unexecuted, so as to bind the corporation; it was not even made in the name of the corporation, so far as the undertaking to negotiate a loan for Mrs. Walters was concerned, but was a personal undertaking on the part of McCormack. Furthermore, the modification of the terms and time of payment was without consideration. Nothing of value was to pass to the plaintiff by undertaking to finance the deal, and waive right to payment for these plans and specifications, and Mrs. Walters on her part assumed no obligation, and relinquished no right or advantage to which she was entitled under the written contract.

[4] Whether this alleged oral agreement is

considered as a mere modification of the written contract, or is a novation, it lacks the requirements of the statute to make it enforceable.

Section 1531 of the Civil Code defines novation as follows: "Novation is made (1). By a substitution of a new obligation between the same parties, with intent to extinguish the old obligation."

Section 1532, Civil Code: "Novation is made by contract, and is subject to all rules concerning contracts in general."

Section 1541, Civil Code: "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration."

[5] The contention of respondent's counsel that the oral agreement here relied on had become an executed agreement is not supported by their own authorities. They cite 6 California Jurisprudence, 376. The text of this citation recites: "Obviously the executed oral agreement which may be proved for the purpose of altering a previous written contract, must consist in the doing or suffering of something not required to be done by the terms of the writing."

This rule is quoted from Mackenzie v. Hodgkin, 126 Cal. 591, 59 P. 36, 38, 77 Am. St. Rep. 209, which is also cited by respondent. In that case the written contract involved the sale of an entire crop of raisins at a stipulated price. Evidence was offered to show a subsequent oral agreement to pay for a certain portion of the crop called Valencia raisins, at a different price. Defendant claimed that he had made and delivered the Valencia raisins on the oral promise to pay for them at 3½ cents per pound. The court in the opinion says:

"His counsel argue that this is 'an executed parol agreement,' and therefore that evidence thereof is admissible to alter the previous writing. Civ. Code, § 1698. We do not think so. We find no evidence that Williams, Brown & Co. ever paid anything as on a purchase by them of the Valencias; and, as concerns Hodgkin, so far as appears, he did nothing under the alleged oral agreement which he was not bound to do in the proper fulfillment of the written contract. * * * Obviously, the executed oral agreement, which may be proved for the purpose of altering a previous written contract, must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing. * * *

"True, the defendant here testified that he sold the Valencia Raisins, but the alleged sale rests in mere spoken words, which in themselves could not be allowed to alter the writing. His acts towards the execution of any contract were only such, so far as proved, as the original agreement required him to perform."

The facts accompanying respondent's further authorities cited on the question of executed oral contracts are quite distinguishable from the circumstances of this case.

In the instant case the evidence shows a complete fulfillment of plaintiff's contract, to the point of entitling it to one-half of the stipulated price for its services, a representation by defendant to McCormack that she could not finance her building, and that further preparation of the plans might as well stop, a gratuitous offer by McCormack to procure her a loan, and to release her from obligation to pay for the plans unless he procure her the necessary financial aid, or she in some other way use the plans as prepared by plaintiff.

[6] McCormack's offer to negotiate a loan and suspend defendant's liability to pay for the plans, even if within the scope of his agency, was entirely without consideration. Defendant on her part, neither undertook to do anything not within the terms of her written contract, nor subjected herself to any new burden or liability.

She was, it is true, only liable at that time, for 50 per cent. of the commission called for by the writing, and, if there was anything in the relations of the parties to entitle her to order a suspension of the completion of the plans and specifications, she might, by notice to that effect, have escaped liability for the uncompleted part of plaintiff's work, but there is nothing in the record to show the extent to which the plans had been completed or the value of the work still to be done in perfecting them. The plans were completed, and were, so far as appears, in strict compliance with the contract, and the only reason given why they were not accepted and used by the defendant was her inability to finance her building, a situation for which, under the terms of the written contract, the plaintiff was in no wise responsible.

[7] Respondents place some stress upon the fact that, during the long period which elapsed from the date of the alleged oral agreement to the time of the commencement of this action, no demand was made upon defendant for payment of any amount claimed for services rendered in preparing the plans and specifications. While this was a circumstance that might properly have been considered by the court, it is in no wise conclusive of the legal rights of the parties. The witness Cope testified that the matter was allowed to rest during this period until it became apparent to plaintiff that there was no prospect of the building being constructed, and until after it was understood by plaintiff that the defendant had transferred her activities to another locality.

The judgment is reversed.

We concur: MARKS, J.; BARNARD, J.

101 Cal. App. 587

REEVES v. TAYLOR. (Civ. 17.)

District Court of Appeal, Fourth District, California. Oct. 29, 1929.

Brokers 🔑86(3)—Evidence held insufficient to show prospective purchaser became interested or that binding contract was secured through brokers' efforts precluding recovery for commission.

In broker's action to recover commission for sale of orange grove, evidence *held* insufficient to show that purchaser became interested in defendant's property or that parties were brought together or binding contract secured through broker's efforts precluding recovery for commission.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Cecil H. Reeves against D. L. Taylor. Judgment for defendant, and plaintiff appeals. Affirmed.

Nichols, Cooper & Hickson, of Pomona, for appellant.

Isaac Jones, of Ontario, for respondent.

BARNARD, J. This is an action by a broker for the recovery of a commission for the sale of an orange grove, claimed to have been made by plaintiff and one L. L. Hammersley, a salesman in his employ. On March 6, 1926, the defendant executed and delivered to plaintiff a written listing agreement. On April 19, the said Hammersley, acting for plaintiff, secured from defendant what was apparently a written option, in connection with a deal he then had on with a man named Thompson, permitting him to sell the place listed to Thompson for $16,000. On the morning of April 20th or 21st, plaintiff met one Edward Kranz and his father at an orange grove owned by Kranz and situated across two 10-acre tracts from defendant's grove, the sale of which is in controversy. This meeting was for the purpose of considering the sale of another orange grove owned by plaintiff, and which he was trying to sell to the said Kranz. Kranz obtained his first information concerning defendant's grove through this conversation, the extent of this information being in dispute. At this same conversation, Kranz stated to plaintiff that he had certain equities in certain properties in Altadena, which he would like to trade in on some orange grove. Shortly before the conversation ended, the said Hammersley appeared on the scene, which will be later referred to. Later that morning, Kranz and his father drove by defendant's grove, and the father advised the son to purchase the same if he could get it.

In the afternoon of the same day, plaintiff and Hammersley went to Altadena, examined the properties proposed to be used in trade by Kranz, and then called on Kranz, where another conversation occurred. It further appears that about May 18, Kranz ascertained from a neighboring packing house the name of defendant, which had not been given him by plaintiff, and called at defendant's home. Defendant was not there, but his wife stated that she thought the property was not for sale, and Kranz left word to write him in the event they desired to sell. The following day, having received a postal card, he again called. The next succeeding day, which was May 20, a purported agreement of purchase and sale between defendant and Ida E. Kranz, mother of Edward Kranz, was executed and put in escrow in a bank. Shortly thereafter the said Hammersley called at defendant's home, in connection with the Thompson deal above mentioned, which he states he still hoped to put through. While there, he stated to defendant's wife that he had another deal in mind, with some trade in it. Mrs. Taylor told him he was too late, that they had already sold, giving him the name of the purchaser, and he replied: "That lets us out; I am sorry we couldn't make the deal, this other deal * * * but I am glad you sold the grove." The other deal just referred to was apparently the Thompson deal on which he had called.

Two or three days later, both agents came out and claimed to have been instrumental in making the sale. Defendant, having been told by Kranz in the first instance that no agent was connected with the sale, then notified Kranz that he would not sell, unless Kranz paid the commission. Later, by consent of both parties, the bank returned the deposit, and the deal was dropped. It appears that defendant had purchased the property involved on contract, the preceding December, from a man named Stewart, paying only about $300 down, although Stewart received part of the proceeds of the crop picked that spring. After abandoning the Kranz deal, defendant threw up his contract with Stewart, receiving nothing for his equity in the place. He did not convey any equity to Stewart or to any one, and did not suggest that Kranz deal directly with Stewart. However, some time in September, or later, Stewart conveyed the property involved to Kranz. The listing agreement above referred to, contained the following provisions:

"* * * I hereby empower and appoint you my agents for a period of 60 days from this date, and thereafter until further notice from me in writing."

"* * * Should a deal be made through your efforts or assistance, or by me to any person or persons who become interested in said property through your efforts, I agree to pay you for your services a commission as per schedule below. Any change in price or terms which I may accept shall not affect your agency or rate of commission.

Should this property not be sold, but is shown or described to a prospective purchaser by said agents prior to the termination of this listing and I subsequently sell or convey said property to such prospective purchaser within ninety days from the termination of this listing, then I agree to pay said agents the full commission for such sale. I agree to furnish a good and sufficient deed and a satisfactory certificate of title."

No notice in writing terminating the agency was ever given.

Plaintiff filed suit for a commission, and this appeal is from a judgment in favor of defendant. Appellant contends that a finding by the trial court, to the effect that no sale, or contract of sale, was made through the efforts of the plaintiff, or his salesman, is not supported by the evidence. He insists that the place was sold through his efforts, and to one to whom he had described it. While it might appear that such sale as was made, was made through plaintiff's efforts, if we accepted his evidence in its entirety, there is a sharp conflict in the evidence in its most important phases, namely, as to what was said in the two conversations above mentioned, the only times the agents talked to the alleged purchaser. In the first conversation, in the morning, plaintiff says he told Kranz he thought he had another piece of property which would suit him, and that he gave him the location, described the property, and offered to take him to see it; but that Kranz preferred to drive his own car and agreed to investigate the place. He also states that at this time Kranz suggested turning in the equities on the Altadena properties on the purchase price of defendant's place, and that on the same afternoon at Altadena, after investigating the properties offered, he told Kranz that these would not be acceptable to defendant, but that this must be a cash deal, and that, after again telling him all about defendant's grove, Kranz agreed to go and investigate it the following Monday. Hammersley testified that during this talk at Altadena he told Kranz he thought he could deliver defendant's place to him for $16,000.

On the other hand, Kranz testified that at this first conversation in the morning the talk was entirely on the grove belonging to plaintiff, which he desired to sell to Kranz; that during the conversation plaintiff mentioned that he thought he had another piece of property that would suit Kranz, which he stated he could not deliver; that he told him where the grove was, but not the name of the owner. Kranz denies that anything was said to him that afternoon at Altadena, by either of the agents, about the defendant's property, and says the only mention of the Altadena equities which he desired to trade was the fact that he would like to trade them on some orange grove. The evidence of Kranz is somewhat confirmed by the evidence of Hammersley, that he accidently dropped in at the first conversation referred to, because he was out there to see if the above-named Thompson was in the vicinity, looking at defendant's grove. He further states that he fully expected to close the deal with Thompson that very day. It will be recalled that only a day or two before he had secured a written option for this purpose. The fact that the suggestion of trading in certain equities was made while plaintiff was attempting to sell his own land, and that plaintiff immediately went to Altadena to investigate the same, under the circumstances just narrated, confirms the statement of Kranz that these equities were not mentioned in connection with defendant's place. A further suspicious circumstance is that Hammersley states that during the talk at Altadena he told Kranz he thought he could deliver defendant's place to him for $16,000, and yet Kranz, with no effort to look into this, went ahead to deal direct with the owner, and agreed to pay $17,000. The usual motive for going around an agent and dealing with the owner is to get the land at a lower price.

It will be noted that the purported agreement between defendant and Kranz was made on May 20, 1926, about a month after plaintiff alleges he interested Kranz in the deal. It is undisputed that neither plaintiff nor his salesman said anything to Kranz after the first day; that nothing was said to defendant until after the purported sale to Kranz; and that no effort was made to ascertain why Kranz did not come out to investigate the place, as they claim he agreed to do. The court was justified in believing the portion of the evidence which indicates that both of these conversations between the agents and Kranz were had in connection with the plaintiff's effort to sell his own land, and that no effort was made to interest Kranz in the property of defendant. It is a reasonable inference that at that time the agents believed defendant's place to have been practically sold to Thompson; that they therefore told Kranz in effect that the place was not on the market, and made no effort to describe it to him, or to interest him in it; that Kranz did not become interested in defendant's property through any effort of the agents; and that the parties were not brought together or a binding contract secured through their efforts. The rights of the parties were fixed by the special conditions of this listing agreement. Nothing more is here presented than a conflict in the evidence, which the trial court has resolved in favor of the defendant.

A further consideration is that plaintiff relies on the purported agreement of May 20, between defendant and Ida Kranz, as being a binding and enforceable agreement, and therefore giving him a right to a commission, under the well-known rules of law. So far as it appears from the evidence, under its own terms, this contract could not have been enforced, and was therefore not sufficient to entitle plaintiff to a commission. The contract contained this clause: "This escrow is contingent upon successful completion of escrow between A. B. Stewart and seller herein."

The evidence is uncontradicted that defendant owed Stewart more than he was getting out of this escrow, and that Stewart objected to accepting a new owner. There is no evidence that Stewart ever gave his consent, or that the contingent escrow mentioned was ever completed.

For the reasons given, the judgment is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

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101 Cal. App. 632

PESCHONG et al. v. MADDEN et al.
(Civ. 5569.)

District Court of Appeal, Second District, Division 1, California. Nov. 1, 1929.

1. Vendor and purchaser 🔑341(3)—In action to recover purchase money paid, finding vendors had agreed to complete building by certain date held not supported by evidence.

In action to recover money paid on account of purchase price of real property, finding that vendors had agreed to build and complete bungalow on or before certain date *held* not supported by paragraph in escrow instructions providing for period of 60 days within which to close escrow, and testimony of plaintiff regarding conversation with defendant, in which defendant said that term "on demand," in escrow instructions, meant that money would be required to be paid at end of escrow period, on completion of building.

2. Evidence 🔑400(2)—There being no allegation of fraud in connection with drawing contract as regards building completion, purchasers could not modify contract by oral testimony had prior to execution.

There being no allegation of fraud in connection with drawing of contract between vendors and purchasers, so far as time of completion of building was concerned, purchasers, seeking to recover money paid on account of purchase price, could not add to or modify contract, or its legal effect, by oral testimony had prior to execution of contract.

3. Evidence 🔑413—There being no allegation charging fraud regarding insertion of clause regarding payment in building contract, oral testimony was inadmissible to modify clause.

Where escrow instructions provided for payment of $1,100 by purchasers on demand, and there was no allegation in complaint, in action to recover money paid on account of purchase price, charging fraud with regard to insertion of clause in contract, oral testimony tending to modify such provision was incompetent.

4. Vendor and purchaser 🔑341(3)—Finding that purchasers were not required to deposit sum in escrow until building was completed held not supported by evidence.

In action to recover money paid on account of purchase price of real property, finding that under terms of escrow agreement purchasers were not obliged to deposit in escrow balance of cash payment until building was completed *held* not supported by evidence.

5. Vendor and purchaser 🔑116—Purchasers, not making payment required, could not rescind, because there was trust deed on property, instead of mortgage as agreed.

Where vendors agreed that property should be conveyed with first mortgage for $3,400 as a first lien on it, and condition precedent to conveyance was payment into escrow by purchasers of $1,100 on demand of vendors, purchasers were not in position to rescind contract on ground that there was trust deed on property, instead of mortgage, where they had not paid sum of $1,100 on demand, since time never arrived under terms of contract when vendors were legally obligated to tender conveyance.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action to recover money paid on account of the purchase price of real property by John H. Peschong and another against Alice M. Madden and another. From a judgment for plaintiffs, defendants appeal. Reversed.

George Acret, of Los Angeles, for appellants.

Max Brown and Brown & Mahon, all of Los Angeles, for respondents.

HAHN, Justice pro tem. The action which gives rise to this appeal is one wherein plaintiffs, as buyers of certain real property, sought to recover from the defendants, one of whom was the owner of the property and the other the agent of the owner, a judgment for the sum of $300 paid on account of the purchase price. From a judgment in favor of plaintiffs for the sum of $300, as prayed for, the defendants appeal.

On the lot in question, at the time the negotiations for its sale and purchase were consummated, a house was in the course of construction under the direction of defendant Gordon W. Madden, who was the agent and son of defendant Alice M. Madden, owner of the property. The negotiations for the purchase were concluded on or about March 27, 1924, and escrow instructions were signed and filed with the escrow agent, the Venice City Bank, on or about March 31st.

These escrow instructions, among other things, provided that the purchase price of the property was to be $7,250, which sum was to be paid as follows: The sellers were to place a first mortgage lien on the property for the sum of $3,400, which the buyers were to assume and pay. In addition, the buyers were to execute their promissory note for $2,350, payable to Alice M. Madden, the owner, and also a trust deed securing the same, which would be placed on the property as a second lien. The balance of the purchase price, to wit, $1,500, was to be paid in cash. Four hundred dollars of that sum was paid at the time of, or prior to, the signing of the escrow instructions, and the remaining $1,100, according to the escrow instructions, was to be paid "on demand." There was no provision in the escrow instructions as to when the building in course of construction was to be completed, but the escrow instructions did contain a clause which reads as follows: "Possession to be given upon completion of buildings." The instructions further contained a clause providing for the closing of the escrow within 60 days from the date thereof; but it was therein provided that, in the event the escrow was not completed within that time, the same might be continued until either party gave notice to terminate it.

Plaintiffs in due course executed the $2,350 note and trust deed and delivered the same in escrow; but they never did pay into escrow, or to the sellers, the $1,100 in cash, or any part thereof, which the escrow instructions provided was to be paid "upon demand."

On July 11, 1924, plaintiffs served upon defendants a written notice of rescission, containing the following declaration: "This action is taken at this time because of a material misrepresentation made by you all during the time of our negotiations, that fact being statements made by both of you that the first lien on said property, subject to which we would take title, was, and would be, a first mortgage, when, as a matter of fact, we have just discovered that, instead of a first mortgage, there is, and has been at all times subsequent to the 7th day of February, 1924, a trust deed against said property; this trust deed having been recorded April 19th of this year. Another fact which prompts this action is your failure to complete said house on or about the 31st day of May, 1924, pursuant to your agreement."

Having determined that the judgment must be reversed, we will limit our discussion to the points forming the basis for our conclusion.

[1, 2] It is first contended by appellants that the finding of the trial court that the defendants had agreed to build and complete the bungalow on the property on or before May 31, 1924, and the additional finding that "the said defendants did not complete nor finish said bungalow when and as agreed," are not supported by the evidence. Appellants' contention in this respect must be sustained. The trial court held, and we think correctly, that the escrow instructions constituted the entire contract between the parties, and measured their rights and obligations, except in so far as the issue of fraud was concerned. The allegations of the complaint charging fraud related solely to the alleged representation that the first lien which the buyers were to take the property subject to was to be a mortgage, and later the buyers discovered that the first lien on the property was a trust deed. Nowhere in the escrow instructions is there found any provision that requires the defendants to complete the bungalow on or before May 31st; nor is there any competent evidence in the record to support that finding.

The plaintiff Fannie R. Peschong was permitted by the court to testify to a conversation she had with the defendant Alice M. Madden at the time the escrow instructions were signed and delivered to the bank, in which conversation she stated that the defendant Alice M. Madden said the term "on demand," as contained in the escrow instructions, meant that the money would be required to be paid at the end of the escrow period, upon completion of the building. Respondents argue that the finding complained of finds support in the paragraph contained in the escrow instructions that provides for a period of 60 days within which to close the escrow, and the testimony of respondent Fannie R. Peschong, wherein she relates her conversation with defendant Alice M. Madden concerning the meaning of the word "demand."

We cannot agree with the respondents' contention in this respect. The language of the escrow instructions does not justify the inference drawn by respondents. These instructions constituted the contract between the parties, and there being no allegation of fraud in connection with the drawing of the contract, so far as the time of completion of the building was concerned, respondents could not add to or modify the contract, or its legal effect, by any oral testimony had prior to the execution of the contract. This proposition needs the citation of no authorities. Clearly, under the contract, the sellers had a reasonable time within which to complete the bungalow, and there is nothing in the evidence that will support the conclusion that a reasonable time had elapsed at the time the notice of rescission was given.

[3, 4] Appellants next attack the findings of the court to the effect that under the terms of the escrow agreement respondents were not obligated to deposit in escrow the $1,100, which was the balance of the cash payment, until the building was completed. As we have already pointed out, the escrow instructions provided that the $1,100 was to be paid by the buyers "on demand." The evidence clearly showed, and in fact it is not disputed, that demand was made upon the buyers to put up the $1,100 in escrow on or about April 5, 1924. There is further evidence, undisputed, that the day before the notice of rescission was given the buyers called upon the sellers and requested an extension of time within which to pay the $1,100. The language of the

contract that provided for payment of the $1,100 "on demand" is clear and unambiguous. There is no allegation in the complaint charging fraud with regard to the insertion of this language in the contract; hence any oral testimony which would tend to modify the provision for the payment of the $1,100 "on demand" would be incompetent. We feel that appellants' contention that the evidence does not support the finding under discussion is well taken.

[5] The next and only other point we deem it necessary to consider is the question as to whether or not plaintiffs were entitled to rescind because at the time of giving the notice of rescission, the first lien on the property in question was a trust deed instead of a first mortgage. The escrow instructions clearly provide, and in fact the testimony of respondents relating to the conversations leading up to the contract show, that the sellers agreed that, *when the property was conveyed*, it was to be conveyed with a first mortgage for $3,400 as a first lien upon it. It was clearly immaterial as to what sort of a lien was upon the property prior to the time that the sellers were obligated to convey the property. There is nothing in the record, nor would there be any presumption in law, to support a conclusion that the sellers could not, at any time prior to the time that they were called upon to deliver a deed, have the first lien of the trust deed removed and a first mortgage placed upon the property. The fact that the trust deed was executed on February 7th, and recorded against the property on April 19th, had no bearing upon the material issues in this case. The obligation assumed by the sellers with regard to a first mortgage was that the property *would be conveyed to the buyers subject to a first mortgage for $3,400.* The evidence clearly shows that the time never arrived under the terms of the contract when the sellers were legally obligated to make a conveyance or tender a conveyance to the buyers. The condition precedent to the conveyance was the payment into escrow by the buyers of the sum of $1,100 on demand of the sellers. This condition was never fulfilled, although demand was made. Hence the inevitable conclusion that the buyers were not in a position to rescind the contract on July 11, 1924.

While not necessary to support our conclusion in this matter, weight is added to it by the fact that the record discloses that no demand of any kind was ever made by the buyers upon the sellers to place a first mortgage on the property, instead of the trust deed. It appears without conflict that both parties were continuing a friendly relation, and no word of criticism or complaint was lodged by the buyers against the sellers, either by reason of the delay in completion, as claimed by the buyers, or in respect to any other matter relating to the transaction. As we have already observed, the day before the notice of rescission was given the buyers were asking for an extension of time within which to pay the $1,100 remaining on the purchase price. The conduct of the buyers in connection with the attempt to rescind does not find a basis in equitable considerations.

We do not deem it necessary to consider other questions raised and discussed in the briefs of both parties.

For the reasons we have indicated, the judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

101 Cal. App. 592

GROVE et ux. v. MORRIS et al. (Civ. 6875.)

District Court of Appeal, First District, Division 1, California. Oct. 30, 1929.

1. Landlord and tenant ⟹214—Lease of ranch, requiring payment of first year's rent in advance, held properly construed as requiring payment of annual rent in advance.

Lease of ranch, requiring first year's rental to be paid in advance, and providing that large amount of live stock and personal property should be turned over to lessee at time lease was executed, *held* properly construed as requiring annual rental to be paid in advance.

2. Appeal and error ⟹882(3)—Lessees, denying lease was terminated, could not, on appeal, claim lease was terminated to defeat judgment for rent.

Where lessees, in answer to suit on lease by lessor, denied that lease was terminated, and court's finding that lease was not terminated was supported by evidence and law, lessees could not on appeal claim that lease was terminated, so as to defeat judgment for rent, which was properly rendered to date of commencement of action.

3. Landlord and tenant ⟹136—Lessees, entitled to sell cattle, but required to use proceeds to buy sheep, held liable for conversion of cattle, where converting proceeds to own use.

Where lessees under lease of ranch had right to sell cattle, but were required to use proceeds of sale for purchase of sheep, which they failed to do, and court found that lessees sold cattle and converted proceeds to own use, and did not intend to use proceeds for purchase of sheep, such finding, supported by evidence, was sufficient to sustain judgment against lessees for conversion of cattle.

4. Landlord and tenant ⟹161(3)—Allowance for lost articles, to be paid for at expiration of lease, held premature, where lease had not expired at commencement of suit.

Where lease of ranch provided that personalty lost shall be paid for by lessee at expiration of lease, and court found that at time of commencement of suit and entry of judgment lease had not expired, but was in full force and effect, allowance to lessor for lost articles was premature.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by J. D. Grove and another against Edward Morris and others. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

Frank W. Taft, of Willits, for appellants.
Charles Kasch, of Ukiah, for respondents.

KNIGHT, J. The defendants appeal from an adverse judgment in an action to recover rentals claimed to be due under the terms of a written lease, and for damages on account of the alleged loss and conversion of personal property while defendants were in possession of the leased premises. The lease was entered into on December 7, 1925, between plaintiffs, J. D. Grove and wife, and the defendants Morris and Ingvason, doing business under the name of Certified Seed Farms Company, and the portions thereof necessary to be considered here read as follows:

"* * * The said lessor do lease and let unto the said lessee, all those lands situate in Little Lake Valley, Mendocino County, California, known as the Grove's Ranch, * * * containing approximately 1,080 acres, for a period of one calendar year from the date of this contract, together with an option for the continuance of the time of this lease, under the terms and conditions herein set forth, up to and including December 6, 1932, for a consideration of Two Thousand ($2,000.00) Dollars cash in hand paid, receipt whereof is hereby acknowledged under the following terms and conditions, to wit: * * * The lessee shall also have full possession of all live stock, farm equipment and small tools in accordance with list of same attached hereto, and made a part hereof, and shall use the same to its advantage. All tools and articles lost during the term of this lease shall be charged to the lessee at inventory prices and paid for at the expiration of the lease. The lessee shall not be held liable for losses or death of said livestock, except as through deliberate act to destroy upon the part of the lessee. Lessee shall be empowered to sell all of the cattle of the original inventory, at any time during the term of this lease, at an average price of $50.00 per head, for the credit of the lessor; said proceeds from such sale to be used for the purchase of sheep at prices to be stipulated by the lessor. All household effects left by the lessor for the use of the lessee shall likewise be inventoried, and any losses which might occur by reason of negligence of the lessee shall be charged at lessee, but there shall be no charge for reasonable wear and tear thereof. * * * Should lessee relinquish leasehold rights under this agreement at the termination of any current year thereof, a written notice of such intent shall be delivered to lessor prior to October 1st, of any current year thereof, and shall permit the lessor to enter for purpose of plowing and cultivation of said land, on or after November 1st, of said current year. * * *"

The personal property enumerated in the inventory attached to the lease consisted generally of live stock, including 47 head of cattle, ranch equipment and machinery, tools, harnesses, household furniture, etc. Morris and Ingvason paid the rent for the first year in advance, as provided in the lease, and went into the possession of the property. On July 13, 1926, they assigned the lease to the defendant Mrs. Long, but the assignment contained no covenants or other assumption of obligations on the part of the assignee. Upon leasing the ranch, Grove and his wife moved to Contra Costa county, but about the time the assignment was made, and being evidently unaware of the fact that the lease had been assigned, Grove returned to the ranch, presumably for the purpose of inspecting the live stock and of removing certain personal effects he had left there. More or less bitterness was engendered by his presence there, and on July 30, 1926, Mrs. Long sent him a telegram from Oakland, reading as follows: "From the date you quit premises I assume responsibility for personal property listed under lease and now on premises, except household furniture which is agreeable to Hesselwerdt you may store upstairs at your own risk. [Signed] A. R. Long" —immediately upon receipt of which Grove quit the premises. Following the assignment, Mrs. Long placed a man named Hesselwerdt in charge of the ranch, and about December 1, 1926, at the request of Morris and Ingvason, Mrs. Long caused all of the cattle to be sold at $45 a head, and the proceeds from the sale to be deposited in her name in a bank in Willits. About two weeks later the ranch was entirely abandoned, and up to the time of the trial of this action remained wholly unoccupied; but no notice whatever of the abandonment was given to plaintiffs, nor was any reassignment of the lease ever made.

The complaint was filed on March 2, 1927, and contained four causes of action. The first was for the recovery of the rental, and the second for the value of the personal property (other than cattle) claimed to have been lost or converted during defendants' occupation of the ranch; the third was for damages on account of the alleged conversion of the cattle, and the fourth for damages for alleged waste. The action came on for trial in October, 1927, and findings were made and judgment entered on March 2, 1928. No relief was granted under the fourth cause of action, but with respect to the other three judgment was entered in plaintiffs' favor as follows: For the rental of the premises from December 7, 1926, up to the date of the commencement of the action; $755.25 for loss or conversion of the personal property (other than the cattle); and $2,350 as damages for the conversion of the cattle. All of said amounts, except the rent, were apportioned in the findings and judgment between the original lessees, Morris and Ingvason, and their assignee, Mrs. Long, with the provision that if, within 15 days after notice of the entry of judgment, Mrs. Long returned any of the personal property with which she had been charged, the amount of the judgment would be reduced accordingly. Within the period allowed certain property was redelivered, and the total amount of the judgment was reduced $123.50. The judgment further provided that payment of any part thereof by one of the parties should operate as a pro tanto satisfaction in favor of the others.

[1] The trial court construed the terms of the lease as requiring the annual rental to be paid in advance, and accordingly gave judgment against the original lessees, Morris and Ingvason, for $2,000, which covered the period between December 7, 1926, and December 7, 1927; and appellants contend that such construction in erroneous. After examining the entire lease, it is apparent that the same is inartificially drawn; but when the surrounding circumstances, including the size and character of the ranch and the fact that a large amount of live stock and personal property was turned over to the lessees at the time the lease was executed, are taken into consideration in connection with the wording of the lease, which admittedly required the first year's rental to be paid in advance, we are of the opinion that the construction adopted by the court is not unreasonable.

It was alleged in the complaint and denied in the answer that the lease was terminated at the time of the abandonment of the ranch at the end of December, 1926, and upon that issue the trial court found that the lease had not been terminated; its finding being as follows:

"And the court further finds that said lease was not terminated on the 1st day of January, 1927, or at any other time. And the court further finds that plaintiffs did not enter or take possession of said premises at any time, or terminate said lease. And the court further finds that said lease is still in full force and effect. And the court further finds that the defendants Morris and Ingvason have violated the convenants of the lease and abandoned said property. And the court further finds that no notice has been served upon plaintiffs to terminate said lease as required by law. And the court further finds that the plaintiffs have not, nor have either of them, ejected the said defendants, or any of them, from the aforesaid premises, or any part thereof."

Appellants criticize the foregoing finding as being "paradoxical." In support of such criticism they argue that, while the judgment for rental must necessarily be founded upon the theory that the lease was not terminated, the judgment for the value of the lost personal property, and the judgment for damages for conversion of the cattle, must necessarily be founded upon the theory that the lease was terminated. And in this regard appellants say that, if the lease was not terminated, under its terms the lessees were not required to pay for the lost property until "the expiration of the lease," and that they had the right to hold the proceeds derived from the sale of the cattle for the purchase of sheep.

[2] As already stated, appellants in their answer denied that the lease was terminated, and the court so found, and the finding is supported by the evidence and the law. Consequently appellants are not in a position now to claim that the lease was terminated; and, since it was not terminated, the court was warranted in giving judgment for the rental from December 7, 1926, to the date of the commencement of this action.

[3] Nor do we find anything inconsistent in giving judgment for the conversion of the cattle upon the theory that the lease was not terminated. True, appellants had the right under the terms of the lease to sell the cattle, which they did in December, 1926; but they were required to use the proceeds from the sale for the purchase of sheep, which, up to the time of trial in October, 1927, they had not done, and in this respect the court found "* * * that defendant Long sold the cattle on said premises and converted the proceeds thereof to her own use," and "that said funds were not used for the purpose of purchasing sheep," and "that the defendants did not, nor did either of them ever desire or intend to use said funds for the purchase of sheep." The foregoing finding, being supported by the evidence, is legally sufficient to sustain the portion of the judgment to which it relates.

[4] We are of the opinion, however, that the judgment for the alleged value of the property claimed to have been lost by appellants cannot be sustained for two reasons: First, the lease provided that "all tools and articles lost during the term of this lease shall be charged to the lessee at inventory prices and *paid for at the expiration of the lease*" (italics ours), and the court found that at the time of the commencement of the suit and the entry of judgment the lease had not expired, but was in full force and effect. The allowance for lost articles was therefore premature. Secondly, and in any event, the evidence was wholly insufficient to warrant a judgment for the sum of $755.25 for the loss of said property. As already appears, the articles of personal property with which appellants were charged were enumerated in an inventory attached to the lease, although no prices were specified; but the judgment for $755.25 is based wholly upon another list of property, prepared by Grove from memory shortly prior to trial, which

purports to set forth the value of each article there listed, and which included some 40 articles not enumerated in the inventory attached to the lease. The value of those extra articles totaled $444.83, leaving $310.42 as the value of the articles enumerated in the inventory attached to the lease; and the latter sum included an item of "motor saw and two blades," which the court found later was worth only $26.50, instead of $202.50, as set forth in Grove's separate list. When the difference of $176 is deducted from the sum of $310.42 representing the net value of said property, a balance of only $134.42 remains; and, according to Grove's testimony, the property remaining on the ranch at the time of trial was worth $100. Consequently, according to the evidence adduced, the maximum amount for which a judgment could have been allowed for the loss of the personal property, assuming plaintiffs were entitled to the same, was $34.42. The other points raised by appellants' brief are merely incidental to the main questions already decided, and therefore do not require discussion.

For the reasons stated, the judgment is modified by striking therefrom paragraphs (c) and (g), which relate to the allowances for lost property, and by correspondingly reducing the total amount set forth in paragraph (d) to $4,350, and the total amount set forth in paragraph (h) to $2,458.33, and, as thus modified, the judgment will stand affirmed; respondents to recover their costs.

We concur: TYLER, P. J.; CASHIN, J.

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101 Cal. App. 500

KEELE v. CLOUSER et ux. (Civ. 7107.)

District Court of Appeal, First District, Division 2, California. Oct. 28, 1929.

1. Cancellation of instruments ⚷37(5)—In suit to cancel deed, allegations of nondelivery and that deed was recorded without plaintiff's knowledge, held sufficient allegation of inadvertence and mistake (Civ. Code, § 3412).

In suit under Civ. Code, § 3412, to have deed which had been recorded through inadvertence and mistake delivered to plaintiff and canceled, allegations that deed was never delivered to defendants and that it had been recorded without knowledge or consent of plaintiff, *held* sufficient allegation of facts constituting inadvertence and mistake, since all that is required is to show facts constituting invalidity, whether they involve duress, accident, or mistake.

2. Cancellation of instruments ⚷41—In suit to cancel deed, complaint pleading facts entitling plaintiff to some relief in equity is good against general demurrer (Civ. Code, § 3412).

In suit under Civ. Code, § 3412, to cancel deed which had been recorded through inadvertence and mistake, complaint pleading facts entitling plaintiff to some relief in equity is good as against general demurrer, regardless of sufficiency to state cause of action under strict wording of statute.

3. Cancellation of instruments ⚷47—In suit to cancel deed, evidence supported finding deed was recorded without plaintiff's knowledge and without delivery (Civ. Code, § 3412).

In suit under Civ. Code, § 3412, to cancel deed, evidence *held* sufficient to support findings that deed was never delivered to defendants and was recorded without knowledge or consent of plaintiff, that it was void for lack of delivery, and that there was reasonable apprehension that, if left outstanding, it would cause injury to plaintiff.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Suit by Mary V. Keele, formerly Mary V. Haas, against Eugene Clouser and wife, to cancel a deed. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 268 P. 682.

Wm. A. Spill, of Pasadena, for appellants.

Simpson & Simpson and Leon U. Everhart, all of Pasadena, for respondent.

NOURSE, J. Plaintiff sued under section 3412 of the Civil Code to have a deed which had been recorded through inadvertence and mistake delivered to her and canceled. Plaintiff had judgment, and the defendants appeal upon typewritten transcripts.

The complaint alleged the execution of a written contract by plaintiff and defendants for the sale of certain real property which in express terms provided for the delivery of a deed and certificate of title when the terms of the contract were fully complied with by the defendants. It alleged that, at the time of entering into said contract and as a part of the same transaction, plaintiff executed a deed for the purpose of conveying to defendants a clear title to the property involved when the terms of the contract had been met, and that "by inadvertence and mistake, and without the knowledge or consent of this plaintiff, and without delivery thereof, said instrument * * * was placed on record * * * that said instrument was * * * and now is void and of no effect." A demurrer to the complaint was overruled, and the defendants answered, denying the execution of the contract and alleging that the deed was duly and regularly recorded.

[1, 2] The Code section under which the action was instituted reads: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

Appellants attack the judgment on the

ground that the complaint fails to state a cause of action. The argument seems to be that the facts constituting the alleged "inadvertence and mistake" are not pleaded with sufficient particularity. The allegations that the deed was never delivered to appellants and that it had been recorded without knowledge or consent of respondent were sufficient. All that is required under section 3412, Civil Code, "either in pleading or proof is to show the facts constituting the invalidity of the instrument, whether they involve fraud, duress, accident, mistake." Hironymous v. Hiatt, 52 Cal. App. 727, 731, 199 P. 850, 851. But, if there be any doubt as to the sufficiency of the complaint to state a cause of action under the strict wording of the Code section, it nevertheless does plead facts entitling respondent to some relief in equity, and this is all that is necessary against a general demurrer. Brown v. Anderson-Cottonwood Irr. Dist., 183 Cal. 186, 188, 190 P. 797.

[3] Appellants also argue that the evidence is insufficient to support the findings of fact. The trial court found, as alleged in the complaint, that "by inadvertence and mistake and without the knowledge or consent of the plaintiff and without a delivery thereof said instrument was filed for record * * * that said instrument was and now is void for lack of authorized delivery * * * (and that) there is reasonable apprehension that if left outstanding it may cause serious injury to the plaintiff against whom it is void."

Supporting this finding, the undisputed evidence is that, before any papers were executed in the transaction, the respondent agreed to sell the premises to the appellants at a fixed price of $3,000 on terms of $500 down and $35 a month, with interest. At the same time the respondent agreed to execute a deed "for the protection" of the appellants, to be delivered to them when the payments were completed. A written contract covering these terms was then signed; the respondent executed a deed and delivered it to her agent with instructions to place it in a designated bank along with the contract for delivery according to the terms of the contract. The respondent soon after left for the East, and the agent, without her knowledge or consent, placed the deed of record. The appellants moved into the premises and continued to make the monthly payments to the bank for a period of about 4½ years. They then became disturbed because undesirable residents were moving into the neighborhood, and, discovering that the deed had been recorded, consulted an attorney, who advised them to repudiate their written contract and to make the claim that they had clear title to the premises under the deed. This they did while about $800 was due under the contract. The appellants did not dispute any of this evidence, and both testified that they fully understood from the beginning of the transaction that the deed was not to be delivered until they had completed their payments. The evidence amply supports the finding that the recordation was made inadvertently.

We find no error in the record.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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101 Cal. App. 608

BUTLER et al. v. STARKWEATHER.
(Civ. 6733).

District Court of Appeal, Second District. Division 1, California. Oct. 30, 1929.

Appeal and error ⟹766—Appeal must be dismissed on timely notice of motion for failure to file points and authorities within 30 days after filing transcript (Supreme Court Rule I, § 4, and Rule 5, § I).

Where appellants' points and authorities were not filed within 30 days after filing of transcript, as required by Supreme Court Rule 1, § 4, and no application for extension of time was made, nor good cause shown for not making it, appeal must be dismissed on timely service and filing of notice of motion under Rule 5, § 1.

Appeal from Superior Court, Los Angeles County; Charles R. Barnard, Judge.

Action by Bertrian Butler and another against J. W. Starkweather. Judgment for defendant, and plaintiffs appeal. On motion to dismiss the appeal. Appeal dismissed.

F. E. Davis, of Hollywood, for appellants.

Walters & Mauk, of Los Angeles, for respondent.

YORK, J. The transcript on appeal herein was filed on June 14, 1929, and appellants' opening brief was not presented for filing until September 20, 1929. Theretofore, on the 5th day of September, 1929, a notice of motion to dismiss the appeal was filed herein, it having been served on said day on the attorney for appellants.

Section 4 of rule 1 of the Rules of the Supreme Court and of this court provides that: "Within thirty days after the filing of the transcript, the appellant shall file with the clerk his printed points and authorities. * * *"

Section 1 of rule 5 provides that: "If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed, upon notice given, either on motion of the respondent or of the court in which the appeal is pending."

No extension of time was granted, and, so far as the record discloses, none was asked for. The points and authorities were not on file at the date the notice of motion was served and filed. If the argument used by appellants upon this motion to dismiss had been directed to the court by way of a request for a continuance of time within which to file appellants' opening brief or points and authorities, we might have something to pass upon, but it has always been held in cases where more than 30 days have thus elapsed, and where no application is made for an extension of time, and no good cause is shown for not making such application, and where the notice of motion to dismiss is served and filed before the memorandum of points and authorities is on file in this court, this court will have to dismiss the appeal. Berendsen v. Babdaty, 62 Cal. App. 185, 216 P. 385; Waugaman v. Richardson, 72 Cal. App. 10, 236 P. 207; Welch v. Stratton, 73 Cal. App. 765, 239 P. 380; Walker v. Mathews, 58 Cal. App. 255, 208 P. 140.

The appeal is therefore dismissed.

We concur: CONREY, P. J.; HOUSER, J.

101 Cal. App. 579

INGOLD v. DALY BANK & TRUST CO. OF ANACONDA et al. (Civ. 5551.)★

District Court of Appeal, Second District, Division 2, California. Oct. 29, 1929.

Rehearing Denied Nov. 27, 1929. Hearing Denied by Supreme Court Dec. 26, 1929.

1. Bills and notes ⚷539—Findings held equivalent to finding that plaintiff was purchaser of draft given for valueless stock in good faith and for value (Civ. Code, § 3133).

In action on draft given for stock against purchaser, stopping payment of draft when finding stock had no value, trial court's findings *held* equivalent to finding that plaintiff was purchaser and holder of draft for value, under Civ. Code, § 3133.

2. Bills and notes ⚷370—Lack of consideration for draft, unaccompanied by other element, such as fraud, would not constitute defect in title of person negotiating it.

Lack of consideration for draft, unaccompanied by any other element, such as fraud, would not constitute an infirmity in instrument or defect in title of person negotiating it.

3. Bills and notes ⚷343—That purchaser of draft given for corporate stock knew of precarious condition of corporation would not prevent him from being bona fide purchaser for value (Civ. Code, § 3133).

That findings showed purchaser of draft given for stock knew of precarious condition of corporation at time, and that stock then had no value, but not showing draft was irregular, or that it was received by purchaser before overdue, that it had been previously dishonored, or that purchaser had notice of infirmity in draft or defect in seller's title thereto, would not affect purchaser's right to recover on draft as purchaser of draft in good faith and for value, under Civ. Code, § 3133.

4. Bills and notes ⚷370—As against bona fide purchaser of draft given for stock, it is no defense that stock had no value (Civ. Code, § 3133).

As against purchaser in good faith and for value, under Civ. Code, § 3133, of draft given for stock, who was found to have had no connection with fraud by which stock was sold, it is no defense that stock which was transferred was of no present or immediate value.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by R. F. Ingold against the Daly Bank & Trust Company of Anaconda and others. From an adverse judgment, plaintiff appeals. Reversed.

Page, Nolan, Rohe & Hurt and Henry Ramey, all of Los Angeles, for appellant.

James Donovan, of Los Angeles, for respondents.

CRAIG, J. On November 19, 1923, the respondent Daly Bank & Trust Company of Anaconda, Mont., transmitted to respondent Charles E. Sackett, at Los Angeles, Cal., its draft on the Wells Fargo Nevada National Bank of San Francisco, Cal., for $1,000. On November 23, 1923, the payee indorsed the same to respondent N. M. Hayter, who in turn indorsed it to R. F. Ingold, appellant herein, and, after deposit for collection by the latter, payment thereof was stopped. The appellant instituted this action against the respondents for the amount represented by said draft, and, judgment having been rendered in favor of the defendants, he appealed.

Much is said in the briefs on the subject of alleged participation by Ingold in deception and fraud practiced upon Sackett concerning the value, or lack of it, of the stock in question, and other matters whose consideration is made unnecessary by the findings upon the issues vital to a determination of this appeal. The judgment cannot be upheld, unless the findings of fact warrant it. We shall therefore quote all of the findings, which, of course, contain a story of the transaction in dispute as found by the trial court. They are as follows:

"I. The plaintiff, R. F. Ingold, and N. M. Hayter were, prior to November 19, 1923, directors of the Altruart Film Corporation. R. F. Ingold was also treasurer of said corporation from the time of its creation up to November 26, 1923. That N. M. Hayter was also fiscal agent of the Altruart Film Corporation up to November 26, 1923, and as such directors and officers of said corporation were familiar with the financial condition of said corporation.

"II. Robert W. Major was president of said corporation from the creation thereof up to December ——, 1923.

"III. That on or about the 1st of Novem-

★Rehearing denied. Hearing denied by Supreme Court.

ber, 1923, Robert W. Major, as president of the Altruart Film Corporation, and N. W. Hayter, as fiscal agent and director of said corporation, represented to the defendant Charles E. Sackett that the Altruart Film Corporation was in a good financial condition, and that some directors of said corporation desired that said Charles E. Sackett should purchase an interest in said corporation and become a director of the same, and that by the 1st of January, 1924, 'the company would be manufacturing and selling moving pictures. It was further represented to said Sackett that N. M. Hayter was in charge of the sales of the stock of said corporation under a certain permit issued by the commissioner of corporations, and that he had a number of sales agents, and that the sales were going very well. That stock had been issued to 11 persons, who became incorporators and promoters of said corporation, and that each of said incorporators had paid in to said corporation $1,000 each for stock which was to be issued to each of said incorporators. That among the original incorporators was one John D. Elms, who had invested in said corporation the sum of $1,000, and that said Elms was about to retire from said corporation, and that said N. W. Hayter had purchased the interest of said Elms in said corporation, and would sell to the defendant Sackett for the sum of $1,000.

"IV. That, relying upon the statements so made by said Major and Hayter, and each of them, to the defendant Sackett, Sackett purchased what was known as the Elms stock from N. M. Hayter, and gave therefor a certain draft for $1,000, issued by the Daly Bank & Trust Company of Anaconda, Mont., drawn on Wells Fargo Nevada National Bank of San Francisco, payable to Charles E. Sackett, or order, and indorsed by said Sackett to Hayter.

"V. That immediately after the purchase of said Elms stock by Charles E. Sackett from N. M. Hayter, and after delivering said draft to said Hayter, Robert W. Major, president of said corporation, informed said Sackett that the representations so made by Major and Hayter to said Sackett were false and untrue, and said Major advised said Sackett that the corporation had no assets, that it was in debt and had no funds with which to pay its debts, and advised said Sackett to stop the payment of said draft.

"VI. Upon the advice so furnished to said Sackett by said Major, Sackett ordered the Daly Bank & Trust Company to notify the Wells Fargo Nevada National Bank of San Francisco to refuse payment of said draft, and upon such notice Wells Fargo Nevada National Bank of San Francisco refused to pay said draft.

"VII. That on the same day that said draft was received by N. M. Hayter from Sackett for the Elms stock it was delivered to the plaintiff, R. F. Ingold, who was then and had been since the creation of Altruart Film Corporation treasurer of said corporation and one of its directors, and knew at the time he received said draft from said Hayter that said draft was given by Sackett to Hayter for the Elms stock.

"VIII. That in the purchase of said Elms stock by N. M. Hayter from John D. Elms, Hayter gave his promissory note therefor, which note was indorsed by the plaintiff, R. F. Ingold.

"IX. That R. F. Ingold knew at the time that Sackett purchased the Elms stock from Hayter that the stock was of no value and of only prospective value, and also knew that the physical properties of the corporation were worthless, and that said corporation had no assets of any real value whatever at the time Sackett purchased the Elms stock from N. M. Hayter.

"X. That the plaintiff, R. F. Ingold, knew that the draft received from Sackett was given by Sackett to said Hayter in consideration of the transfer of the Elms stock from Hayter to Sackett.

"XI. That plaintiff knew and was charged with knowledge of the fact that consideration given for said draft by Hayter was worthless, and that Sackett received no consideration for said draft transferred by Sackett to Hayter.

"XII. That the plaintiff, Ingold, received said draft from Hayter, well knowing that the Elms stock, which was transferred by Hayter to Sackett, was worthless, and that Sackett received no consideration of value for the transfer of said draft.

"XIII. That the plaintiff was not a bona fide purchaser of said draft from Sackett under section 3133 of the Civil Code.

"XIV. That at the time when the stock of John D. Elms was purchased by Charles E. Sackett from N. M. Hayter the plaintiff herein was of the opinion and belief that with proper management said corporation might prove to be a profitable organization.

"XV. That the plaintiff and Sackett had never met prior to the sale by Hayter of the Elms stock to Sackett, and the plaintiff and Sackett did not meet until October, 1925, almost two years after the transaction which is the subject of this litigation. That the plaintiff did not at any time, or at all, directly or indirectly, make any representation whatsoever, of any kind or character, to Sackett, and said Sackett was not induced to enter into the purchase of Elms' stock because of any actions, conduct, statement or representation of the plaintiff.

"XVI. That Robert W. Major was a creditor of the Altruart Company and demanded of Hayter that he be paid a portion of the money which was paid to Hayter by Sackett in purchase of the Elms stock, and that Hayter refused this demand, and it was then, and only then, that Major represented to Sackett that the Altruart Company was not in good financial condition and that he might lose his money unless he stopped payment on the draft.

"XVII. That the plaintiff was a stranger to the transaction between Sackett and Hayter whereby Sackett purchased the Elms stock, and was not charged with any fraud or knowledge of any fraud, if such there was, as between Hayter and Sackett or between Major and Sackett, and that the plaintiff herein paid Hayter the full sum of $1,000 for said draft."

It thus appears from the findings of the trial court that, although the appellant was an officer of the corporation and was fully advised of its doubtful financial condition, and knew that the Elms stock was then worthless, and that the respondent Sackett gave a draft for $1,000 therefor, he was not a party to any wrongdoing. It was found, in effect, that he knew that the Elms stock, acquired by Hayter and by him sold to Sackett, was of prospective value, and that he was of the opinion and belief that with proper management the corporation might prove to be a profitable organization. Ingold paid Hayter the full sum of $1,000 for said draft, and had therefore indorsed the note which Hayter had given for the stock which the latter sold. Appellant "did not at any time, or at all, directly or indirectly, make any representation whatsoever of any kind or character to Sackett, and said Sackett was not induced to enter into the purchase of Elms' stock because of any actions, conduct, statement, or representations of the plaintiff." He "was a stranger to the transaction between Sackett and Hayter whereby Sackett purchased the Elms stock, and was not charged with any fraud or knowledge of any fraud."

[1] The foregoing was equivalent to finding that Ingold was a purchaser and holder of the draft in good faith and for value. Section 3133 of the Civil Code reads as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular on its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

[2, 3] Notwithstanding an attempted finding, numbered XIII, which is but a conclusion, the most that can be said of these findings is that appellant knew of the precarious condition of the corporation at the time, and that the stock then had no value. They do not pretend to find that the draft was irregular, that it was received by Ingold before it was overdue, that it had been previously dishonored, was received without good faith or value, paid by Ingold, or that he had notice of any infirmity in the draft or defect in Hayter's title to it. A lack of consideration for a draft, unaccompanied by any other element, such as fraud, would not constitute an infirmity in the instrument or a defect in the title of the person negotiating it. Faris v. Beck, 74 Colo. 480, 222 P. 652; Otis v. Cullum, 92 U. S. 447, 23 L. Ed. 496.

[4] In their briefs respondents repeatedly assert that they alleged fraudulent representations and bad faith on the part of Ingold. They did, but the court's findings are directly opposed to these allegations, and so such assertions are of no consequence upon this appeal. Sackett gave the draft in question for the Elms stock. He received that stock. Undoubtedly he might sue the parties ex delicto who made the false statements to him, but as against Ingold, who is found to have had no connection with such fraud as was practiced, we hold that it is no defense that the stock which Sackett received was of no present or immediate value.

The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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101 Cal. App. 638

RICHARDSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6851.)

District Court of Appeal, Second District, Division 1, California. Nov. 1, 1929.

1. Mortgages ⚿544(3) — Although not party to foreclosure proceeding, assignee of purchaser at judicial sale held entitled to writ of assistance to let him into property.

Assignee of purchaser at judicial sale *held* entitled to writ of assistance to let him into possession of property, although not party to foreclosure proceeding.

2. Joint tenancy ⚿8—Joint tenant held not to have purchased at judicial sale for benefit of other joint tenant, where judgment which included foreclosure decree operated to terminate joint tenancy.

Where wife filed action against husband for purpose of terminating joint tenancy, and judgment, while including decree of foreclosure of mortgages existing on property, operated to terminate joint tenancy, by directing distribution of joint tenancy funds remaining after payment of mortgage liens, rule that joint tenant, who bids in property owned in joint tenancy at judgment sale, takes title for benefit of all joint tenants, not being applicable under such circumstances, wife *held* not to have purchased property bid in at judicial sale for benefit of husband.

3. **Husband and wife ⚷131(1)—Under statute, property bid in by wife at foreclosure sale was presumed to be wife's separate estate (Civ. Code, § 164).**

Under express provisions of Civ. Code, § 164, property bid in by wife at foreclosure sale was presumed to be her separate estate.

4. **Husband and wife ⚷122—Property bought in at foreclosure sale by wife, not living with husband, became her separate property; "accumulation" (Civ. Code, § 169).**

Where wife and husband were living separate and apart at time wife bid in property at foreclosure sale, such property became separate property of wife, being an "accumulation," provided by Civ. Code, § 169.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Accumulate; Accumulation.]

5. **Mandamus ⚷187(9)—Absent contrary evidence, presumption that judgment including foreclosure decree had become final obtained on application to District Court of Appeal for mandate requiring issuance of writ of assistance.**

On application for writ of assistance to let assignee of purchaser at judicial sale into possession of property, District Court of Appeal presumed, in absence of evidence to contrary, that judgment which included foreclosure decree had become final, and that assignee was entitled to be put in possession of any rights he had under such judgment.

Application by R. W. Richardson for a writ of mandate, to be directed to the Superior Court of the State of California, in and for the County of Los Angeles, J. Walter Hanby, Judge, and L. E. Lampton, Clerk, to require issuance of writ of assistance. Writ granted.

James H. O'Neill, of Los Angeles, for petitioner.

E. W. Mattoon, County Counsel, L. K. Vobayda, Deputy County Counsel, and J. Everett Brown, all of Los Angeles, for respondent.

HAHN, Justice pro tem. Petition for a writ of mandate to compel the superior court of the state of California in and for the county of Los Angeles, and J. Walter Hanby, judge of said court, to order L. E. Lampton, county clerk of Los Angeles county, to issue a writ of assistance, directed to the sheriff of Los Angeles county, to let petitioner into the possession of certain real property sold under a foreclosure sale and conveyed to the petitioner by sheriff's deed, and to compel L. E. Lampton, clerk of said court, to issue such writ.

It appears from the amended petition that in June, 1925, Grace E. Jones, then being the wife of Frank Jones, brought action in the superior court, in and for the county of Los Angeles, seeking a partition of the real property, which is the subject of this proceeding, and which the said Grace E. Jones alleged was owned by herself and her husband, Frank Jones, as joint tenants. In addition, the plaintiff asked for an accounting of the rents collected by her husband, Frank Jones, from the joint property. Earl L. Jones, son of Frank Jones, was joined with his father as defendant, it being alleged that he was the holder of two mortgages which were liens upon the property.

Frank Jones filed an answer denying all of the material allegations of the complaint, except that he and plaintiff were husband and wife. Earl L. Jones, with his answer, also filed a cross-complaint, asking for a decree of foreclosure of the two mortgages. It also appears from the record that at the time of the filing of this action, and continuously during the proceeding, plaintiff, Grace E. Jones, and defendant Frank Jones, did not live together as husband and wife, but were living separate and apart; the plaintiff, Grace E. Jones, depending for her support upon her own efforts.

The court found that the plaintiff and defendant were joint owners of the property in question; that the plaintiff was entitled to an accounting from her husband, Frank Jones, on account of the rents collected by him from the property, and upon such accounting found that the plaintiff was entitled to judgment against her husband for the sum of $472.44. The court also found that the mortgages held by Earl L. Jones constituted a first lien upon the property. The judgment and decree of the court was that the property be sold by the sheriff, and that out of the proceeds derived from the sale the mortgage liens were first to be satisfied; that the surplus, if any, remaining in the hands of the sheriff, was to be divided equally between the plaintiff, Grace E. Jones, and her husband, Frank Jones: Provided, however, that Grace E. Jones was to have a lien on the share of Frank Jones in said surplus to the extent of the amount of her judgment against him for $472.44.

The record discloses that the property was sold in accordance with the decree of the court, that the mortgage liens were paid in full, and that there remained from the proceeds of the sale a surplus of $3,422.92, which sum was distributed in accordance with the decree and judgment of the court; Frank Jones receipting to the sheriff for the amount payable and paid to him. At the time of the foreclosure sale, plaintiff Grace E. Jones, bid in the property and received from the sheriff a certificate of sale therefor. This certificate was immediately thereafter assigned and transferred by Grace E. Jones to the petitioner herein, it being alleged in the petition that the funds used by the said Grace E. Jones in purchasing and paying for said property at said sale were furnished by the petitioner.

Upon the expiration of the period of redemption, the sheriff executed and delivered to petitioner a deed to the premises, the grantee in said deed being the petitioner, which deed was duly recorded in the office of the county recorder of Los Angeles county. Petitioner thereupon presented his sheriff's deed to and demanded of Frank Jones the possession of said premises, he having continued to occupy the said premises during the entire foreclosure proceedings and the period of redemption. This demand was refused by Jones, whereupon petitioner made demand of L. E. Lampton, county clerk of Los Angeles county, for a writ of assistance, directed to the sheriff of Los Angeles county, to let petitioner into possession of the property in question, which demand was refused. Upon the refusal of the county clerk to issue the writ, petitioner filed application with the superior court for a writ of mandate to compel the county clerk to issue such writ of assistance. The matter came on before the court upon notice, and after a hearing, at which Frank Jones and his counsel resisted the issuance of the writ, the court refused to issue the writ. Thereupon the petitioner applied to this court for a writ of mandate.

In response to the alternative writ issued, respondents filed a general demurrer to the petition and also an answer. The answer denies, upon information and belief, that any of the money paid by Grace E. Jones toward the purchase price of the property at the sheriff's sale was furnished or paid by R. W. Richardson, the petitioner, and also denies, upon information and belief, that the petitioner either presented to Frank Jones the sheriff's deed or demanded of Frank Jones the surrender of possession of the property in question. In addition, respondents in their answer assert four separate defenses, which may be stated briefly as follows:

(1) That, because the petitioner was not a party to the partition and foreclosure proceedings in the superior court, he is not entitled to apply for or receive the aid of this court in the form of a writ of mandate to put him in possession of the property.

(2) That, inasmuch as the property in question was at the time of the filing of the partition action the joint property of Grace E. Jones and her husband, Frank Jones, when Grace E. Jones became the purchaser of the property at the foreclosure sale she took title as trustee for the joint tenancy.

(3) That the purchase price paid by Grace E. Jones for the property at the sheriff's sale was the community property of Frank Jones and Grace E. Jones, and hence the property so acquired at the sale became the community property of Grace E. Jones and Frank Jones.

(4) That there is another action pending in the superior court in and for the county of Los Angeles, wherein the property here involved is the subject of litigation.

Respondents present in their briefs no particular argument in support of their general demurrer, but content themselves with citing the same authorities that they cite in support of their four separate defenses. We therefore assume that a discussion of the points recited in the separate defenses will cover the points involved in their demurrer.

[1] There is no merit in the first point urged that the petitioner herein is not entitled to be heard upon an application for a writ of mandate because he was not a party to the partition and foreclosure suit in the superior court. The only case cited by respondents in support of this contention is that of Langley v. Voll, 54 Cal. 435, wherein the department opinion was modified by the court in bank by eliminating that portion which declared that a grantee of a purchaser of real property at a judgment sale was not entitled to a writ of assistance to let him into the property, on the ground that a determination of that question was not necessary to support the decision.

On the other hand, in the case of Sullivan v. Superior Court, 185 Cal. 133, 195 P. 1061, it was held that the purchaser at a sale, although not a party in the foreclosure proceeding, is entitled to a writ of assistance to obtain possession of the property purchased, and that a writ of mandate will issue directing the issuance of such writ of assistance. The court in the Sullivan Case points out a provision in the judgment and decree of foreclosure, which is similar to that contained in the degree of foreclosure under which the property here involved was sold, which reads as follows:

"It is further ordered, adjudged, and decreed that the purchaser or purchasers of said mortgaged premises under said mortgages at such sale be let into possession thereof and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who, since the commencement of said action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on the production of the sheriff's deed for such premises or any part thereof."

While it is true that the petitioner herein was not himself a purchaser of the property at the sale, there would seem to be neither reason nor rhyme in holding that a purchaser at a sale would be entitled to a writ of assistance to gain possession of the property, but that the assignee or grantee of the purchaser should not have the aid of the arm of the court to be placed into possession of property which has been duly deeded to him by the sheriff upon a proper transfer and assignment of the sheriff's certificate.

[2] Respondents' second defense is based upon the equitable proposition that a joint tenant, who bids in the property owned in joint

tenancy at a judgment sale, takes title for the benefit of all of the joint tenants. But this rule is not applicable to the instant case, for the reason that the action filed by Grace E. Jones against her husband, Frank Jones, was for the very purpose of terminating the joint tenancy, and the judgment of the court, while including a decree of foreclosure of the mortgages, operated to terminate the joint tenancy by directing the distribution of the joint tenancy funds remaining after payment of the mortgage liens. The record shows that each of the joint tenants received his respective share as decreed by the court. The joint tenancy having been terminated by judicial decree, the case of Huntington v. Perrin, 65 Cal. App. 20, 223 P. 94, cited by respondents, is not in point.

[3] It is next urged that, when Grace E. Jones bid in the property, she then being the wife of Frank Jones, the money which she used to pay for the property is presumed to be community funds, and that hence the property she acquired became community property. Petitioner's answer to this contention is, first, that under section 164, Civil Code, "whenever any * * * property, * * * is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property." Heney v. Pesoli, 109 Cal. 53, 41 P. 819; Jordan v. Fay, 98 Cal. 264, 33 P. 95; Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313, Ann. Cas. 1912A, 567.

[4] A second answer is that, it appearing from the record that Grace E. Jones and her husband, Frank Jones, were living separate and apart at the time Grace E. Jones bought in the property at the foreclosure sale, this property would become the separate property of Grace E. Jones, in that it would be an "accumulation," as provided by section 169, Civil Code. The Supreme Court of this state, in the case of Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313, Ann. Cas. 1912A, 567, interprets the term "accumulation" as applying to the acquisition of property by grant deed during the time a wife lives separate and apart from her husband.

The respondents state their fourth and last defense to the issuance of the writ as follows: "That there is another action pending between the parties hereto, to wit, Frank Jones v. Grace E. Jones and R. W. Richardson, being action No. 76227, and that the subject-matter of this writ is being litigated in said action."

[5] Respondents do not elaborate this statement by suggesting that either by practice or authority this court is precluded from granting the relief prayed for by petitioner, because of the other pending action. Nor are we aware of any rule or authority that would preclude granting the relief prayed for, if upon the facts of the case the petitioner is entitled to relief. There is nothing in the brief statement presented in respondents' answer which would enable this court to conclude that the relief here prayed for would or could be granted in the action now pending in the superior court. Whether the action pending is one for divorce, with the determination of the property rights of the parties as a collateral issue, or whether it is one in which some other question affecting the title to the property is involved, we are unable to determine. In any event, so far as the case of Grace E. Jones, as plaintiff, against Frank Jones and Earl L. Jones, as defendants, is concerned, we must presume, in the absence of any evidence to the contrary, that the judgment has become final, and that petitioner is entitled to be put in possession of any rights he may have which flow from the judgment.

We therefore conclude that the demurrer of respondents to the petition is without merit and should be overruled, that the petitioner is entitled to the relief prayed for, and that a peremptory writ of mandate should issue to L. E. Lampton, county clerk of Los Angeles county, and clerk of the superior court of the state of California, in and for the county of Los Angeles, requiring him to issue to petitioner a writ of assistance in accordance with the terms of the decree of foreclosure and sale in the case of Grace E. Jones v. Frank Jones and Earl L. Jones, being case No. 171492 in the superior court of the state of California, in and for the county of Los Angeles, directed to the sheriff of Los Angeles county, directing him to let petitioner into the possession of the property described in said decree of foreclosure.

Let the peremptory writ issue.

We concur: CONREY, P. J.; HOUSER, J.

101 Cal. App. 274

RATH v. BANKSTON et al. (Civ. 6238.)

District Court of Appeal, Second District, Division 2, California. Oct. 17, 1929.

1. Automobiles 🔑244(14)—Where automobile collided with stalled truck, findings that truck driver was present and tail-light on trailer was lit held supported by evidence.

In action for injuries received when automobile in which plaintiff was riding collided with stalled truck which had run out of gasoline, findings that driver of truck was present at scene of accident, and that tail-light on rear of trailer was lit, *held* supported by evidence that when truck stopped driver walked back to make sure lantern was lit and that globe was clean, and that he remained there up to moment of accident flagging approaching cars with his arms.

2. Automobiles 🔑148—Automobile driver must have car equipped with adequate brakes and maintained in such condition that it may not become menace to other traffic, but is not necessarily negligent where unforeseen failure of equipment occurs.

Automobile driver is not necessarily negligent as matter of law if unforeseen failure of part of equipment occurs, although, generally speaking, it is duty of automobile driver on public highway to see that car is properly equipped with brakes and maintained in such condition as to mechanical efficiency and fuel supply that it may not become menace to or obstruction of other traffic.

3. Automobiles 🔑152—Truck driver's failure to maintain sufficient fuel in gasoline tank held excusable, where same procedure as to refilling tank was sufficient on previous trips.

In action for injuries resulting when automobile collided with stalled truck, failure of truck driver to maintain sufficient fuel in truck's gasoline tank *held* excusable, where same procedure as to refilling tank had been found sufficient on previous trips of same and similar trucks over same route, since law does not require driver who has put in sufficient fuel to alight at intervals to examine gasoline supply at risk of being held guilty of negligence as matter of law if he fails to discover it is nearly exhausted.

4. Negligence 🔑65—Unless defendant is negligent there can be no "contributory negligence" by plaintiff.

Where there is no negligence on part of defendant there can be no such thing as contributory negligence on part of plaintiff, since "contributory negligence" is such act or omission of plaintiff, amounting to want of ordinary care, as concurring or co-operating with negligent act of defendant, is proximate cause of injury.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Contributory Negligence.]

5. Automobiles 🔑244(56)—Evidence held insufficient to show negligence of guest in car colliding with stalled truck.

In action for injury arising from collision of automobile with stalled truck, evidence *held* insufficient to show any negligence on part of plaintiff who was guest in car which collided with truck, but had no control or direction over its route or manner of driving it.

6. Negligence 🔑93(1)—Negligence of automobile driver held not imputable to guest.

Negligence of automobile driver in driving his car into stalled truck equipped with red lantern visible for ordinary city block is not imputable to guest riding with him.

7. Appeal and error 🔑1071(1)—Erroneous finding of contributory negligence is immaterial, where finding that defendant was not negligent was proper.

In action for injuries in automobile collision, error in finding plaintiff guilty of contributory negligence *held* immaterial, where finding that defendant was not negligent was proper.

8. Appeal and error 🔑690(2)—Court cannot be said to have abused discretion in refusing certain evidence, where record does not show such testimony was offered.

On appeal, trial court cannot be said to have abused discretion in refusing to allow plaintiff to introduce certain evidence after reopening of case to take additional testimony, where record does not show that such testimony was offered or excluded.

9. New trial 🔑105—Refusal of new trial for newly discovered evidence contradicting testimony of witness relative to maneuvering of stalled truck held proper.

In action for injuries in automobile collision in which car in which plaintiff rode collided with stalled truck, new trial for newly discovered evidence showing truck could have been backed to curb, and that testimony as to impossibility of such maneuver was therefore false, *held* properly refused, since evidence designed merely to impeach or contradict adverse witnesses is not proper basis for new trial, especially where affidavits showed test was made before case was reopened.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by May Rath against George M. Bankston and another, doing business as Bankston Bros. Truck Company. Judgment for defendants, and plaintiff appeals. Affirmed.

MacDonald & Thompson and Frankley & Spray, all of Los Angeles, for appellant.

David D. Stuart and Hubert Starr, both of Los Angeles, for respondents.

BURNELL, Justice pro tem. The plaintiff herein appeals from a judgment for the defendants in an action for damages for personal injuries sustained by reason of a collision between the automobile in which she was riding as a guest and a truck and trailer owned and operated by defendants.

The accident occurred at about 4:30 a. m. of March 7, 1925. Appellant, a young woman, had gone out for a drive with one Clarence

Habecker. Starting from Los Angeles at about 8 o'clock in the evening of the preceding day they had driven to Santa Monica in Habecker's touring car and to a point somewhere on the highway running northwest of Santa Monica and along the ocean shore. Here the car was parked for several hours while the two young people "watched the waves." Whether or not the waves were wild, and what, if anything, they were saying does not appear in the record before us nor is it pertinent to the issues in the case. They started on their homeward journey shortly after midnight, but were compelled to stop en route to Los Angeles for repairs to a broken gas line, so that it was about half past 4 in the morning when they reached the vicinity of the intersection of Coronado street with Sunset boulevard in that city, along which latter thoroughfare Habecker was driving in an easterly direction. Appellant was seated in the front seat of the automobile beside Habecker, in a reclining position, when the crash occurred. The three-ton truck of respondents, with a five-ton trailer attached to it, had run out of gasoline and had been left where it stopped when that occurred, on the south side of Sunset boulevard, between Coronado and Waterloo streets, "at a point about five feet south of the southerly car track on said Sunset boulevard"—to quote from the findings. The court found that at the time of the collision a red tail-light was burning at the rear of the trailer. There was also testimony that the truck driver was standing at the rear of the trailer, waving his arms to signal approaching traffic. Into the rear end of the trailer the car driven by Habecker crashed, with the result that appellant received severe and, in all probability, permanent injuries. The court found, also, that at the time and place of the accident "the sun had not risen and was not shining, the street lamps were not lighted; the weather was clear and it was sufficiently light so that said truck and trailer were visible for a distance of one hundred and twenty feet or more away, and the tail-light on said trailer was visible for at least one ordinary city block toward the rear."

Appellant insists as grounds for a reversal that certain of the findings are unsupported by, and, indeed, are contrary to, the evidence. The findings thus attacked may be briefly summarized as follows: First, that the truck became disabled and stopped without any negligence on the part of defendants; second, that the plaintiff was guilty of contributory negligence; and, third, that the leaving of the truck in the street was not the proximate cause of the collision. Appellant further urges that the court abused its discretion in refusing to allow her to introduce certain testimony as to the feasibility of moving the truck and trailer after the reopening of the case for the purpose of taking some additional evidence, and that a new trial should have been granted on the ground of newly discovered evidence.

The testimony as to the stopping of the truck and its presence in the street is uncontradicted and is substantially as follows: The truck and trailer, driven by one Case, who was in the employ of respondents, left Santa Barbara for Los Angeles about 10 o'clock of the day preceding the accident. It was returning empty, after delivering a load of water pipe. When the truck left Los Angeles on its northerly trip the gasoline tank was filled to its capacity of 30 gallons, and at Ventura, which is approximately 65 miles from Los Angeles, 15 gallons more were added. On the return trip the fuel supply was again replenished at Ventura, and the tank contained 25 gallons when the truck left that city. This was the method ordinarily followed by Case and defendants' other driver engaged in heavy hauling between Los Angeles and Santa Barbara, and on no previous occasion had a truck run out of gasoline. In fact, between 5 and 10 gallons usually remained in the tanks on arrival back in Los Angeles. On this particular trip, however, the truck ran out of gasoline while proceeding along Sunset boulevard, stopping quite suddenly at the point where, about 5 minutes later, the automobile in which appellant was riding crashed into it. There was no evidence as to any leakage from the gasoline tank, breakage of the gas line, or other mechanical defect in or about the truck. It was equipped with a forced feed system, with an air gauge to indicate the pressure of gasoline flowing into the carbureter, and just prior to its stopping this gauge had registered a pressure of three pounds. The driver of the truck had no warning that it was about to run out of gasoline until it "just stopped all of a sudden * * * just like turning the switch off," and the air gauge "just went down in a second." The driver immediately set his brakes, the truck and trailer then being at the point hereinabove described. Here there is a slight grade down hill from east to west. The driver testified that it would have been impossible to have released the brake and allowed the truck to coast down and to the right-hand or southerly curb, because "you can't steer your trailer," and that in order to bring the two vehicles to the curb the trailer would have had to be disengaged from the truck and manipulated by one man while another would have been required at the brakes "to keep the trailer from getting away."

[1] While there is some conflict in the evidence as to the presence of the driver at the scene of the accident and as to the tail-light on the rear of the trailer, the findings of the court as to these matters are amply supported by testimony that when the truck stopped the driver at once walked back "to make sure my lantern was lit," and that he found that it was, and that the globe (it was a kerosene

lantern with a red globe) was clean, and that he remained there up to the moment of the accident, flagging approaching cars with his arms. He further testified that he saw the car driven by appellant's friend when it was about two blocks away and "waved at him when he was half a block away," and that he was then going "faster than the other machines that came along there," and between 35 and 40 miles per hour; also that the impact pushed the truck and trailer "ahead about three or four feet and jack-knifed" them. The truck driver also testified that he was expecting another truck and trailer, which was making the same trip with him, to come along and assist him, but that the driver of the other truck had taken a different route after arriving at Hollywood boulevard and had gotten ahead of him, so that while this route also led by the scene of the collision his companion driver had passed it a few minutes prior to the arrival of the truck involved in the accident, which, as we have said, occurred about 5 minutes after the truck had stopped.

It is in evidence that at the time of the accident there was in effect an ordinance of the city of Los Angeles making it unlawful "for the operator of a vehicle to stand said vehicle * * * at any place in the roadway where the two right wheels of the vehicle are more than one foot distant from the regularly established curb line. * * *" If, in view of the testimony above summarized, we are to hold that the court was in error in its findings of lack of negligence on the part of respondents, we must do so on the theory that it is negligence as a matter of law for the operator of a motor vehicle to allow it to run out of fuel under any and all circumstances. This we are not prepared to do.

[2] Generally speaking, it is the duty of one driving a motor vehicle along a public highway to see that it is properly equipped so that it may be at all times controlled to the end that it be not a menace to the safety of others or of their property. The law requires that such a vehicle be equipped with brakes adequate to its quick stopping when necessary for the safety of its occupants or of others, and it is equally essential that it be maintained in such a condition as to mechanical efficiency and fuel supply that it may not become a menace to, or an obstruction of, other traffic by stopping on the road. But if the person in charge of such vehicle has done all that can be reasonably expected of a person of ordinary prudence to see that his vehicle is in proper condition, and an unforeseen failure of a part of his equipment occurs, it does not necessarily follow that he must be deemed guilty of negligence as a matter of law. This view is well illustrated by the case of Giorgetti v. Wollaston, 83 Cal. App. 358, 257 P. 109, 110. There one of the plaintiffs had been riding in a Ford truck driven by her husband. The front lamps commenced to grow dim, whereupon the husband stopped the truck "on the right-hand side and off the paved portion of the highway, with the exception that the left wheels rested thereon 6 or 7 inches from the edge." He alighted, adjusted the lamps, consuming from 7 to 10 minutes in so doing, and then passed around the vehicle, on the side resting on the pavement, to the rear. While so doing he was struck by the defendant's machine, which also collided with the truck, and as a result both the plaintiffs received physical injuries. The Motor Vehicle Act in force at the time of the accident contained a section reading as follows: "No person shall leave standing, or cause or permit to be left standing upon the main traveled portion of any public highway, a vehicle undergoing repair, or which has been stopped for the purpose of having repairs made thereon, or for the purpose of camping; provided, however, that this provision shall not apply to a vehicle which shall be disabled, while on such main traveled portion of the highway, in such manner and to such extent that it shall be impossible to avoid stopping such vehicle on said main traveled portion of the highway, and impracticable to remove the same therefrom until repairs shall have been made." Section 20(w), as added by St. 1919, p. 219. The testimony was conflicting as to whether it would have been practicable, on the night of the accident, to have moved the truck entirely off the pavement. The appellant, contending that respondents were guilty of contributory negligence, relied on the facts that (a) there was no tail-light on the truck; (b) that the car had been stopped and left on the paved portion of the highway because of the failure of the headlights, and that to so leave it was negligence. Answering the contention the court said: "The defect in the headlights of the truck, which led respondents to stop, was, as fairly appears from their testimony, due to a condition which developed a few minutes before the car was stopped and was not caused by a lack of due care on their part; but the absence of lights either in front or in the rear rendered the operation of the truck at the hour mentioned unlawful, and it was the duty of respondents to remove the same from the main traveled portion of the highway. Motor Vehicle Act, §§ 13 and 20 (w). The failure of any person to perform a duty imposed upon him by law raises a presumption of negligence, and if such negligence proximately contributes to his injury, he cannot recover. McKune v. Santa Clara, etc., Co., supra [110 Cal.] p. 486 (42 P. 980); Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Shimoda v. Bundy, 24 Cal. App. 675, 142 P. 109. This presumption, however, is not conclusive, but may be overcome by evidence that the failure was excusable or justifiable under the circumstances and not inconsistent with the exercise of due care.

Berkovitz v. Am. River Gravel Co., supra; Cragg v. Los Angeles Trust Co., 154 Cal. 663, 667, 98 P. 1063, 16 Ann. Cas. 1061; Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Western Indemnity Co. v. Wasco Land & Stock Co., 51 Cal. App. 672, 197 P. 390; Graybiel v. Auger, 64 Cal. App. 679, 222 P. 635; Mitsuda v. Isbell, 71 Cal. App. 221, 234 P. 928. In the instant case it does not appear that the time consumed in adjusting the lamps was unreasonable, and, as stated, there was testimony which, if believed by the jury, tended to show that the condition of the highway east of the pavement was such at the time of the accident as to render it impracticable to remove the truck farther in that direction." The judgment for plaintiff was affirmed, and a hearing in the Supreme Court was denied.

[3] So in the present case we cannot say that the learned trial judge was unjustified in regarding the failure of respondents to maintain sufficient fuel in the truck's gasoline tank as excusable under the circumstances, bearing in mind that exactly the same procedure as to refilling the tank was followed as had been found sufficient on previous trips of the same and similar trucks over the same route. Whether gasoline had been syphoned from the tank by some thief while the driver was at dinner after taking on gas at Ventura, as suggested by respondents, is but a matter of speculation with no foundation in any of the evidence in the record. The fact remains that the truck had reached its destination in Los Angeles on previous trips with several gallons unexpended. We do not think the law requires that the driver of a motor vehicle, who has seen to it that his car contains the amount of fuel which his past experience has found over-sufficient for the journey in hand, should alight at intervals to examine his gasoline supply at the risk of being held guilty of negligence as a matter of law if he fails to discover that it is nearly exhausted. We are fortified in this line of reasoning by that of the opinion of the Supreme Court in Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675, 677, which case, like that of Giorgetti v. Wollaston, supra, is also authority for the statement that violation of an ordinance is not conclusive proof of negligence, but may be excused where it appears that such violation was unintentional and justifiable under the circumstances. We quote from the opinion: "Defendant's proposed instruction No. 14, which was refused by the court, among other things, stated: 'Unless you believe from the evidence that defendant failed to use reasonable or ordinary care to keep said lamp [the tail light] lighted, and that said failure, if such you believe there was, directly and proximately caused or contributed to the collision,' the plaintiff cannot recover. The court gave instruction No. 5, proposed by plaintiff, as follows: 'You are instructed that the law of this state required at the time of the collision every motor truck while on the public highway during the period from one-half hour after sunset of one day to one-half hour before sunrise of the next day to carry at the rear a lighted lamp exhibiting a red light. If you believe from all the evidence in this case that the motor truck belonging to the defendant was being driven by the agent of the defendant in the course of his employment during this period of time without such a lighted lamp, then the defendant was guilty of negligence, and if you believe that the plaintiff, Virginia Berkovitz, was, without fault on her part, injured by reason thereof, your verdict should be in favor of the plaintiff.' Instruction No. 5 is a correct statement of the law in most cases where the violation of a statute is charged. By the exercise of ordinary care, the driver of a motor vehicle at night would always know whether the headlights were burning and in such a case instruction No. 5 would be strictly accurate. The tail light, however, is not in the immediate view of the driver, whose attention is ordinarily directed ahead, and it cannot be the intention of the law that a watchman must be maintained over the rear light to observe whether it is constantly burning. It is well known that with the best of care coal oil lights, as well as electric lights, sometimes go out. If one drives a motor vehicle in the night time when he knows, or in the exercise of ordinary care ought to know, that the tail light is not burning, he is guilty of negligence. While ignorance of the law is no excuse, ignorance of the fact, where ordinary care has been exercised, is a sufficient excuse. Violation of an ordinance 'is presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances.' Mora v. Favilla, 186 Cal. 199, 199 Pac. 17; [Harris v. Johnson, 174 Cal. 55, 58, 61 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560]; Gooding v. Chutes Co., 155 Cal. [620] 622, 102 Pac. 819, 23 L. R. A. (N. S.) 1071, 18 Ann. Cas. 671; Cragg v. Los Angeles Trust Co., 154 Cal. [663] 667, 98 Pac. 1063, 16 Ann. Cas. 1061; Baddeley v. Shea, 114 Cal. 6, 45 Pac. 990, 33 L. R. A. 747, 55 Am. St. Rep. 56. 'The only question remaining open on this point is whether conclusive proof of the violation of such a statute or ordinance is also conclusive proof of negligence. Some courts have held that it is, and some that it is not. But the true rule is perfectly plain. The violation of such a law, left without explanation or excuse, is conclusive of negligence, but it may be excused. * * * If some good excuse appears which would be a sufficient defense to an action for the penalty imposed by the law * * * then the law is not really violated. * * * We find but few cases in which this is clearly stated; but they deserve to take precedence of all the others, as they reconcile

the principle upon which the others were actually decided.' Shearman & Redfield on Neg. § 467. The defendant was entitled to an instruction embodying, as did this one, the substance of the rule as herein stated. If the jury believed the testimony of the driver to the effect that the tail light was burning three or four blocks east of the place of the accident, they might have concluded, under proper instructions, that he was not guilty of negligence even though the light was out when the collision occurred."

This case is not parallel with Keiper v. Pacific Gas & Electric Co., 36 Cal. App. 362, 172 P. 180; Flynn v. Bledsoe Co. (Cal. App.) 267 P. 887, or Winsky v. De Mandel (Cal. Sup.) 266 P. 534, in all of which the collision producing the injury was with a vehicle left standing in the street. In the first of these cases the defendant, "without any cause or reason for so doing, other than his desire to step across the street into a garage," had left his automobile "standing unoccupied and unattended upon and across" a street car track in the middle of a city street, without even setting its brakes. In the second case a truck over 18 feet in length had been parked at an angle of almost 90 degrees with the curb on a heavily traveled street 52 feet wide, the portion of which available for traffic at the time being reduced to about 40 feet by a pile of building material in front of a building being erected on the opposite side of the street. This was in violation of an ordinance requiring parking at an angle of approximately 45 degrees. In the third case above referred to a laundry truck had been left by its driver standing in a street intersection in an angular position and directly in the path of pedestrian travel, and the plaintiff, forced to go around it to cross the street, had been struck by another automobile. In none of these cases was there the slightest justification or excuse shown for a willful and deliberate violation of the law.

We are satisfied that the court below committed no error in finding that respondents were not guilty of contributory negligence.

[4-6] While our determination of the matter above considered must of necessity decide this appeal, we do not desire it to be understood that we approve of the trial court's finding on the subject of appellant's alleged contributory negligence. It is erroneous for two reasons: First, because there can properly be no finding that a plaintiff is guilty of contributory negligence where the defendant has been found guilty of no primary negligence. The two are utterly inconsistent. Second, because in our opinion there is no evidence to support such a finding in this case.

Taking up the first of these reasons, we find that "contributory negligence" is defined as "such an act or omission on the part of the plaintiff, amounting to a want of ordinary care, as concurring or cooperating *with the negligent act of the defendant*, is a proximate cause or occasion of the injury complained of." Beach on Contributory Negligence, p. 7; Wardlaw v. California Ry. Co., 5 Cal. Unrep. 225, 42 P. 1075; Gaster v. Hinkley, 85 Cal. App. 55, 258 P. 988. (Italics ours.) When, therefore, there is, as found by the court below, no negligence on the part of the defendant, there can be no such thing as *contributory* negligence on the part of the plaintiff. Murray v. Southern Pacific Co. (C. C. A.) 236 F. 704; Gatliff Coal Co. v. Sumner, 196 Ky. 592, 245 S. W. 144; Ballew v. Asheville, etc., Ry. Co., 186 N. C. 704, 120 S. E. 334; Ross v. St. Louis & S. F. Ry. Co., 93 Kan. 517, 144 P. 844.

Furthermore, we find no evidence to support the finding. The plaintiff was a guest in Habecker's car, having no control or direction over its route or the manner of driving it. The manifest negligence of Habecker in driving his car into the trailer equipped with a red lantern visible for an ordinary city block is not imputable to her. The facts disclosed by the record in this case are closely akin to those in the very recent case of Marchetti v. Southern Pacific Co. (Cal. Sup.) 269 P. 529, 530, where the deceased, for whose death damages were sought to be recovered, had been ridng as a guest in his employer's foreman's automobile when the latter collided with a train of defendant company. A nonsuit had been granted in the trial court "solely upon the ground that the evidence showed that the deceased was guilty of contributory negligence which proximately caused his death." Reversing the order granting the nonsuit the court said: "The evidence bearing upon this point was undisputed. The deceased was riding with Connors under the latter's direction, and had no control whatever over the operation of the automobile in which they were riding. There can be no question of Connors' negligence in driving the machine on to the railroad crossing without taking the proper precautions to observe whether a train was or was not approaching. The negligence of the driver of a machine, however, cannot be imputed to a passenger therein, in the absence of any evidence showing that the latter exercised some control over the driver or that he possessed the power to supervise or direct the manner in which the automobile should be operated. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 P. 1059; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319. In this case there was no such evidence. The deceased, as we have before stated, was simply going with Connors, in the latter's machine, for the purpose of attending to some matter of business regarding their employer's property. Connors was the foreman of his employer, and the deceased was subject to his orders. Connors had entire control of the machine, and was operating the same without any assistance or direction on the part of the deceased. If the deceased, therefore, was guilty of contributory negligence, it must have been by some act either of commission or omission on his part which of itself constituted contributory negligence. There was no evidence in the case tending to show any such act of negligence on the part of the deceased. All the witnesses agree that the deceased was simply sitting in the machine at the side of Connors, and that he was looking straight ahead of him while they were traveling along A street and just before their machine collided with the defendants' train. No witness testified, nor is there any evidence from which it may be inferred, that the deceased exercised or attempted to exercise any control or direction over the operation of the automobile by Connors. Respondents argue, however, that the evidence shows that, as the deceased was looking straight ahead, he could not have been looking to his left and along the railroad track on which the train was approaching, and that this failure of the deceased to look for the approaching train constituted contributory negligence on his part, which would defeat a recovery in this action. This argument, we think, is satisfactorily and completely answered by the following statement of the law on this subject, found in 3 Cal. Jur., pp. 853 and 854: 'A passenger in a motor vehicle approaching a railway crossing is under no legal obligation to warn the driver, either of the presence of the tracks or of an approaching train; the view being unobstructed and the driver reasonably competent and vigilant. And, while it is the passenger's duty to look and listen, it is not his duty to stop for a successful observation, since he has no authority over the driver, but is wholly subject to the latter's action. The passenger has a right to suppose that the driver, on approaching a railway crossing with which he is familiar, will exercise due care for the protection and safety of his passengers, and that, even when so near the crossing as to be in apparent danger of collision with an on-coming train, he will or may take some action which will avert an accident. Nor is the passenger obliged, even when the danger of collision becomes suddenly imminent, to displace the driver, seize the operating levers, and endeavor to avoid the impending catastrophe. Nevertheless, it has been said that the passenger must look out for himself, and may not, in a place of danger, as on approaching a railway crossing, rely blindly on the driver. But a passenger in a machine operated by another cannot be said as a matter of law to have been negligent in not calling the chauffeur's attention to the danger of a collision.' Respondents contend that under the authority of Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709, and Parmenter v. McDougall, 172 Cal. 306, 156 P. 460, that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety, and that, if such passenger is aware that the operator is carelessly rushing into danger, it may be incumbent upon him to take steps for his safety. These cases undoubtedly contain a correct statement of the law upon the subject of a passenger's duty in case of known danger. They have little or no application to the present case, for the reason that it does not appear that there was anything that could have been done by the deceased which would have averted the collision."

[7] We deem the decision from which we have just quoted decisive on this point. The error in finding appellant guilty of contributory negligence is, however, immaterial in view of our conclusion that the finding as to nonnegligence of the respondent is proper and controls the case on this appeal.

[8] Appellant urges that the court below abused its discretion "in refusing to allow plaintiff to show the truck and trailer could readily have been moved, after a reopening of the case to take certain additional testimony." It appears from the reporter's transcript that after the case was submitted it was upon motion of plaintiff reopened and the testimony of an alleged eyewitness to the accident was taken. No questions were propounded to this witness as to the feasibility of moving the truck and trailer, and the record does not show that any testimony whatever relating to this subject was offered by appellant or excluded by the court. This completely disposes of this point.

[9] Appellant next urges that a new trial should have been granted on the ground of newly discovered evidence. The affidavits in support of this motion are to the effect that appellant's counsel hired a truck and trailer similar to those involved in the accident, and by experimenting with them at the scene thereof determined that they could readily be backed to the curb, and hence that the testimony of the witness Case as to the impossibility of this maneuver was false. Apart from the fact that the affidavits failed to disclose facts showing that the evidence referred to therein could not have been discovered in time for presentation at the trial, had appellant's counsel used due diligence in preparing the case, we are of the opinion that the court did not abuse its discretion in denying the motion for a new trial on the grounds stated. Newly discovered evidence, designed merely to impeach or contradict the testimony of adverse witnesses, is not a proper basis upon which to grant a new trial. Waer v. Waer, 189 Cal. 178, 207 P. 891; Hanton v. Pacific Electric Ry. Co., 178 Cal. 616, 174 P. 61; Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62; Wood v. Moulton, 146 Cal. 317, 80 P. 92; People v. Anthony, 56 Cal. 397. The fact that

Case swore falsely (assuming such to be the fact merely for argument's sake) would not justify the contention that appellant was taken by surprise by his testimony. There is nothing to show that she was led to believe that his testimony would be other than it was, or that she did not have ample time to prepare to meet every issue of fact relevant to the cause. As said in Pico v. Cohn, 91 Cal. 129, 25 P. 970, 971, 13 L. R. A. 336, 25 Am. St. Rep. 159, a litigant at the trial "must be prepared to meet and expose perjury then and there." The testimony of Case was given on May 21, 1926, and it would seem that appellant had ample time to make any inquiries as to its probable truth or falsity, as well as any actual test on the ground between that time and May 24 when she rested her case. Moreover, the affidavits on motion for new trial show that the "test" was actually made on May 25, 1926, and as we have noted, when the case was reopened on May 27, the record shows no offer of this testimony by appellant.

We deem it unnecessary to further prolong this opinion by discussion of the other points urged by appellant, as our views above expressed are determinative of this appeal.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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101 Cal. App. 610

WAIZMAN v. BLACK et al. (Civ. 7078.)★

District Court of Appeal, First District, Division 2, California. Oct. 31, 1929.

Rehearing Denied Nov. 26, 1929. Hearing Denied by Supreme Court Dec. 30, 1929.

1. Automobiles 🔑244(11)—Evidence held insufficient to show that defendant, driving automobile which was struck at street intersection by car in which plaintiff was riding, was negligent.

In action for damages for personal injuries sustained in automobile collision at street intersection, evidence *held* insufficient to show that driver of car which was struck by automobile in which plaintiff was riding was negligent.

2. Evidence 🔑568(1), 570—Weight of expert or opinion evidence is ordinarily jury question.

Weight of expert or opinion evidence is ordinarily question for jury.

3. Evidence 🔑568(1)—Opinion of unqualified nonexpert witness does not create conflict with undisputed physical facts, which demonstrate beyond all reasonable doubt that expert's opinion was merely an erroneous guess.

Opinion of nonexpert witness on subject about which he is admittedly unqualified to testify does not create conflict with undisputed physical facts, which demonstrate beyond all reasonable doubt that expressed opinion was merely an erroneous guess.

4. Evidence 🔑568(1)—Witness' opinion or conclusion in direct examination can have no weight against facts stated in cross-examination, which are necessarily opposed to such opinion.

Mere opinion or conclusion of witness in his direct examination can have no weight as against facts stated by him in cross-examination, which are necessarily opposed to such opinion.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Olga Waizman against Marie Black and others. From the judgment rendered, defendant Hazel Reding appeals. Reversed.

J. Hampton Hoge, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for injuries received in an automobile collision. The cause was tried before a jury, and resulted in a verdict for plaintiff and against the defendants Black and Hazel Reding in the sum of $10,000. The defendant Reding alone appeals from the judgment following the verdict, upon typewritten transcripts. Two grounds of appeal are advanced—that the evidence is insufficient to support the verdict against this appellant, and that the verdict is excessive.

On September 1, 1927, the plaintiff was returning from Yosemite Valley, riding as the guest of the defendant Black in the latter's Ford coupé. At about 1:30 p. m. of that day, as they approached from the south the intersection of the Yosemite Highway with G street in the city of Merced, the car driven by the appellant approached the same intersection traveling east on G street. As the appellant's car had about crossed the intersection of the two streets, the Black car crashed into it, striking the right rear wheel and fender of appellant's car with the front right wheel and fender of the Black car. As a result of the collision the Black car went up in the air, landed on its radiator, and then on its top with the wheels in the air, and finally came to a stop resting on its left side in the furthermost (or northeast) corner of the intersection, close to the northerly curb of G street. The appellant's car was turned completely around "in its tracks," and came to a stop close to the southerly line of G street, with the front end "just about in line with the sidewalk."

Passing for the moment the controversy between the parties as to the relative rates of speed of the two vehicles, the undisputed evidence is that appellant's car was proceeding well over toward the right-hand curb of G street; that it had passed into the intersection of the two streets, and "had just about cleared the [Twenty-First] street," when it

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★Rehearing denied. Hearing denied by Supreme Court.

was struck in the rear by the Black car. Thus the collision occurred in the southeast corner of the intersection, after the appellant had entered and almost cleared the intersection, and at a time when the Black car had scarcely more than nosed into the intersection. The evidence does not clearly show the exact width of either street in the intersection, but all the evidence, when viewed in the light most favorable to respondent, shows that appellant's car traveled at least four times the distance *in* the intersection before the impact that was traveled by the Black car.

Upon the issue of appellant's negligence there is some testimony in the record which at first glance would seem to create a conflict. Both the plaintiff and Miss Black testified that their car approached and proceeded into the intersection at an unlawful rate of speed —about 25 miles an hour. The only disinterested witness to the collision testified that the Black car was going near 40. The plaintiff and Miss Black both estimated the speed of appellant's car at 35 or 40 miles an hour, and then the plaintiff admitted that she was wholly unqualified to give an opinion on the question. Miss Black's testimony was that, after she had reached the intersection, she saw the appellant's car speed up, but on another occasion she admitted that the appellant had reached the intersection before she (Miss Black) had, was proceeding across at a moderate rate of speed, and that she thought appellant would be clear from her path as she went through the intersection. The testimony of the appellant and of those riding with her all showed that appellant was the first to reach the intersection; that she was proceeding at a lawful rate of speed, and had no reason to anticipate that Miss Black would continue on into her path at an unlawful rate of speed.

This testimony carries the usual discrepancies, where inexperienced and prejudiced witnesses are asked to give their opinions on matters of which they know nothing. Thus, as to the question of speed of appellant's car, the plaintiff frankly admitted she was unable to testify, and then guessed that it was about 30 or 35, while Miss Black, when asked how fast appellant was going at the intersection, answered: "*Maybe* 35 or 40." If we were to consider such testimony as evidence, it is certainly evidence of the weakest character, which must give way to the physical facts, when such facts clearly demonstrate that the estimates of the witnesses were poor guesswork.

Here the undisputed physical facts are that the Black car made a complete somersault and landed on its side on the other side of the street, some 40 or 50 feet from the point of impact, while appellant's car was turned completely around and stopped in its tracks. Can there be any doubt as to the relative rate of speed of the two cars at that time? The same undisputed evidence is that the appellant had entered the intersection and had almost passed completely through it before struck in the rear by the Black car at the furthermost southeast corner of the intersection. Can there be any doubt as to which car first entered the intersection? If the testimony of plaintiff and of Miss Black as to the speed of the Black car and as to the time both cars entered the intersection were true, then the appellant must have driven at a rate of about 100 miles an hour, to have been in the position where the impact occurred. Aside from the fact that such speed was highly improbable, the fact that she came to a complete stop when hit demonstrates the impossibility of plaintiff's theory.

[1-4] We have read the record with care, including the entire typewritten transcript of the testimony, and fail to find any evidence of any character showing negligence on the part of the appellant. The only competent evidence in the record is that she approached the intersection at a lawful rate of speed at a time when the Black car was about 100 feet away; that she proceeded across the intersection at a lawful rate of speed and in a prudent and careful manner. She had just about cleared the intersection when the Black car, proceeding at an excessive and unlawful rate of speed crashed into her. If appellant's car had struck the Black car, or if the Black car had struck appellant's car amidship, or near the front portion, there would have been some doubt as to these disputed questions of fact; but, when the car approaching the intersection from the south strikes another car on the very tail end of the latter as the latter car is *leaving* the intersection, the conjectures of witnesses as to relative speed and time of entering the intersection must fall before the undisputed physical facts.

We are not unmindful of the accepted rule that the weight of expert or opinion evidence is ordinarily a question for the jury. We merely hold that the opinion of a nonexpert witness upon a subject about which he is admittedly unqualified to testify does not create a conflict with the undisputed physical facts, which demonstrate beyond all reasonable doubt that the expressed opinion was merely an erroneous guess. A similar situation arose in Newell-Murdock R. Co. v. Wickham, 183 Cal. 39, 43, 190 P. 359, where the Supreme Court said: "These statements of the witness, which are but statements, of conclusions and probabilities, following his emphatic statement that the subject was not touched upon, cannot be considered as a substantial contradiction of the positive testimony of the defendants that nothing of the kind was said." So, too, the "mere opinion or conclusion of a witness in his direct examination could have no weight as against *facts* stated by him in his cross-examination which are *necessarily opposed to such opinion.*" (Italics ours.) Burns

v. Jackson, 53 Cal. App. 345, 347, 200 P. 80. In Keyes v. Hawley (Cal. App.) 279 P. 674, we held that the physical facts showing want of negligence on the defendant's part, and which were almost identical with the facts found in the case at bar, were not controverted by the mere guess or conjecture of a witness.

As the judgment must be reversed for the reasons given, it is unnecessary to consider the other point raised.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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101 Cal. App. 497

BEST v. PAUL. (Civ. 7103.) ★

District Court of Appeal, First District, Division 2, California. Oct. 28, 1929.

Rehearing Denied Nov. 26, 1929. Hearing Denied by Supreme Court Dec. 26, 1929.

1. **Deeds 🔑196(2, 3)—Mere relation of parent and child is insufficient to raise presumption of fraud or undue influence respecting deeds from parent to child.**

Mere relation of parent and child is not sufficient to raise presumption of fraud or undue influence respecting deeds from one to the other.

2. **Deeds 🔑196(2, 3)—Advanced age of grantor is insufficient to raise presumption deed to grantee was procured by fraud or undue influence.**

Advanced age of the grantor is not alone sufficient to raise presumption that deed to grantee child was procured by fraud or undue influence.

3. **Deeds 🔑196(2, 3)—That grantor did not seek independent advice in making deeds does not create presumption of fraud or undue influence by grantee daughter, where evidence showed grantor acted voluntarily with knowledge.**

That grantor did not seek independent advice in making transfers of property to daughter does not create presumption of fraud or undue influence regarding deeds, in face of evidence that grantor acted freely and voluntarily, with full knowledge and understanding of transaction.

4. **Deeds 🔑211(3)—Daughter, deeded property, need not show by preponderance of evidence, in action to set aside deeds, that she did not commit fraud upon mother.**

Daughter, to whom mother had deeded property, *held* not required by preponderance of evidence to satisfy court or jury that she did not commit fraud on her mother in action by another to set aside deeds.

5. **Deeds 🔑196(2, 3)—Presumption against fraud is evidence supporting finding that conveyances from mother to daughter were not procured through fraud or influence.**

Presumption against fraud approximates in strength presumption of innocence of crime, and is evidence supporting finding that conveyances by mother to daughter were free and voluntary acts of grantor, and that they were not procured through fraud or influence.

6. **Deeds 🔑208(4)—Evidence that grantor recorded deeds for benefit and with consent of grantee daughter is prima facie evidence of delivery.**

Evidence that deeds were recorded by grantor for benefit and with consent of grantee daughter is prima facie evidence of delivery to grantee, and is sufficient to support finding of delivery.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Lucille K. Best, as administratrix of the estate of Martha J. Kuznik, sometimes known as Dr. Martha Kuznik, deceased, against Angelika K. Paul, sometimes known as Mrs. Angelika Paul. Judgment for defendant, and plaintiff appeals. Judgment affirmed.

Bauer, Wright & Macdonald and Alexander MacDonald, all of Los Angeles, for appellant.

Edward Winterer, Albert J. Sherer, and Earl E. Howard, all of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to set aside certain deeds conveying real property to defendant. The cause was tried before the court sitting without a jury. Findings and judgment favored the defendant, and the plaintiff has appealed on a bill of exceptions.

Dr. Kuznik was the mother of the plaintiff, the defendant, and of two other children. She died April 19, 1925, at the age of 73 years. About 2 months before her death she executed the conveyances to the defendant, covering practically all the real property owned by her. When the deeds were executed, the defendant, at the request of the grantor, was living in the home of her mother in the capacity of housekeeper, and was the only one of the four children who gave her any care or affection in her last illness. The mother was a practicing physician, who continued actively in her practice until her death. She assumed full charge and control over her properties at all times until the deeds were executed, and at that time executed the deeds freely and voluntarily, and with a full knowledge of the facts and of the effect of the transfers. She personally caused the deeds to be recorded, and notified those with whom she had business transactions that she had voluntarily conveyed the properties to the defendant.

The conveyances were attacked upon four grounds: That the grantor was of unsound mind, undue influence by defendant, fraud by defendant, and nondelivery. The trial court found adversely to plaintiff on each issue, and the burden of her appeal is that the evidence is insufficient to support the findings. We have examined the evidence. There is

★Rehearing denied. Hearing denied by Supreme Court.

not so much as a substantial conflict. All the evidence shows unmistakably that the grantor was of sound mind, that she was unusually alert for a person of her age, that she was of strong and dominating mind, and that until a few days before her death, which came suddenly from heart failure, she was capable mentally and physically to carry on her medical practice and to transact her business affairs, and that she did both.

There is no competent evidence tending to prove undue or any influence or fraud on the part of the respondent. This the appellant concedes, but she argues that the burden of proof was on the respondent to show that the transaction was fair, and that respondent failed to sustain that burden. The argument is, not that the evidence admitted was insufficient to prove the fairness of the transaction, but that the portions of the evidence relating to conversations with the deceased should not be considered for that purpose. If appellant were right, it would not help her on this appeal, because all the declarations of the deceased could be disregarded without affecting the judgment.

[1-3] The mere relation of parent and child is not sufficient to raise a presumption of fraud or undue influence. Broaddus v. James, 13 Cal. App. 464, 472, 110 P. 158; Wilbur v. Wilbur, 197 Cal. 1, 14, 239 P. 332; Longmire v. Kruger, 80 Cal. App. 230, 237, 251 P. 692. The advanced age of the grantor is not alone sufficient to raise such presumption. Soberanes v. Soberanes, 97 Cal. 140, 146, 31 P. 910; Johnson v. Studley, 80 Cal. App. 538, 559, 252 P. 638. The fact that the grantor did not seek independent advice in making the transfers does not create the presumption, in face of the evidence that she acted freely and voluntarily and with full knowledge and understanding of the transactions. Soberanes v. Soberanes, 97 Cal. 140, 146, 31 P. 910; Wilbur v. Wilbur, 197 Cal. 1, 16, 239 P. 332.

[4, 5] Here is a case where the grantor was of sound mind and body, voluntarily deeding her property to the only one of her four children who had given her any affection or care during the later years of her life, and the only one who had aided her with money and labor when she was in financial difficulties. It cannot be the law that a grantee under such circumstances must by a preponderance of evidence satisfy a court or jury that she did not commit a fraud upon her mother. The presumption against fraud approximates in strength the presumption of innocence of crime (27 Cor. Jur. 44, § 170; Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26), and this presumption is evidence supporting the finding that the conveyances were the free and voluntary acts of the grantor, and that they were not procured through the fraud or influence of respondent.

[6] As to the fourth ground—nondelivery—the evidence is that the deeds were recorded by the grantor for the benefit, and with the consent of the grantee. This is prima facie evidence of delivery to the grantee (8 R. C. L. 1006, 1009), and is sufficient to support the finding.

There is no error in the record. Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

101 Cal. App. 672

UNITED STATES GUARDIAN CORPORATION v. FOREMAN et al. (Civ. 7106.)

District Court of Appeal, First District, Division 2, California. Nov. 5, 1929.

1. Appeal and error ⚷1071(5)—Plaintiff's contention on appeal that finding of alteration in note was not sustained held without merit, where no finding of material alteration was made.

Where trial court, in action on note, found that alteration was made, but did not make finding that alteration was in a material respect, contention of plaintiff on appeal, defendant not having appealed, that finding as made was not sustained by evidence, *held* without merit, since, even though finding was not sustained by evidence, finding as made did not constitute a defense, and was therefore immaterial.

2. Bills and notes ⚷526—Evidence held to support finding nothing was paid on note after commencement of action, constituting waiver of notice of dishonor or protest.

In action against indorser on note, in which indorser contended he had never been served with notice of dishonor or protest, evidence failing to show that firm of attorneys making payment on note after commencement of action were indorser's general agents, nor attorneys for defendant, nor that they had any authority from him, except in regard to various other transactions, *held* to sustain finding that indorser did not, after commencement of action, pay any amount on principal of note.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Action by the United States Guardian Corporation against L. O. Foreman and others. Judgment for defendant Foreman, and plaintiff appeals. Affirmed.

Howard F. Shepherd, B. L. Hoyt, and Herndon J. Norris, all of Los Angeles, for appellant.

Stick, Moerdyke & Gibson and John C. Stick, all of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action on a promissory note. It made a corporation, the maker, and two individuals, as indorsers, parties defendant. L. O. Foreman, one of the indorsers, was served, and appeared and answered, and a trial was had in the trial court before the court sitting without a jury. The trial court made findings in favor of the defendant, and from a judgment entered thereon the plaintiff has appealed, and has brought up a bill of exceptions.

[1] The plaintiff contends that the trial court erred in making a finding that an alteration appearing on the face of the note was not authorized or assented to by the defendant. That the alteration was made is not disputed. The trial court made a finding that the alteration was made, but did not make a finding that the alteration was in a material respect. The defendant has not appealed. The plaintiff contends that the finding as made is not sustained by the evidence. Even though it is not sustained by the evidence, the finding as made does not constitute a defense, and therefore it is immaterial.

[2] The trial court found that "it is not true that on September 25, 1925, or at any other time, defendant L. O. Foreman paid upon the principal of said note the sum of $5,000, or any other sum, or paid any sum whatsoever upon principal, interest, or any other account with respect to said note." The plaintiff contends the finding is not supported by the evidence. The note was made by the Cox-Klemin Aircraft Corporation to raise money to finance its business. The note was written payable to the maker. Later it was indorsed by the maker, and also by L. Charles Cox and by the defendant L. O. Foreman. It was indorsed by the individuals for the accommodation of the maker. The defendant alleged that he had never been served with notice of dishonor or protest. The plaintiff admits the defendant was not served, but claims that said notice was waived, and in this behalf it asserts that, after the action was commenced, the defendant Foreman paid $5,000 on the amount alleged to be due on the note, and that such act constituted a waiver. The defendant replies that he did not make nor authorize the making of the payment.

From the record before us it is an undisputed fact that the payment was made by C. G. Bond. He made the payment by delivering to the plaintiff the check of Lee, Smyth & Wise, a firm of attorneys of whom he was the representative. The evidence does not show that said firm were the attorneys of the defendant, nor that they were his general agents, nor that they held any authority from him, except as stated below. The principal debtor, as we have stated, was Cox-Klemin Aircraft Corporation. There was evidence that Mr. Cox, an officer of that corporation, caused the payment to be made, and, furthermore, that he promised to pay the balance of the note. There was evidence that Lee, Smyth & Wise were the attorneys of the Cox-Klemin Aircraft Corporation. Under these circumstances, we cannot say that the plaintiff has sustained the burden of proof resting on it. The trial court did not err in making the finding complained of.

At about the time the note was dated, the defendant was in New York. He was a stockholder in the Cox-Klemin Aircraft Corporation. That corporation was in need of financial assistance. The defendant had theretofore indorsed notes to accommodate the corporation. Some of those notes were falling due, therefore some new notes were written and signed, and were delivered into the hands of Lee, Smyth & Wise, to be by that firm delivered in accordance with instructions thereafter to be issued by the defendant Foreman. Thereafter Mr. Foreman wired Lee, Smyth & Wise "to turn over to Captain Cox $45,000 worth of notes which you now have bearing my indorsement for the express purpose of being discounted at the Bank of the United States. Proceeds to be used to take up notes as follows: 30,000 United States Guardian Company and American Trust Company and Seventh Avenue National. All notes taken up must bear my personal indorsement to be forwarded to me here together with certificate of deposit for $15,000 to be held by me which is to cover cash balance left there per Cox wire. Wire me when Guardian is paid also any other information." Except as stated in this paragraph, there is no evidence that Lee, Smyth & Wise in any way had authority to represent the defendant. Neither is there any evidence that the money received from discounting the notes was subject to the order of any person, except Cox-Klemin Aircraft Corporation.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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101 Cal. App. 566

ANDREW v. BANKERS' & SHIPPERS' INS. CO. OF NEW YORK et al. ★

(Civ. 6946.)

District Court of Appeal, First District, Division 2, California. Oct. 29, 1929.

Rehearing denied Nov. 26, 1929. Hearing Denied by Supreme Court Dec. 26, 1929.

1. Fraud 🔑9—To warrant recovery for fraud, plaintiff must show representation of material fact, knowingly false, or recklessly made, with intent to deceive, and that such other relied thereon, was deceived, and suffered damages (Civ. Code, §§ 1709, 1710).

To warrant recovery in action based on fraud and deceit, Civ. Code, §§ 1709, 1710, plaintiff must ordinarily show that representation was as to a material fact, that such fact was false, and known to be false by party making it, or else recklessly made, or without reasonable grounds for believing its truth, with intent to induce other party to do or refrain from doing some act, which representation was

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★Rehearing denied. Hearing denied by Supreme Court.

relied on by other party, and that such other party, in acting on representation, was ignorant of falsity thereof, and reasonably believed it to be true, and that he thereby suffered damage.

2. Trial ⇨165—Motion for nonsuit at close of plaintiff's case operates as demurrer, and plaintiff's evidence must be taken as true.

Motion for nonsuit at close of plaintiff's case operates as demurrer to evidence, and plaintiff's evidence must therefore be taken as true.

3. Trial ⇨165—On motion for nonsuit at close of plaintiff's case, evidence must be construed most strongly against defendant.

On motion for nonsuit at close of plaintiff's case, evidence must be construed most strongly against defendant, and every favorable inference fairly deducible and every favorable presumption fairly arising from evidence must be considered as facts in plaintiff's favor.

4. Fraud ⇨30—For false representations contained in riders attached to insurance policies, both insurance company and agent attaching riders should be held liable.

Where insurance agent was acting for company in attaching riders to insurance policies covering automobiles, which riders contained false representations, both agent and company should be held responsible for fraud.

5. Fraud ⇨58(2)—Evidence held to show fraudulent misrepresentations of insurance company and agent in policy rider, inducing plaintiff to purchase automobile sale contracts (Civ. Code, § 1568).

In action based on alleged fraud and deceit resulting from fraudulent misrepresentations contained in riders attached to insurance policies covering automobiles, on which plaintiff relied in purchasing automobile sale contracts, evidence *held* to show fraud of insurance company and its agent in attaching rider to policy containing representations that agent had inspected automobile insured and found make and number of car to be correctly stated, in view of Civ. Code, § 1568, providing that consent is deemed to have been obtained through fraud only when it would not have been given had such cause not existed.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Archibald Andrew against the Bankers' & Shippers' Insurance Company of New York and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

W. S. Andrews and Edwin T. Cooper, both of San Francisco, for appellant.

Miller & Thornton, of San Francisco, for respondents.

LUCAS, Justice pro tem. This is an action based upon alleged fraud and deceit. Archibald Andrew, plaintiff in the court below, sought therein to recover the sum of $14,594 paid by him to one E. A. Shouse for eleven automobile sale contracts which plaintiff claims he was induced to purchase by reason of the fraudulent statements, misrepresentations and deceit of the defendants. The contracts were later found to be fictitious and of no value.

At the trial of the cause, after plaintiff had rested, the defendant company moved for a nonsuit; the motion was granted and judgment entered accordingly, while, as to defendant Earsman, the case was continued for further hearing. When the trial was resumed, however, plaintiff rested without introducing any further evidence, and the said Earsman thereupon likewise moved for a nonsuit; his motion was granted and judgment was entered. From these orders and judgments plaintiff appeals.

The complaint contains eleven separate but similar counts. The allegations contained in the first count may be briefly summarized as follows: That the defendant company was and is a New York corporation, doing business in the state of California; that J. Murray Earsman was the agent of said company, authorized to execute and deliver policies of insurance and indorsements thereon, to make inspection of automobiles insured under said policies, and to represent in riders attached to the policies the fact of such inspection and the result thereof; that on or about February 18, 1920, one E. A. Shouse offered to sell and transfer to plaintiff a certain written conditional contract of sale covering a certain purported automobile therein described, together with promissory notes evidencing the balance due thereunder, said contracts and notes purporting to be executed by one R. H. Peppin as buyer while the said Shouse was named therein as seller; that at the same time, and as a part of the same transaction, the said Shouse offered to deliver and tendered to plaintiff an insurance policy issued by the defendant company, through its agent Earsman, insuring Shouse, Peppin, the Bank of Italy and the plaintiff Andrew as their interests might appear against loss from fire and theft of the said purported automobile described in said contract; that the description of the said automobile set forth in said policy of insurance was the same as that contained in the aforesaid contract of sale between Shouse and Peppin; that at the same time, and as a part of the same transaction and for the purpose of inducing plaintiff to purchase said documents and automobile and the alleged title and interest of Shouse therein, said Shouse tendered and delivered to plaintiff a written rider or representation signed by Earsman, while acting within the scope of his authority as agent for such company and on behalf of said company. This rider was attached to said policy and was in words and figures as follows:

"7. Endorsement.

"Effective date Feb. 14, 1920, assured R. H. Peppin, E. A. Shouse, Arch. Andrew and Bank of Italy, as int. may appear.

"Attaching to policy No. B 2727 of the Bankers and Shippers Insurance Company of New York.

"I have inspected automobile insured hereunder and find make and number of car to be correctly stated. Date—February 14, 1920. J. Murray Earsman Agent. 12 19 3000 B."

It is further alleged that plaintiff, relying upon said written representation of defendants as to the inspection of said automobile and upon the said findings as to the correctness of the make and number thereof, purchased said above-mentioned contract and notes, and paid Shouse therefor $359, no part of which sum has been repaid to plaintiff, except the sum of $352; that said written representations in said rider contained were made, executed, and issued by the defendant company by and through its agent Earsman, for the purpose of inducing plaintiff to purchase said contract, notes, and purported automobile, and with the knowledge that plaintiff would rely thereon in making such purchase; that said contract and notes were wholly fictitious and forged; that the alleged purchaser and automobile therein described were nonexistent; that no such automobile had ever been in the possession or under the control of said Shouse nor sold by him to any one; that plaintiff obtained no title or interest in any automobile, nor secured any claim against any purchaser; that said Shouse is insolvent, and unable and refuses to repay plaintiff any of the money so paid by plaintiff as aforesaid; that defendants never inspected, or attempted to inspect, said automobile, and never found the make or number thereof to be correctly stated; that said representations thereto were wholly false and untrue; that the defendants made the same without any reasonable grounds for believing them to be true, and at said time knew them to be wholly false and untrue; and that they were made by defendants with the intent to induce plaintiff to purchase said documents, and that plaintiff relied and acted thereon to his damage in the sum of $7, no part of which has been paid.

The other ten counts of the complaint are the same as the first, except as to dates, purchasers, automobiles, prices, and amounts due.

The answers of the defendants are not set out in full in the record, but in the reporter's transcript appears a stipulation to the effect that both defendants had filed verified answers specifically denying all of the allegations contained in each and every count of the complaint, except the one as to the incorporation of the defendant company, which allegation is admitted. In addition thereto, the defendant company filed certain amendments to its answer, in which it set up six separate affirmative defenses to eight causes of action, and five separate defenses to the remaining three causes of action. These special defenses briefly allege that each policy of insurance referred to in the complaint, under its terms, became void, if the interest of the assured in the property covered thereby was other than sole and unconditional ownership; that at all times the automobiles referred to in said complaint were in existence; that Shouse, believed by Earsman to be a reliable man, misled and deceived Earsman as to the number and make of the automobiles; that the loss complained of by plaintiff, if any, was not caused by his reliance upon the insurance policies and the riders, but by his own negligence in failing to make investigation as to the truth of the statements contained therein before purchasing the contracts and notes, and by allowing monthly payments on the contracts to remain due and unpaid for over a year after Shouse had become insolvent and the policies of insurance had expired; and, lastly, that certain of the policies of insurance were canceled for nonpayment of premiums more than a year prior to the commencement of the action.

The defendant Earsman set up no special defense, but relied solely upon his specific denials of the allegations of the complaint.

Upon the issues thus formed, the case went to trial.

The only evidence received was that offered on behalf of the plaintiff, which consisted of the eleven automobile sales contracts and the accompanying notes, the eleven insurance policies, each having attached thereto the so-called rider No. 7, notices sent out to the purported purchasers of the automobiles that the contracts had been assigned to the Bank of Italy, an agreed statement of facts, certain stipulations as to what one witness would testify to, and the oral testimony of plaintiff and one S. E. Biddle.

It appears therefrom that the plaintiff Andrew was and had been engaged in the business of lending money and discounting automobile paper; that he was and had been a client of the Bank of Italy, Oakland Branch, for many years; that said bank had frequently taken up automobile contracts on his order, making the payments therefor, and thereafter collecting from plaintiff; that plaintiff was in good financial condition, and that his credit was good at the bank for substantial sums of money upon his unsecured promissory notes. It also appears that Andrew and Earsman were and had been friends for a number of years preceding the date of the transactions under consideration herein, and that for two or three years prior thereto they had been associated in business together; also that prior to the purchase of the contracts in question the said Andrew had purchased several automobile contracts from Shouse, which were accompanied by insurance policies to which no rider similar to rider No. 7 was attached; furthermore that on one occasion Andrew had made to Shouse a secured loan of about $5,000.

Earsman, it appears, was an insurance agent with an established business in Oakland, and was the duly accredited agent of the defendant company. Shouse was an automobile dealer, handling principally used cars, which he sold on contract. These contracts he had been in the habit of discounting to various parties, including plaintiff and the said Bank of Italy, delivering with each contract a policy of insurance. None of said policies had, prior to February, 1920, carried the rider above mentioned. It also appears from the evidence that this rider was originally drafted at the instance of the said Oakland Branch of the Bank of Italy, which institution had, some time prior to 1920, sustained a loss of about $4,000 by reason of having discounted certain spurious automobile contracts. To prevent a repetition of such loss, and to devise a means of protection against the recurrence thereof, several conferences were had between the said defendant J. Murray Earsman and S. E. Biddle, the then manager of said Oakland Branch of the Bank of Italy. At these conferences Biddle insisted, and it was agreed, that in the case of policies covering automobiles of Shouse, and wherein plaintiff Andrew and the bank were named as the insured, an inspection of such automobiles should in each instance be made by Earsman, as the agent of the defendant company, that the make and the number of the automobiles should be checked, and that a certificate executed by Earsman as agent should be attached to each policy, certifying to such inspection and the result thereof. The form of the indorsement or rider was agreed upon and assented to by the defendant insurance company only after the bank had stated it would accept no more policies from said company unless they contained such riders. When this was agreed to, as aforesaid, the plaintiff Andrew was then notified by the bank that in all cases where it was goinng to loan him money and accept as collateral the contracts of Shouse the abovementioned rider must be attached to each policy of insurance accompanying such contracts. Thereupon Andrew decided that he wanted such riders attached to all of the policies received by him, whether he borrowed money from the bank on the accompanying contracts or not, and he and Biddle informed Earsman of this fact. Earsman thereupon agreed to make the inspection and to attach such certificates or riders to all of the Andrew policies. Shouse was notified of this action and condition.

Between the middle of February, 1920, and the first of February, 1921, plaintiff discounted and purchased from Shouse at various times, and principally through the Bank of Italy, the eleven automobile contracts mentioned in the complaint, together with the notes evidencing the balance due thereunder. In each case, prior to the discounting of these contracts, Shouse applied to Earsman for an insurance policy upon the purported automobiles mentioned therein. Earsman, as the agent of the defendant company, issued the eleven policies above mentioned, to each of which there was attached rider No. 7, and he thereafter forwarded true and correct copies of said policies and riders to the general agency of the company in San Francisco.

Just what inspection was made by Earsman prior to issuing said policies and riders is a little uncertain. According to the evidence of Andrew and Biddle, Earsman admitted to them after the discovery of the fraud that he thought he had in some instances made the inspection, but that in most instances he had taken the word of Shouse that the car was there as represented, and that he did not personally examine any of said automobiles for the purpose of determining the numbers before he issued the policies and riders.

It is claimed, however, by the respondents that Earsman went to the place of business of Shouse, and there saw automobiles of the same make and kind described in the policy, but that he did not in all cases look at the numbers. All parties admit that no inspection of any kind was ever made at any place other than the place of business of Shouse, and that none of the purported automobiles described in the eleven contracts of sale was ever registered with the motor vehicle department of the state of California. The eleven policies of insurance so issued, each with the said rider attached thereto, were delivered or transferred to Andrew or to the bank for him, along with the contracts for the sale of the purported automobiles covered by said policies. Upon receipt of said contracts, the Bank of Italy mailed to each of the purchasers therein named a notice stating that his contract had been assigned to the bank. In each instance Andrew repaid to the bank all of the money advanced by it in the purchase of these contracts. Payments were in some way made at various times upon six of the contracts—by whom it does not appear, while nothing was ever paid upon the other five.

Some time in February or March, 1921, it was discovered by all of the parties hereto, after investigation, that all of the eleven automobile contracts and notes which are the subject of this action were fictitious, spurious, and forged, that none of said contracts or notes was signed by the persons named therein as vendees and makers, and that none of the automobiles referred to in said contracts was ever owned or possessed by Shouse. It was also discovered that the premiums on eight of the policies had never been paid, and that the defendant company had never been informed or learned prior to March, 1921, that, in making the inspections certified to in said riders, Earsman had relied upon Shouse for the numbers of the automobiles, and had not made a personal examination thereof. After the discovery of the fraud, plaintiff instituted neither a civil nor criminal action against Shouse, but, instead, accorded him an opportunity to work out of the difficulty and to repay the moneys of which plaintiff had been defrauded. Nothing came of this arrangement, and early in 1922 plaintiff began the present action.

The motions for nonsuits upon which the judgments appealed from were based were made upon the following grounds: That no fraud had been shown; that the rights of plaintiff, if any, were based upon insurance policies; that said policies would have been enforceable only if the riders attached thereto were guarantees of ownership; that the policies were void; that the loss suffered was not covered by the policies; that there was no consideration for said policies, and that plaintiff's loss, if any, was caused by his own carelessness.

[1-5] No consideration need be given to any of the foregoing grounds other than the ground that no fraud had been shown, as this is clearly an action sounding in fraud and deceit and not on contract. It is based upon the provisions of sections 1709 and 1710 of the Civil Code. These sections provide:

"Sec. 1709. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage whch he thereby suffers."

"Sec. 1710. A deceit, within the meaning of the last section, is either:

"1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

"2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true. * * *"

Several elements must be proven before a recovery may be had for fraud:

"Fraud may be the basis of an action for damages and deceit. When a cause arises out of an alleged false representation, the plaintiff, in order to prevail, must ordinarily show that the representation was as to a material fact; that such fact was false and known to be false by the party making it, or else recklessly made, or without reasonable grounds for believing its truth; that the representation was made with intent to induce the other party to do or refrain from doing some act; that it was relied upon by the other party—in other words, that such other party was actually misled and deceived and induced by it to act or refrain from acting; that in so acting or refraining from acting he was ignorant of the falsity of the representation and reasonably believed it to be true; and that he thereby suffered damage or injury. The absence of any one of these elements is generally fatal to a recovery." 12 Cal. Jur. 724.

From the foregoing it is seen that, to enable a plaintiff to recover in an action based upon fraud and deceit, it must first be made to appear that a false representation was made as to a material fact. The six elements necessary to a recovery in such an action, as set forth in the rule above announced, will be considered briefly herein in connection with the facts above stated.

First, as to the representation being of a material fact:

"To constitute fraud in any case the misrepresentation or concealment complained of must be of a material fact, for a representation, even though untrue, does not affect the validity of a transaction unless it is material. To be material, a representation must be of such a character that, if it had not been made, the contract or transaction would not have been entered into." 12 Cal. Jur. 740.

The original fraud in this case was clearly the fraud of Shouse in forging the conditional automobile sales contracts. By this act he created, for the purpose of sale and with the intent to defraud, contracts and promissory notes having absolutely no value. Before he could dispose of these contracts and promissory notes and perpetrate a fraud upon his friend Andrew or upon the Bank of Italy, however, it was necessary for him to secure policies insuring Andrew and the Bank of Italy against loss by fire or theft, and certifying that the agent for the company had personally inspected the automobiles insured thereunder, and had found the make and number of the cars to be correctly stated. Both the Bank of Italy and plaintiff had served notice that they would accept no more automobile paper from Shouse, unless such policies and certificates were furnished. In his testimony at the trial of the cause the plaintiff in this regard testified positively that:

"Q. State what would have been your action with reference to the purchase of each of these documents in the eleven cases if that certificate had not been on there. A. I would have refused to buy the contract.

"Q. I will ask you if subsequently to the placing of this endorsement upon the insurance policies in the summer or fall of 1919 you ever purchased from Mr. Shouse any automobile paper without receiving the certificate of inspection mentioned in these policies? A. No.

"Q. State your belief, if any you had, in the truth of the representations made by that certificate of inspection in each case. A. I believed the inspection had been made as stated."

From this it appears that without the representation of a personal inspection having been made by Earsman plaintiff would not have purchased the contracts.

"Consent is deemed to have been obtained through one of the causes mentioned in the last section (fraud) only when it would not have been given had such cause not existed." Section 1568, Civ. Code.

In answer to the contention that the

false representation was of a material fact, respondents make the point that the certificates or riders were of absolutely no value as a source of protection to purchasers of the contracts and notes, for the reason that they contained no guarantee of ownership. The testimony adduced from plaintiff on cross-examination in this regard follows:

"Q. Let us see what it says: Here is the certificate. 'I have inspected automobile insured hereunder, and find make and number of car to be correctly stated.' A. Yes.

"Q. There is nothing there to the effect that Shouse was the owner of any car, is there? A. No.

"Q. There is nothing there guaranteeing that Shouse is the owner of any car? A. No.

"Q. As a matter of fact those automobiles might have been changed and might have the same number and Shouse still not own them? A. They might.

"Q. Where were you then protected by the certificate? A. In this way, that if he had gone to the place of business and failed to find a car of that make and number and had told me he could not put the endorsement on because he could not find it I certainly would not have paid the money on that contract.

"Q. But if there was any car there that was of the make covered by the policy and did have the number covered by the policy you would have then gone ahead irrespective of whether or not you knew Shouse was the owner of that car? A. Yes."

It is undeniably true that plaintiff, as the purchaser of forged automobile paper, would in no wise be protected against loss thereunder merely because an insurance agent certified that he had seen an automobile of the make and number mentioned in said paper in the possession of the seller thereof. If title were not in the seller, or if the contract to purchase were a forgery, the certificate would avail nothing, and the purchaser of such paper would sustain a loss because of the forgery and fraud of the seller; but it is also true, as shown by the evidence, that the plaintiff would not have become a purchaser, and would therefore not have suffered loss had it not been for the representation of the insurance company and its agent. In other words, whether the riders on the insurance policies were any protection to Andrew *after* he purchased the contracts and notes is of no moment. The important part, and that which makes the representation material, is that he would not have "altered his position to his injury or risk" by buying the contracts were it not for such representations. As a matter of fact, the so-called riders on the policies and the truth of the representations contained therein were material to plaintiff for two reasons: They at least assured him that automobiles of the make and number mentioned actually existed, and they enabled him to borrow money from his bank on the automobile contracts which said policies accompanied.

Second, as to the representation being false and made knowingly or without reasonable grounds for belief in its truth: It may be conceded that defendant Earsman did not know that the automobiles were nonexistent, but it is also a conceded fact in the case that Earsman, in such inspection of the automobiles as he may have made, relied upon Shouse for the numbers thereof, and that he knowingly misrepresented that he had made a personal inspection of the cars and found their makes and numbers to be as represented.

Third, as to the representations being made with intent to induce a party to act: It is the law that, "where one knows that he is stating an untruth in order to induce another to act to his injury, the intent to deceive is necessarily involved. Upon the principle that one is liable for the natural and necessary consequences of his acts, a party, knowing the circumstances, is guilty of fraud when he negligently, carelessly, or with lack of foresight makes representations or commits acts, the natural and necessary consequence of which will be such as to cause deception, even though such party acts under the honest impression that he is violating no obligation or invading no right. In fact, gross negligence alone may furnish conclusive evidence of fraudulent intent, even where there is no actual intention to deceive." 12 Cal. Jur. 745, and cases cited.

Furthermore, the evidence shows that Andrew had notified Earsman, the agent of the defendant company, that he wanted riders attached to all of his policies, whether he borrowed money thereon from the bank or not, and Earsman knew he would not accept the Shouse contracts without them. With this knowledge he agreed to make an inspection and to attach certificates to all of Andrew's policies.

Fourth, as to the representations being relied upon by plaintiff, and, fifth, that plaintiff believed them to be true: It has already been shown by plaintiff's testimony above quoted that he relied upon the representations and believed them to be true. The motions for nonsuits, having been made at the close of plaintiff's case, operated as demurrers to the evidence, and the evidence of plaintiff must therefore be taken as true. It is well settled in such circumstances that the evidence must be construed most strongly against the defendant, and that every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence, must be considered as facts in favor of the plaintiff. 9 Cal. Jur. 551.

Sixth, as to damages: These follow as a natural consequence of plaintiff purchasing fictitious and valueless automobile paper which he would not have purchased but for the false representations of the defendant Earsman. Since Earsman was acting for the company, both should be held responsible.

The judgments appealed from are therefore reversed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

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101 Cal. App. 552

KATZ v. PEOPLE'S FINANCE & THRIFT CO. (Civ. 15.)

District Court of Appeal, Fourth District, California. Oct. 29, 1929.

1. Sales 🔑454—Provisions in contract stating that one agrees to sell and another promises to pay, and requiring insurance on personalty by company acceptable to seller, held merely to raise inference that sale contract was conditional.

Provision in contract reciting that party of first part agrees to sell and party of second part promises to pay, and requiring purchaser to keep personal property insured at all times against fire in company acceptable to seller, *held* not conclusive of reservation of title in seller, but merely to raise inference of intention that sale contract should be considered conditional and not absolute.

2. Sales 🔑454—Contract for purchase of packinghouse equipment for citrus fruits held ambiguous, permitting consideration of extraneous circumstances to determine whether contract was absolute or conditional.

Contract denominated in its caption a contract of sale, and providing that party of the first part agrees to sell and party of second part promises to pay for complete packinghouse equipment for citrus fruits, and containing provision requiring purchaser to keep property insured at all times against fire in company acceptable to seller, *held* sufficiently ambiguous and uncertain to permit consideration of extraneous circumstances in determining whether contract was one of absolute or conditional sale.

3. Contracts 🔑170(1)—Interpretation placed upon ambiguous contract by parties thereto may be considered.

Where contract was ambiguous, interpretation parties themselves have accepted and acted upon may be considered.

4. Contracts 🔑143—Questions concerning rights, duties, and obligations arising under written ambiguous contract may be determined by rules of interpretation.

Where contract has been reduced to writing, instrument itself measures rights, duties, and obligations of parties, but, when doubt arises as to what rights, duties, and obligations are conferred, such questions may be determined by application of rules of interpretation.

5. Evidence 🔑424—More liberal rule applies to admission of extrinsic evidence for interpretation of contract, where controversy arises between party thereto and third party.

Where controversy under written contract arises between one of parties thereto and third party, a more liberal rule applies in admitting extrinsic evidence when interpreting it.

6. Sales 🔑454—Contract for sale of packinghouse equipment for citrus fruits, when considered with extraneous circumstances, held contract of conditional sale (Civ. Code, § 1647).

Contract denominated in caption "Contract of Sale," and providing that party of first part agrees to sell and party of second part agrees to purchase complete packinghouse equipment for citrus fruits, and party of second part agrees to pay purchase price in specified installments, and that purchaser will keep property insured at all times against fire in company acceptable to seller, when interpreted by references to circumstances under which it was made and matters to which it relates, as permitted by Civ. Code, § 1647, *held* contract of conditional sale.

7. Appeal and error 🔑1011(1)—Rule that finding based on conflicting evidence will be sustained on appeal, if substantially supported, applies to interpretation of written, ambiguous contract of sale.

Rule that, where there is merely conflict in evidence, finding of trial court will be sustained on appeal if substantially supported, applies to ambiguous, written contract of sale as well as to other contracts.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Edmund E. Katz against the People's Finance & Thrift Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Raymond E. Hodge and John A. Hadaller, both of San Bernardino, for appellant.

Walter E. Byrne, of San Bernardino, for respondent.

SLOANE, P. J. Marcus Lathrop, as executor, substituted as party plaintiff in place of Edmund E. Katz, deceased, August 1, 1928.

This appeal was taken to the District Court of Appeal for the Second Appellate District and transferred to this court for decision.

Judgment was for plaintiff in the trial court in the sum of $537.50 and costs amounting to $17.10, on suit for the use and occupation of plaintiff's warehouse in the city of San Bernardino. Plaintiff at all times mentioned in the complaint was the owner of the warehouse in question. Respondent concedes that the facts of the case are fairly stated in appellant's opening brief and are, as slightly abbreviated, as follows:

The uncontradicted evidence showed: That appellant, defendant below, for a period of five weeks immediately prior to the 15th day of October, 1925, had occupied plaintiff's building under a lease. That on said date said tenancy was terminated; the rental thereunder being fully paid. That during said period appellant, the then owner thereof, kept and maintained in said building certain personal property consisting of a complete packinghouse equipment for the packing and handling of fruit. That upon the termination of appellant's tenancy on October 15, 1925, respondent, plaintiff below, by a written agreement, leased the said building to one Chuzaburo Yamada, this last tenancy being terminated on April 27, 1926, by notice and entry. On October 15, 1925, when appellant yielded and Yamada took possession of the building, appellant, as seller, and Yamada, as buyer, entered into a contract of sale of the packinghouse equipment, which equipment remained on the premises during Yamada's occupation thereof, and until December 14, 1926.

On April 27, 1926, respondent served on both Yamada and appellant a notice of termination of Yamada's tenancy, which notice also required the removal, within five days thereafter, of all property of Yamada and appellant, or either of them, then on the premises.

The property, consisting of the packinghouse fixtures and equipment, was not removed at the termination of the Yamada lease, but remained in plaintiff's warehouse until December 14, 1926, when it was removed by appellant. Respondent from month to month rendered to appellant bills for such use and occupancy of the warehouse, and demanded payment thereof.

The trial court found the appellant liable for the value of the use and occupation of the premises, in the sum of $537.50, and gave judgment for respondent and against appellant accordingly. The case was tried by counsel on both sides in a manner deserving of commendation and of the emulation of trial lawyers generally. The facts on which the parties are not in dispute were stipulated to, and the controversy limited to the bare issue upon which the liability of appellant turns, namely, the ownership and control of the fixtures and equipment with which the building was occupied during the period covered by the action. The evidence disclosed, and the trial court found that the retention of this property in the warehouse rendered the premises unavailable for any profitable use by the owner. The only disclaimer of liability by appellant is the contention that it was not the owner of or in the control of the fixtures and equipment during the period sued for.

The stipulated facts show that the respondent leased the real property to one Chuzaburo Yamada on October 15, 1925, and that on the same date the appellant, the then owner of said personal property, entered into a contract of purchase and sale with said Yamada of the trade fixtures and equipment in the building.

The lease of the real property to Yamada was soon after terminated, and notice was given by the respondent to Yamada and to appellant to remove the packinghouse equipment, and demand upon defendant to pay for the occupancy of the premises soon after followed.

The case turns upon the question as to whether the purchase and sale contract between appellant and Yamada was merely an agreement to sell or a consummated sale and transfer of title of the fixtures and equipment. This agreement was in writing, and in words and figures as follows:

"Contract of Sale.

"This contract of sale entered into between the Peoples Finance and Thrift Company, a corporation, hereinafter called the party of the first part, and Chuzaburo Yamada, hereinafter called the party of the second part, this fifteenth day of October, 1925

"Whereas

"The party of the first part agrees to sell to the party of the second part, and the party of the second part agrees to purchase from the party of the first part, all that certain personal property situate and described as follows, to-wit: Complete packing house equipment for citrus fruits, apples, etc."

(Here follows itemized description of property.)

"The party of the first part agrees to sell all said personal property at said described location for the sum of fifteen hundred dollars ($1,500.00), and the party of the second part promises to pay to the party of the first part as follows: One Hundred Dollars ($100.00) upon the signing of this contract, receipt of which is hereby acknowledged, and the balance in monthly installments of $50.00 or more, with interest thereon from date until paid, at eight per cent. per annum, payable monthly, said installments of $50.00 or more, due on the first day of each month, beginning January first, 1926, and thereafter on the first day of each month, until the full amount of Fifteen Hundred Dollars ($1,500.00) and interest, is paid.

"The party of the second part agrees, in addition to the monthly installments, to pay for all materials used, such as boxes and wrapping paper, said additional payments to be credited on the purchase price above mentioned.

"The party of the second part agrees to keep the said personal property insured at all times against fire, in a company acceptable to the party of the first part.

"Witnesseth our hands this fifteenth day of October, 1925.

"The People's Finance & Thrift Company,
"Edna M. James, Asst. Secy.
"Party of the first part.
"Chuzaburo Yamada,
"Party of the second part."

If the execution of this agreement constituted a sale and transfer of the title, accompanied as it was by delivery of possession to Yamada, appellant obviously was no longer responsible, without an express agreement, for its retention in respondent's building.

If, on the other hand, the agreement was only a conditional contract, under which appellant retained title, with the right to resume possession and control on the failure of Yamada to comply with the terms of the contract, appellant should have removed these fixtures and equipment on notice of termination of Yamada's lease, and on respondent's demand, as it finally did on or about December 14, 1926.

It is not always an easy matter to determine whether an agreement of this general character is an absolute or a conditional sale, an executed or an executory contract.

The contract in question does not by its terms reserve title in the vendor, until stipulated payments of the purchase price are made, and it is denominated in its caption a contract of sale. Possession was given to the purchaser, and nothing further remained to be done by the vendor to pass the title.

[1] On the other hand, the body of the instrument recites that the party of the first part "agrees to sell" and the party of the second part "promises to pay." These are not apt words for an instrument intended to pass title, and to serve as a bill of sale. The contract also requires the purchaser "to keep the said personal property insured at all times against fire, in a company acceptable to the seller." Neither of these recitals, however, is at all conclusive of a reservation of title in the appellant.

Ruling Case Law, vol. 23, p. 1348, § 171, lays down the following rule of interpretation of contracts: "The question whether the contract is executory or executed depends primarily on the intention of the parties to be gathered from the terms of the contract and such surrounding circumstances as may be legitimately considered by the court as evidences of intention. Effect will be given to words of present transfer when not inconsistent with other circumstances or provisions evidencing a contrary intention. Still the fact that the bargain is in words of either past or present time, does not conclusively evidence a perfected sale, as distinguished from an executory contract of sale, and when such is apparently the intention of the parties the contract will be deemed executory though the instrument states that the property is 'sold' to the buyer, such word being construed as meaning 'contracted to be sold.' On the other hand, though the contract is in terms of future time, or where it recites that the seller has agreed 'to sell,' it may constitute an executed contract of sale, if such was the intention of the parties."

Likewise, the requirement that the property be kept insured in some company acceptable to the vendor does not in itself establish the inference that the vendor is reserving title which he desires to preserve against the risks of fire. He may merely intend to preserve his right to resort to an attachment lien against the insurance money in case of the destruction of the property and the default of the purchaser in meeting the unpaid purchase price.

[2] However, both recitals referred to raise an inference of an intention that the sale contract shall be considered conditional and not absolute. At any rate, we deem the writing sufficiently ambiguous and uncertain to permit the court to consider extraneous circumstances in determining the intention of the parties.

[3] One of the most common applications of the rules for explaining ambiguities of a written instrument is the interpretation the parties themselves have accepted and acted upon.

[4] The general rule as to supplementing a text of a written instrument by reference to circumstances surrounding its execution is correctly stated in 6 California Jurisprudence, as follows: "When a contract has been reduced to writing, the instrument of course, measures the rights, duties and obligations of the parties. But not infrequently doubt arises as to what rights, duties and obligations are conferred, and such questions are to be settled by application of the rules of interpretation." Supra, p. 247.

These rules are quite fully set out in title 3 of the Civil Code, sections 1635–1661. Section 1647 provides: "A contract may be explained by reference to the circumstances under which it was made and the matters to which it relates."

[5] A somewhat different and a more liberal rule applies to the admission of extrinsic evidence for the interpretation of a contract when the controversy is between one of the parties to the instrument and a third party.

"Strangers are at liberty to show that the written instrument does not disclose the full or true character of the relation between the contracting parties." 6 Cal. Jur. 252, § 162; Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 P. 178.

In the Luckie Case, supra, which arose on a controversy as to which of the contracting parties was in control of an automobile at the time of an accident, the suit being by a third party injured in the accident, the opinion declares (page 479 of 41 Cal. App., 183 P. 183):

"It is competent for the plaintiff in such an action to show that, as a matter of fact, the parties to a written contract creating the relation of contractee and independent contractor" at that time, "put a different construction upon it by their conduct, and that the defendant has in fact exercised a supervision and control over the work in its details inconsistent with the presumed character of the other party to the contract as an independent contractor. * * *

"For these reasons we hold that the nature of the relation between defendant and Foulks at the time of the accident was not determinable solely from the written contract of employment, but from all the evidence in the case, particularly that which bore upon the question as to whether, at that time, defendant was assuming the right to control and direct Foulks respecting the manner in which the work should be executed by him."

Again, in 6 California Jurisprudence, 254, 258, we find this text, supported by the authorities there cited:

"Intention is to be ascertained from a consideration of the language employed in the subject matter of the contract. Resort is first had to contract itself; and if the intention is doubtful under the terms of the instrument, the surrounding circumstances may be considered, to determine its meaning. The court will ascertain the relation of the parties to each other, and to the subject matter, and if possible to construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, if it can be done without disregarding the language of the instrument. * * *

"The understanding of the parties as to the rights of each under the contract, must be ascertained and enforced so as to protect the rights of all of them."

The application of the rules for resorting to the construction placed upon the terms of a contract in case of ambiguities is thus stated in 6 California Jurisprudence, p. 304:

"The intention of the parties is to be ascertained from the writing alone, if possible, and not from the subsequent actions of one of them. However, it is well recognized that the terms of a contract may be manifested by conduct when not stated in words. And where the meaning is doubtful the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention."

[6] We find in the instant case the following circumstances which throw light on the interpretation placed upon this contract between the parties themselves as to the ownership and right of possession of the personal property in question.

It appears from the record that Yamada, at the time of the cancellation of his lease on the warehouse, vacated the premises without removing the packinghouse equipment, and that he thereafter abandoned this property without making any claim of ownership or right to its possession. On November 10, 1926, while this personal property was still in the warehouse, the appellant company served the following notice on Yamada:

"To Chuzaburo Yamada, 1542 7th St. Santa
Monica, California.

"Please take notice that you are delinquent in your payments to the Peoples Finance and Thrift Company of San Bernardino, California, in the sum of $434.80 & int., for and on account of your contract with that corporation dated October 15th, 1925, in which contract you agreed to purchase and pay for certain Fruit Packing House equipment according to the terms in said contract specified, to which you are directed for particulars.

"You have been verbally notified several times by our Mr. Ball, Assistant Secretary of the above named corporation, and you are hereby formally notified that unless the delinquent sums are paid not later than November 13th, 1926, at the office of the said Peoples Finance and Thrift Company, at 431 Court Street, San Bernardino, California, the said corporation will declare the said contract forfeited and your rights in and to the said property forfeited and will take possession of the said property, and attempt to dispose of it.

"People's Finance & Thrift Company,
a Corporation,
"By ———, Secretary."

This notice clearly indicates a claim of title on the part of appellant and the right to cancel the agreement of sale and resume possession of the property, by reason of Yamada's default in payment of the stipulated installments; and a few days later, on or about December 14th, appellant actually took possession of and removed this property from the warehouse, in compliance with the demand of respondent.

These declarations and acts of ownership and possessory rights of the property on the part of appellant, without any legal proceedings to divest Yamada's title or right to possession, if he had such under the contract, are inconsistent with the contention that appellant had parted with its rights of property under the sales agreement.

There was sufficient uncertainty in the terms of the written contract to justify the court in considering the extraneous evidence; and the evidence taken as a whole strongly tends to sustain the finding of the court that this agreement was one of conditional sale.

[7] The rule that where there is merely a conflict in the evidence, the finding of the trial court will be sustained on appeal if substantially supported, applies to the interpretation of a contract of this character as well as any other.

In Pratt v. Welcome, 6 Cal. App. 475, 92 P. 500, 501, it is said: "The principal question involved in the trial of this case was whether a sale made by the plaintiff to the defendant of the animal in dispute was absolute or conditional, and the findings claimed to be inadequately sustained by the evidence are of probate facts which tended to support one of these contentions. There is evidence to sustain either theory, and the findings so made upon conflicting evidence will not be disturbed by an appellate court."

The judgment is affirmed.

We concur: BARNARD, J.; MARKS, J.

101 Cal. App. 561

HAMMOND LUMBER CO. v. BLOODGOOD et al. (Civ. 19.)

District Court of Appeal, Fourth District, California. Oct. 29, 1929.

1. Appeal and error 🔑935(2)—Appellate court assumes motion to set aside default judgment covered all relief granted, where form of motion did not appear in record.

Where form of motion made by defendant to set aside default judgment did not appear in record, Court of Appeals was justified in assuming that motion covered all relief granted by court.

2. Appearance 🔑20, 24(1)—Appearance by both parties contesting motion without objection waives written notice or defect in notice not specifying all relief given.

Where both parties appear and contest a motion, without objection in trial court, such appearance is waiver of written notice, if none were given, or of defect in notice to specify all relief asked and given, if motion and order went beyond terms of notice.

3. Judgment 🔑162(4)—Grant of motion to vacate default judgment, in action to foreclose materialman's lien, held not abuse of discretion under affidavits containing verified answer and showing excusable neglect.

In action to foreclose materialman's lien in which court rendered default judgment for plaintiff, grant of motion to set aside default was not abuse of discretion, where affidavits contained verified answer controverting all material allegations of complaint, and alleged as excusable neglect that plaintiff's manager stated action was instituted for sole purpose of foreclosing mechanic's lien, and not to obtain personal judgment against defendants, inducing defendants not to contest action.

4. Judgment 🔑135—Courts will more readily listen to motion to vacate judgment to give litigant day in court than to motion depriving litigant of defense.

Courts are more quick to listen to motion to vacate and set aside default judgment that will give litigant his day in court than to motion that will deprive litigant of defense.

5. Appeal and error 🔑957(1)—Judgment 🔑139—Motion to vacate default is addressed to trial court's discretion, exercise of which will not be set aside, unless abused.

Motion to vacate default is addressed to sound discretion of trial court, and exercise thereof will not be set aside, except in clear case of abuse of such discretion.

6. Appeal and error 🔑935(2)—All presumptions are resolved in favor of order setting aside default judgment on appeal from order.

On appeal from order granting motion to vacate default judgment, all presumptions must be resolved in favor of court's action in setting aside default.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the Hammond Lumber Company against Leon E. Bloodgood and others. Judgment by default for plaintiff, and, from an order vacating default judgment, plaintiff appeals. Affirmed.

Le Roy B. Lorenz, of Los Angeles, for appellant.

C. W. Benshoof, of Riverside, for respondent.

MARKS, J. On April 16, 1927, appellant filed its action against defendants, seeking to foreclose a materialman's lien. Respondent was named as contractor, and personal judgment was sought against him. The summons is not in the record, but respondent admits personal service in the county of Riverside. On October 21, 1927, the default of respondent was entered, and on December 3, 1927, a default judgment was rendered and entered against him. No judgment was taken foreclosing the lien. On December 8, 1927, respondent served and filed his notice of motion to set aside the judgment, on the grounds of mistake, inadvertence, and excusable neglect. Attached to the notice of motion were respondent's affidavit and his verified answer. At the time the motion was argued, counsel for both appellant and respondent were present and submitted additional affidavits to the trial court. On January 19, 1928, the court below granted respondent's motion, using the following language in so doing: "It is ordered that the motion of defendant, D. W. Lewis, and the proceedings subsequent be and the same is hereby granted and such default is hereby set aside and all proceedings subsequent thereto."

The notice of motion specified a motion to set aside "the judgment by default against said defendant and all subsequent proceedings thereof." Nothing therein contained informed appellant of a motion to vacate the default of respondent. In the affidavit attached to the notice of motion there is the following: "This defendant asks that his default be set aside and that he be permitted to answer and have said action tried upon its merits."

[1] Appellant complains of the order made because it went beyond the terms of the notice of motion and vacated the default of the respondent in addition to granting the relief specified. The form of the motion made by respondent does not appear in the record. We are therefore justified in assuming that it covered all of the relief granted by the court. The record does not show any objection by appellant in the trial court to the form of the motion or to the extent of the relief granted. He makes his objection for the first time here.

[2] It is the well-settled law of this state that, where both parties appear and contest a motion, without objection in the trial court, such appearance is a waiver of a written no-

tice, if none were given, or of the defect in the notice to specify all of the relief asked and given, if the motion and order went beyond the terms of the notice. Acock v. Halsey et al., 90 Cal. 215, 27 P. 193; Curtin v. Dunne, 10 Cal. App. 586, 102 P. 825; Walberg v. Underwood, 39 Cal. App. 748, 180 P. 55; Brown v. Superior Court, 65 Cal. App. 147, 223 P. 426.

[3] Appellant further contends that the granting of respondent's motion to vacate and set aside his default and the judgment against him was an abuse of discretion on the part of the court below.

Attached to respondent's notice of motion was a verified answer and his affidavit. The answer controverted all of the material allegations of the complaint, and, if true, would constitute a complete defense to the action. The affidavit set forth what respondent claimed to be excusable neglect on his part, based on the following facts: That appellant maintained a branch in the city of Riverside, managed by C. A. Pontius, who sold the materials described in the complaint to Leon E. Bloodgood and Gertrude L. Bloodgood, owners of the property described in the lien and complaint; that, shortly after the summons was served on respondent, he talked with Pontius, and denied all liability to appellant; that Pontius then told respondent that the sole purpose of the action was to foreclose a mechanic's lien on the property described in the complaint; that respondent relied upon such statement, and concluded and believed that no personal judgment would be asked or rendered against him; that, relying upon such statement, he did not appear in the action; that he first learned of the judgment against him on December 7, 1927; that he immediately consulted an attorney, and instituted the proceedings to vacate the judgment on December 8, 1927. Counteraffidavits were filed on behalf of appellant and an additional affidavit by the respondent which were before the court at the time of the hearing of respondent's motion. Among the affidavits filed by appellant was one by C. A. Pontius, in which he denied having the alleged conversation with respondent set forth in his affidavit. This, at best, created a conflict of evidence which was decided in respondent's favor by the trial judge. The averments in the other affidavits were too general to be material to the issue.

The question to be answered on this appeal is whether or not the affidavit of respondent contained the statement of any material facts which would justify the order of the court below. It is possible, and perhaps probable, that the statement credited by respondent to Pontius to the effect that the action was instituted for the sole purpose of foreclosing a mechanic's lien upon the property described in the complaint might, and probably did, lull respondent into a sense of false security under the belief that the property would be sold to satisfy the judgment foreclosing the lien. The prompt action taken by him upon learning of the judgment, together with the specific denials and allegations of his answer, would lend color to this belief.

[4] In cases of this kind the courts are more quick to listen to a motion that will give a litigant his day in court than to one that will deprive him of his defense. In this case the only injury that could result to appellant from the granting of the motion would be the delay incident to a trial, assuming that it had a good cause of action; a delay that in all probability would have been less than the time consumed in this appeal.

[5, 6] The courts have repeatedly held that a motion to vacate a default and a default judgment is addressed to the sound discretion of the trial court, and will not be set aside, except in a clear case of the abuse of such discretion. All presumptions must be resolved in favor of the court's action in setting aside such default and default judgment. Fink & Schindler Co. v. Gavros, 72 Cal. App. 688, 237 P. 1083; Moore v. Thompson, 138 Cal. 23, 70 P. 930; Craig v. San Bernardino Investment Co., 101 Cal. 124, 35 P. 558; Brasher v. White, 53 Cal. App. 545, 200 P. 657. We cannot say that there was an abuse of discretion on the part of the trial court in granting respondent's motion.

Order appealed from is affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

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101 Cal. App. 615

SHELLENBERGER v. BAKER et al.

(Civ. 5700.)

District Court of Appeal, Second District, Division 1, California. Oct. 31, 1929.

1. Attorney and client ⟹167(4)—Findings and judgment in action for legal services held conclusive of principal amount plaintiff was entitled to recover.

Though plaintiff, in action for reasonable value of legal services, demanded $1,100, and trial court, at conclusion of trial, in discussing evidence, remarked that there was no evidence showing plaintiff was entitled to retainer fee of $500, and that judgment would be for sum of $650, for which judgment was entered, finding that services were of reasonable value of $650 and judgment for that amount *held* conclusive as to principal amount plaintiff was entitled to recover.

2. Interest ⟹18(1)—Plaintiff, suing for reasonable value of legal services, held not entitled to interest from date of termination thereof.

Plaintiff, suing for reasonable value of legal services, *held* not entitled to interest from date of termination of services.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by George H. Shellenberger against L. L. Baker and others. From the judgment rendered, defendant named appeals. Modified, and as modified affirmed.

Fickeisen & Richardson and J. E. Haley, all of Los Angeles, for appellant.

McAdoo, Neblett, O'Connor & Clagett and B. H. Neblett, all of Los Angeles, for respondent.

HOUSER, J. Defendant L. L. Baker appeals from a judgment rendered against him and Charles L. Hoffman in an action for the reasonable value of legal services.

The first point presented by appellant is that the evidence was insufficient to sustain the finding of fact made by the trial court to the effect that, at the special instance and request of appellant and his codefendant, plaintiff performed the services which are the basis of the action. It would serve no useful purpose to set forth the evidence adduced on the trial relative to the finding in question. Suffice it to say that, in the judgment of this court, the evidence was ample to sustain the finding to which objection is made.

In his complaint plaintiff demanded judgment against the defendants for the sum of $1,100. Prior to the trial, and in accordance with a demand made upon him by the defendants, plaintiff furnished to the defendants a bill of particulars of his claim, wherein, as a part thereof, was recited the item: "To 5 conferences, trip to Long Beach with Barton and English, counsel and retainer, $500.00." The total of plaintiff's claim against the defendants, as shown by the bill of particulars, amounted to $1,150.25. At the conclusion of the trial, in discussing the evidence, the trial judge made the following comment: "* * * However, there is nothing here, to my mind, that would warrant the assumption and there is no proof whatever that Mr. Shellenberger was retained by any retainer fee. There was nothing of that kind at all. That item of $500, therefore, will be taken out. There is nothing to sustain that, but there is as to the remainder. After taking that item out, my judgment will be for the sum of $650. Let the judgment be entered."

[1] Appellant contends that, in view of the fact that the action was brought for the sum of $1,100, which, according to the bill of particulars (showing a total of $1,150.25), included the item of retainer fee, $500, and since in orally discussing the evidence that item was disallowed by the trial court, the judgment should have been for $600, instead of $650 as rendered. However, on examination of the record herein it is noted that, in regard to the value of the services performed by plaintiff "at the special instance and request of the defendants," the findings of the court are that "said services were and are of the reasonable value of $650," for which amount, together with interest and costs, judgment was rendered.

In the case of Montecito Valley Water Co. v. City of Santa Barbara, 144 Cal. 578, 595, 77 P. 1113, 1119, a question somewhat similar to that here involved was presented to the court. Therein it was said:

"The trial court filed a paper, which it entitled its 'Opinion,' the views expressed in which were somewhat modified when the formal findings of the court were subsequently prepared, signed, and filed. At the time that the opinion was presented, the court entertained the view that an amount of water in excess of 4.16 inches, namely, 6 inches of water, were abstracted by the city tunnel, and plaintiff insists that the amount so declared should control, and that this *opinion* should be treated as the *findings of the court*. The position, however, is untenable. The opinion was no more than its name imports—the informal views of the court, subject to future modification after argument, which was actually had—*the legal expression of those views being found, as only properly they could be found, in the formal findings of fact and conclusions of law.* Byrne v. Hoag, 116 Cal. 1, 47 P. 775; O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225."

To the same effect see Estate of Yorba, 176 Cal. 166, 170, 167 P. 854; Estate of Spreckels, 165 Cal. 597, 606, 133 P. 289.

Under the foregoing authorities, the ruling here must follow that as to the principal amount the findings and the judgment are conclusive.

[2] Appellant also contends that the trial court erred in awarding interest to plaintiff at the rate of 7 per cent. per annum on the sum of $650 from the date of the termination of the services rendered by plaintiff to defendants.

Perhaps the leading case in this state on the question thus presented is that of Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164. It is there held that: "In an action to recover the reasonable value of services performed by the plaintiff, the amount, character, and value of which can only be established by evidence in court, or by an accord between the parties, and which are not susceptible of ascertainment either by computation or by reference to market rates, the plaintiff is not entitled to interest prior to verdict or judgment."

To the same effect see Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 P. 719; Macomber v. Bigelow, 123 Cal. 532, 56 P. 449.

In the case of Erickson v. Stockton & Tuolumne County R. R. Co., 148 Cal. 206, 82 P. 961, it is held that interest is not recoverable on an unliquidated claim for the value of services rendered even from the time of the commencement of the action. See, also, Gray v. Bekins, 186 Cal. 389, 199 P. 767; Tryon v. Clinch, 44 Cal. App. 629, 186 P. 1042; Hind v.

Uchida Trading Co., 55 Cal. App. 260, 203 P. 1028; Arocena v. Sawyer, 60 Cal. App. 581, 213 P. 523; Diamond Match Co. v. Ætna Casualty, etc., Co., 60 Cal. App. 425, 213 P. 56; 8 Cal. Jur., 789, 790, 796, and cases there cited.

Since the decision was rendered in the case of Erickson v. Stockton & Tuolumne County R. R. Co., 148 Cal. 206, 82 P. 961, section 1917 of the Civil Code has been repealed. Respondent has directed the attention of this court to no authority which would authorize the trial court in an action of this kind and in the circumstances here present to award interest from the date of the termination of the services of the plaintiff. The judgment should be, and hereby is, modified by striking therefrom the item by which interest was allowed on the principal sum of $650 "from the 19th day of January, 1925, at the rate of 7% per annum, or $92.00."

As thus modified, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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101 Cal. App. 532

PETERSON v. FIRST NAT. BANK OF BAY POINT et al. (Civ. 6863.) ★

District Court of Appeal, First District, Division 1, California. Oct. 29, 1929.

As Modified on Denial of Rehearing, Nov 27, 1929.

Hearing Denied by Supreme Court Dec. 26, 1929.

1. Appeal and error 🔑1010(1)—Sufficiency of evidence to establish fact is primarily for trial court, whose finding, supported by substantial evidence, is conclusive on appeal.

Sufficiency of evidence to establish a given fact is primarily a question for trial court, whose finding is conclusive on appeal, if supported by substantial evidence, according it all favorable inferences.

2. Evidence 🔑389—Oral testimony as to what occurred at bank directors' meeting, minutes of which were admittedly incomplete and incorrect, was admissible.

Where both parties to action against bank for recovery of bonds and note and mortgage securing them admitted that minutes of directors' meeting, treating transaction whereby directors and cashier executed notes to bank as one in which bank loaned each maker face amount of his note, were neither complete nor correct, oral testimony as to what actually occurred was properly admitted.

3. Evidence 🔑441(11)—Oral testimony as to bank director's agreement to indorse, put up security for, and pay, other directors' notes, held not inadmissible as varying makers' absolute obligation to pay.

Oral testimony that bank directors, to make up deficiency in assets, agreed that each should sign his note, and that one of them should indorse each note, put up security, and pay notes, *held* not inadmissible as attempt to vary absolute obligation to pay, contained in terms of each note; it being permissible to show that delivery was conditional.

4. Replevin 🔑72—Evidence held to support finding that plaintiff's assignor agreed to loan credit, evidenced by note sued for, to establish defendant bank's credit.

In action to recover bonds and note and mortgage securing them from bank, evidence *held* sufficient to support court's finding that plaintiff's assignor agreed to loan his credit, as evidenced by his note, for purpose of establishing bank's credit while its capital was impaired because of national bank examiner's action in charging off certain assets as losses.

5. Replevin 🔑72—Evidence held to support finding that bank director delivered collateral to trustee for satisfaction of unpaid directors' notes.

In action by bank directors' assignee to recover bonds and note and mortgage securing them from bank, agreement of bank, another director, and trustee *held* to support court's finding that latter director, for purpose of securing payment of directors' notes to bank, delivered collateral to trustee, with instructions to apply it to satisfaction of such notes, if not paid.

6. Evidence 🔑424—Oral testimony as to obligations secured by agreement, to which neither plaintiff nor her assignor were parties, held admissible in action to recover note from bank.

Neither plaintiff nor her assignor being parties to agreement under which bank director delivered collateral to trustee for application to satisfaction of directors' notes, including that sued for, if not paid, oral testimony as to obligations secured thereby was properly admitted, though not entitled to as much weight as recitals of agreement.

7. Pledges 🔑19—Only pledgor of collateral for satisfaction of notes could substitute new obligations to be secured by pledge (Civ. Code, § 1479).

Under Civ. Code, § 1479, bank director delivering collateral to trustee for application to satisfaction of his and other directors' notes to bank, if not paid, was only party who could substitute new obligations to be secured by such pledge.

8. Pledges 🔑19—Bank held required to apply receipts from trustee on unpaid directors' note pursuant to original trust agreement; director pledging collateral for such purpose not being bound by bank's subsequent agreement and correspondence with others or its resolution consenting to substitution of new obligations.

Pledgor's consent to substitution of new obligations, to be secured by pledge of collateral with trustee for satisfaction of his and other directors' notes to bank, not being evidenced by agreement or correspondence to which he was not party, nor by bank's resolution consenting thereto, though he voted therefor as director, court properly held that bank was required to apply receipts from trustee to satisfaction of unpaid note in accordance with terms of original trust agreement.

★Rehearing denied. Hearing denied by Supreme Court.

9. Appeal and error ⚷931(1)—Appellate court will construe trial court's findings liberally in support of judgment.

All presumptions being in favor of trial court's findings, appellate court will give them a liberal construction in support of judgment, and any uncertainties therein must receive such construction as will uphold, rather than defeat, judgment.

10. Appeal and error ⚷931(4)—Finding that bank had no lien on bonds, note and mortgage because of nonexecution of pledge held inferentially included in express finding of delivery thereof under unfulfilled promise to execute pledge.

Court's finding that plaintiff's assignor delivered bonds, note, and mortgage sued for to bank, with representation that he would pledge them as security for his note, but subsequently refused to do so, and demanded their return, *held* not ambiguous, uncertain, and indecisive of issues because of failure to find positively whether assignor delivered them as security for note; finding that bank had no lien because of nonexecution of pledge being inferentially included in express finding.

11. Husband and wife ⚷45—Bank which was not husband's creditor could not question validity of his transfers of bonds, note, and mortgage to wife.

Trial court having held under its findings on uncontradicted testimony of plaintiff's husband that bank, to which he delivered bonds, note, and mortgage sued for, was not his creditor, it was in no position to question validity of his transfers thereof to plaintiff as made without valuable consideration and change of possession.

12. Replevin ⚷107—Judgment for value of bonds sold by defendant bank held not void for failure to provide in alternative for return thereof (Code Civ. Proc. § 667).

Judgment awarding plaintiff value of bonds sought to be recovered from bank, which admitted that it had previously sold them, *held* not void because of failure to provide in alternative for return of property or its value under Code Civ. Proc. § 667, since such provision would be unavailing.

13. Replevin ⚷107—Bank could not complain of failure of judgment against it for possession of note and mortgage to fix value of note (Code Civ. Proc. § 667).

Bank against which judgment for possession of note and mortgage was awarded could not complain of failure thereof to fix value of such instruments; provision of Code Civ. Proc. § 667, being solely for plaintiff's benefit.

14. Replevin ⚷107—Failure of judgment for recovery of note and mortgage in bank's possession to provide in alternative for recovery of their value held not erroneous.

Failure of judgment awarding plaintiff possession of note and mortgage, which were in defendant bank's posession, to provide in alternative for return of property or its value, *held* not erroneous, in view of bank's ability to deliver them to plaintiff.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Johanna Peterson against the First National Bank of Bay Point and others. From a judgment for plaintiff against named defendant, it appeals. Affirmed.

A. Walter Allen and Raymond T. McGlynn, both of San Francisco, and Wade W. Moore and Hugh H. Donovan, both of Pittsburg, for appellants.

Resleure & Hill, of San Francisco, for respondent.

GRAY, Justice pro tem. In this action for the recovery of Liberty and Victory bonds and a note and mortgage securing the same from the defendant bank, the action having been dismissed as to the other defendants, the pleadings framed for decision the following issues: (1) The character, conditional or absolute, of the delivery to the bank by plaintiff's assignor, her husband, of his promissory note; (2) the conditions under which the bank obtained possession of the bonds, note, and mortgage; (3) the extent of the obligations secured by Carlo Lepori's pledge, and satisfied by its performance; and (4) the validity of plaintiff's title to those bonds and the note and mortgage. Defendant bank appeals from an adverse judgment, based upon findings favorable to plaintiff upon those issues, claiming such findings are unsupported by, and contrary to, the evidence, and also that the judgment is not in alternative form required in an action of claim and delivery.

[1] Before considering the sufficiency of the evidence to support the findings, it is well to state the law, fixing the boundaries of our task in that regard. "The sufficiency of evidence to establish a given fact is primarily a question for the trial court, and if there is substantial evidence to support the conclusion reached below, the finding is not open to review upon appeal. Steinberger v. Young, 175 Cal. 81, 165 P. 432. And so, the finding in question is conclusive on appeal unless this court is convinced that the conclusion reached is without substantial support in the record, bearing in mind that all inferences favorable to its support are to be accorded to it. Hassell v. Bunge, 167 Cal. 365, 139 P. 800; Hind v. Oriental Products Co. (Cal. Sup.) [195 Cal. 655] 235 P. 438. Hence, here, where a clear conflict of evidence exists, this court is not justified in disturbing the finding below." Allen's Collection Agency v. Lee, 73 Cal. App. 68, 72, 238 P. 169, 171. Therefore, in this opinion, no attempt will be made to fully review all of the voluminous testimony offered at the trial, but the investigation will be limited to ascertain whether there is substantial evidence to support the disputed findings.

[2-4] On September 15, 1921, after repeated criticisms of certain assets of the bank as uncollectible and futile recommendations

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

for their voluntary elimination, a national bank examiner charged off as losses a portion of those assets, with a result that the bank's capital was impaired to the extent of $16,174.84. Under date of October 6, 1921, the acting comptroller of the currency, in the manner and form provided by federal statute, notified the bank of such impairment, and that, if either such deficiency were not paid or the bank refused to liquidate, a receiver would be appointed. To consider the problem thus presented, a directors' meeting was held on December 6, 1921, there being present four directors, including the cashier and plaintiff's husband, the owner of 5 shares of stock, and Carlo Lepori, the owner of 170 shares, out of a total of 250 shares; also one Irwin, who was neither a stockholder nor director. At the meeting each director, including the cashier and Irwin, executed and delivered his several note, payable to the bank on demand, indorsed by Carlo Lepori. Each note was for the principal sum of $2,750, except that of Irwin, which was for $2,450, making a total of $13,450. The foregoing facts are undisputed. The only difference between the parties is as to the nature of the delivery of each note, the defendant claiming it was an absolute delivery in partial satisfaction of the impairment of $16,174.84, and the plaintiff claiming a conditional delivery, as a loan of credit until the impairment could otherwise be made up. Voluminous testimony of federal banking authorities as to the government's efforts to rehabilitate the bank, its demands in that regard, and its understanding of the transaction, creates no conflict with the testimony of the actual participants in that meeting. Both parties admit that the minutes of the meeting which treat the transaction as one in which the bank loaned each maker the face of his respective note are incorrect. It being conceded that the minutes were neither complete nor correct, oral testimony as to what actually occurred was properly admitted. Lawrence v. Premier Indem. Assur. Co., 180 Cal. 688, 182 P. 431.

Plaintiff's assignor testified that, at the meeting, Lepori was unwilling to levy a stockholder's assessment to make up the deficiency because of fear that the attendant publicity would be injurious to the bank's credit, and that the directors agreed that each should sign his note, that Lepori should indorse each note, and put up security and pay them. The other two directors, Lepori having died prior to trial, and the cashier, each testified to the same effect. Defendant's objection that such oral testimony was inadmissible because it was an attempt to vary the absolute obligation to pay, contained in the terms of each note, is clearly untenable, because it is permissible to show that the delivery was conditional. Silva v. Gordo, 65 Cal. App. 486, 224 P. 757; Allen's Collection Agency v. Lee, supra. Corroborative of the testimony are the terms of the trust agreement between the bank, Lepori and a trustee, dated January 14, 1921, of which more hereafter, and missing minutes, orally shown to have referred to the notes as "Lepori accommodation notes." This evidence, with the inferences to be drawn therefrom, amply support the court's finding that plaintiff's assignor and the bank made an agreement whereby the former, for the purpose of establishing the latter's credit during the impairment of its capital, for its accommodation, agreed to loan his credit, as evidenced by his note.

[5, 6] Defendant, because of alleged insufficiency of evidence, challenges the court's finding that Carlo Lepori, for the purpose of securing the payment of the notes, including that of plaintiff's assignor, delivered collateral to a trustee with instructions that, if the notes were not paid, the collateral should be applied to their satisfaction. Obviously, this finding is predicated upon the agreement of January 14, 1921, whose terms not only support the finding, but also compel it. This agreement first recites that the bank is desirous of removing estimated losses of $16,574.81 (obviously a clerical error for the amount of the impairment) from its current assets; that the directors made their notes and placed same in the current assets of the bank; that to remove losses by putting in such unsecured notes did not meet the law's requirements; and that Lepori, as a large stockholder and as indorser, is desirous of satisfying the government's requirement, and is willing to assist in the restoration of all estimated losses up to the date of agreement. It then provides that Lepori has placed in the trustee's possession secured collateral of a face value of $21,340; that the trustee is to hold such collateral until the bank furnishes proof that the directors' note, together with estimated losses of $3,034, have been paid; that the trustee shall credit collections in a trust account for the use of the bank; and that, if the directors' notes and the losses of $3,034 were not paid within 90 days, the trustee may, upon 30 days' notice to Lepori, sell the collateral for their face value and deliver the proceeds to the bank to pay directors' notes and the sum of $3,034. The last item does not, as contended by defendant, extend the security to other obligations, but merely provides that, if a percentage of those other obligations are paid, the time of the agreement may be extended 6 months after the expiration of the 90 days. Since neither plaintiff nor her assignor were parties to this agreement, oral testimony as to the obligations secured by it was properly admitted, but the court correctly did not give as much weight to such oral testimony as it did to the solemn recitals of this agreement. Smith v. Goethe, 159 Cal. 628, 115 P. 223, Ann. Cas. 1912C, 1205.

[7, 8] The court further found that, prior to the commencement of this action, the bank received from Carlo Lepori, from another

named director, and from money and property set over to it, by the trustee in accordance with the trust agreement, an amount sufficient to pay all the directors' notes, including that of plaintiff's assignor, and that all such notes have been fully paid. There can be no dispute as to the sufficiency of the evidence to support the first half of this finding, for without contradiction it appears that two directors other than plaintiff's assignor paid their respective notes, that Carlo Lepori as indorser paid the cashier's note, and that the trustee delivered to the bank all the collateral and proceeds therefrom pledged under the trust agreement sufficient in amount to pay the two remaining directors' notes. But the bank claims that, as there was a substitution of obligations secured by the pledge, it was authorized to, and did, apply the receipts from the trustee to the satisfaction of the substituted obligations, leaving nothing to apply to the original obligations, to wit, the notes of the directors, including plaintiff's assignor. Ignoring plaintiff's right to object to such substitution (Civ. Code, § 2994), Carlo Lepori, as debtor under his pledge and indorsement, would be the only party who could substitute new obligations to be secured by this pledge (Civ. Code, § 1479). The agreement of June 26, 1924, between the trustee, the bank, and C. Lepori, admitted by defendant to be some person other than Carlo Lepori, while purporting to make such substitution, does not evidence Carlo Lepori's consent to such substitution, because he was not a party to such agreement. Likewise, the resolution of the bank, consenting to such substitution, fails to show the pledgor's consent to such substitution, because, although Carlo Lepori, as a director, voted for such resolution, the resolution showed the consent solely of the bank and not that of Carlo Lepori. Neither is his consent shown by the correspondence between the bank and trustee and the national banking examiner, for the obvious reason that he was not a party to any of such correspondence. The court, therefore, correctly held that, as the original trust agreement was never amended, nullified, or superseded, the bank was required to apply the receipts from the trustee to a satisfaction of the unpaid directors' note, in accordance with the plain terms of that agreement.

[9, 10] Defendant criticizes the court's finding that plaintiff's assignor delivered to the bank the bonds, note, and mortgage with the representation he would execute an agreement pledging them as security for his note, and that he subsequently refused so to do, and demanded their return, as ambiguous, uncertain, and indecisive of the issues because of its failure to positively find that the assignor either did or did not deliver them as security for his note. "Since all presumptions are in favor of the findings of the trial court, an appellate court in reviewing the findings will give them a liberal construction in support of the judgment. Any uncertainties in the findings are to receive such construction as will uphold rather than defeat the judgment, as will give them effect rather than destroy them." 2 Cal. Jur. 871. Reasonably construed, the court expressly found a delivery under a promise to execute a pledge, and a refusal so to do, and inferentially and necessarily included in the express finding a finding that the bank had no lien because of the nonexecution of the pledge. There was no necessity to find, as suggested by defendant, whether or not it had a general lien under section 3054 of the Civil Code, because no such issue was tendered either by the pleadings or the evidence.

[11] The uncontradicted testimony of plaintiff's assignor shows that he gave the bonds to his wife, as purchased, and prior to their delivery to the bank, and also that he, in writing, assigned the note and mortgage to her, after such delivery. The court so found. Defendant now urges that each transfer, having been made without valuable consideration and change of possession, was invalid as a fraud upon the bank as creditor of the assignor. But as the court under those findings above mentioned clearly held that the bank was not a creditor, it is in no position to question the validity to these transfers. Ackerman v. Schultz, 178 Cal. 190, 172 P. 609.

[12-14] The judgment awarded to plaintiff possession of the note and mortgage, together with collections thereon and the value of the bonds. Defendant urges that its failure to provide, in alternative, for the return of the property or its value (Code Civ. Proc. § 667), renders it void. Since defendant admitted at the trial that it had previously sold the bonds, any provision for their return would necessarily be unavailing, and the judgment was properly for their value. Erreca v. Meyer, 142 Cal. 308, 75 P. 826; Skaggs v. Taylor, 77 Cal. App. 519, 247 P. 218. As to the failure to fix the value of the note and mortgage, the Code provision is solely for the benefit of the plaintiff, and she is the only one who can complain as to such omission. Griffith v. Reddick, 41 Cal. App. 458, 182 P. 984; Waldman v. Broder, 10 Cal. 379; Whetmore v. Rupe, 65 Cal. 237, 3 P. 851. Furthermore, since the evidence discloses that the bank has possession of the note and mortgage, and can deliver them to the plaintiff, the failure to make the judgment alternative in form is not erroneous. Beggs v. Smith, 26 Cal. App. 532, 147 P. 585.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

101 Cal. App. 652

MAHONEY et al. v. ATCHISON, T. & S. F. RY. CO. et al. (Civ. 3899.)

District Court of Appeal, Third District, California. Nov. 1, 1929.

1. Pleading ⟹121(1)—Answer alleging defendant has no information or belief may deny allegations of particular paragraph without specifically setting them forth.

Where answer alleges that defendant has no information or belief sufficient to enable him to answer allegations of particular paragraph of complaint, he may deny said paragraph by denying all allegations thereof without specifically setting forth such allegations.

2. Pleading ⟹121(3)—Defendant's denials of matters alleged in verified complaint presumably within defendant's knowledge must be specific (Code Civ. Proc. § 437).

Under Code Civ. Proc. § 437, as it existed at time of trial, providing that denial of each allegation of verified complaint controverted must be specific and be made positively or according to defendant's information and belief, where matters alleged in verified complaint are presumably within defendant's knowledge, his denials thereof must be specific.

3. Appeal and error ⟹1170(3)—Ruling that defective denials of verified complaint allegations were good did not require reversal unless miscarriage of justice resulted (Code Civ. Proc. § 437; Const. art. 6, § 4½).

Where plaintiffs' verified complaint alleged specific acts of negligence by defendants and trial court held that denials in defendants' answer of allegations contained in certain paragraph of complaint were good, and thereafter plaintiffs without objection introduced evidence to prove allegations defectively denied under Code Civ. Proc. § 437, which at that time provided that if complaint be verified denial of each allegation controverted must be specific and positively made, or according to information and belief of defendant, and defendants without objection introduced evidence in opposition thereto, trial court's ruling did not justify reversal unless it deprived plaintiffs of a substantial right and resulted in miscarriage of justice under Const. art. 6, § 4½.

4. Appeal and error ⟹1170(6)—Evidence being insufficient to warrant judgment for injuries to automobile guest in collision near railroad crossing, reversal of judgment for defendants for trial error was precluded (Civ. Code, § 486; Const. art. 6, § 4½).

In action for injuries to guest in automobile struck by train near crossing in which evidence was insufficient to warrant judgment for plaintiffs on theory that no bell was rung or whistle sounded as required by Civ. Code, § 486, or that train was willfully and negligently operated at reckless and dangerous rate of speed without due care and caution, Const. art. 6, § 4½, precluded reversal of judgment for defendants for erroneous trial ruling.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Lawrence Mahoney and another against the Atchison, Topeka & Santa Fé Railway Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Dorris & Henderson, of Bakersfield, for appellants.

E. W. Camp, Robert Brennan, and Leo E. Sievert, all of Los Angeles, and C. L. Claflin, of Bakersfield, for respondents.

FINCH, P. J. This is an action for personal injuries suffered by plaintiff Maria Mahoney when an automobile in which she was riding as a guest was struck by a railroad train alleged to have been in the "exclusive possession and control" of the defendant railway company. Verdict and judgment went for the defendants, and the plaintiffs have appealed from the judgment.

The accident occurred near a country crossing a few miles south of Bakersfield. The highway there runs north and south and the railroad runs from a northeasterly to a southwesterly direction. The automobile in which Mrs. Mahoney was riding approached the crossing from the south as the train in question was approaching from the northeast. The complaint alleges that the view of the railroad from the highway is so obstructed as to make the crossing "extremely dangerous to those approaching it along the said highway." Admittedly, this allegation was sufficiently denied by the defendants and the evidence relating thereto is conflicting. Paragraph IX of the verified complaint reads as follows: "That as the said locomotive and string of cars approached the said crossing, and before they entered upon said crossing, as aforesaid, the defendants and each of them wilfully, carelessly and negligently failed to sound any whistle, ring any bell or give any other warning signal of the approach of the said locomotive and the string of cars to the said crossing, and that the said defendants wilfully and negligently propelled, ran and operated the said locomotive and the said string of cars up to and upon said crossing at a reckless and dangerous rate of speed, and wilfully and negligently failed to maintain or exercise due care and caution in the control and management of the said locomotive and the said cars while the same were approaching and entering upon the said crossing."

The defendants answered paragraph IX in the following language: "Defendant denies the allegations contained in the ninth paragraph of said complaint and all thereof."

In like form the defendants denied the allegation that the train was in the possession and control of the defendant railway company. In a separate defense the railway company alleged that the collision was "proximately caused by the negligence of the said

Maria Mahoney," setting forth the particulars of such negligence. In appellants' opening brief four alleged errors are specified, and it is then said: "These four errors all relate to one principle, and they may be considered together. The principle is that a denial of the allegations of a verified complaint which merely states that 'defendant denies the allegations of paragraph (giving number) and all thereof' is not such a specific denial as is required under our system of pleading, and is in effect an admission of the allegations of those paragraphs of the verified complaint."

At the time the answer was filed and at the time of the trial, section 437 of the Code of Civil Procedure provided: "If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant."

[1, 2] It has been held that in an answer alleging that the defendant has no information or belief sufficient to enable him to answer the allegations of a particular paragraph of the complaint he may deny the same in the form adopted by the defendants in this case. Read v. Buffum, 79 Cal. 77, 82, 21 P. 555, 12 Am. St. Rep. 131. In considering similar denials, in Etchas v. Orena, 121 Cal. 270, 271, 53 P. 798, 799, it is said: "None of these facts were presumably within the knowledge of the defendant. * * * In answering the complaint in this form, it was not necessary that he should make a specific denial of each of the allegations. * * * As the defendant was equally without information or belief upon either of them, he could properly make the denial in the form adopted by him." In Jensen v. Dorr, 159 Cal. 742, 747, 116 P. 553, 555, in discussing similar general denials for want of information or belief, it is said: "Whatever we might think of this form of denial were the question a new one in this state, it is settled by the decisions that as to matters not presumably within the knowledge of a defendant such a form of denial is permissible, and that a specific denial of each of the allegations as to such matters is not essential, notwithstanding that the complaint is verified." Where, however, the matters alleged in the complaint are presumably within the knowledge of the defendant, his denials thereof, as the foregoing decisions imply, must be specific. Hensley v. Tartar, 14 Cal. 508, 510; People v. Hagar, 52 Cal. 171, 182; Muraco v. Don, 79 Cal. App. 738, 250 P. 1109; Kinard v. Kaelin, 22 Cal. App. 383, 390, 134 P. 370.

[3] The plaintiffs did not demur to the answer or move to strike out any of the defective denials thereof. Plaintiffs' first suggestion that such denials were defective was made by their counsel during the opening statement to the jury, when it was stated that the answer of the defendant railway company admitted that the train which struck the automobile was being operated by such defendant at the time of the accident. Counsel for the railway company interrupted and denied that the answer made any such admission. After argument by respective counsel, the court said, "I will hold that denial good." The plaintiffs, without further objection, thereupon introduced evidence to prove the allegations defectively denied and the defendants, also without objection by plaintiffs, introduced evidence in opposition thereto. At the close of the evidence the court refused to instruct the jury, as requested by the plaintiffs, to find for them in accordance with the allegations so denied. Respondents contend that, by introducing evidence in support of such allegations, the plaintiffs abandoned their objections to the sufficiency of the denials thereof. In discussing a similar question it is said: "It is not only the right of the court to settle or to designate at the outset of a trial the issues of fact which have been joined by the pleadings, and to direct and limit the introduction of evidence to those issues alone, but it is eminently a proper practice, and one which would serve greatly to expedite the trial of causes, if more commonly followed. At the same time, when the court has so declared upon the issues, either party has the unquestioned right to except to the ruling of the court, and, if by that ruling he shall have been deprived of any substantial right of defense to urge that upon the attention of the appellate court. He may not only submit to the ruling of the court without future offer of evidence upon the excluded defense, but it is his duty to accept such ruling." Pastene v. Pardini, 135 Cal. 431, 433, 67 P. 681, 682. See, also, San Joaquin L. & P. Co. v. Barlow, 43 Cal. App. 241, 243, 184 P. 899.

It remains to determine whether the plaintiffs have been "deprived of any substantial right" by the ruling of the court. A judgment is not to be reversed "for any error as to any matter of pleading, * * * unless, * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const. art. 6, § 4½. There is nothing in the record to indicate that the case was not tried on its merits as fully as if the allegations of the complaint had all been denied specifically.

[4] The plaintiffs introduced evidence tending to show that the train in question was being operated by the defendant railway company at the time of the accident. They called the engineer and fireman of the train crew as adverse witnesses, both of them being named as defendants. The engineer testified "that the train was operating between 28 and 30 miles per hour; that the bell on the locomotive was ringing; that he blew the regulation crossing whistle for this crossing; that just as the pilot of the engine started over the concrete pavement of the highway the fireman yelled at him, 'hold her'; that

he immediately applied the brakes in emergency; that just as he did apply the brakes in emergency he saw the automobile appear on the railway track, approximately 50 feet in front of the pilot of the locomotive; that he did not put the locomotive in reverse." The plaintiffs called two experts, who testified that a locomotive can be stopped more quickly by putting it in reverse than by the application of the air brakes and that "releasing the sand from the sand dome on to the track assists in making a sudden stop." One of them expressed the opinion that "a locomotive with one express car and one passenger coach attached, running at the rate of 28 or 30 miles an hour, could be stopped in a distance of less than 100 feet." He admitted "that he wanted to see the railroad company lose the suit." A county traffic officer, called by the plaintiffs, testified "that he heard the locomotive whistle; that he arrived at the scene of the accident just a short time after it happened and assisted in moving the injured parties; that he examined the highway and found rubber marks showing where the car had slid its wheels; that he paced the rubber marks from where the tires gradually started to slide to where they left the pavement and it was 48 good long steps, better than 150 feet; that after the car left the pavement he traced the tracks up onto the railway track at the point of the collision." Another of plaintiffs' witnesses testified "that he saw rubber marks on the pavement for approximately 150 feet before they left the pavement; the pavement was dry; that the automobile was struck upon the railroad right of way and not upon the highway." Witnesses for the defendant testified that the locomotive whistle was blown and that the bell was ringing as the train approached the crossing and that the train was moving at 28 to 30 miles an hour. One of them testified that he "measured the tire marks on the pavement; that the first tire marks on the pavement were 220 feet from the rails; that they started to leave the pavement 123 feet from the rails; that he traced the wheel marks down through a gully three or four feet deep and onto the railroad track; that the automobile was struck exactly 66 feet from the center of the crossing." The driver of a hay wagon testified that "nearly a quarter of a mile from the railroad tracks, the automobile involved in the accident passed him going at the rate of 50 miles per hour." An expert witness testified "that a train similar to the train involved in the accident traveling at the rate of 30 miles per hour, completely equipped with automatic air brake equipment, functioning in perfect efficiency, could not be stopped in less than 300 feet."

Appellants admit that the "dangerous character of the crossing was one properly placed in issue" and, under the evidence, "was a question for the jury." The other alleged acts of negligence relied on by the appellants, as stated in their opening brief, are: "The failure of the engine crew to ring the bell or sound the whistle as required by section 486 of the Civil Code" and "the failure of the engine crew to use proper means to stop the locomotive, upon ascertaining that the approaching automobile was likely to go upon the track."

The uncontradicted evidence shows that the bell was rung and the whistle sounded as required by section 486. No effort was made to prove the contrary. Viewing the evidence in the light most favorable to the plaintiffs, it appears that it would have been possible to have stopped the train within a distance of 100 feet and that the train crew first discovered the perilous position of the automobile when the train was within about 70 feet or less of the point of collision, and when it was therefore impossible to stop the train in time to avoid the collision.

An examination of the entire record not only fails to show "that the error complained of has resulted in a miscarriage of justice," but it affirmatively appears that the evidence is insufficient to support a judgment in favor of the plaintiffs. Under such circumstances the constitutional provision cited forbids a reversal. Nittler v. Continental Casualty Co. (Cal. App.) 272 P. 309.

The judgment is affirmed.

We concur: PLUMMER, J.; ROLFE L. THOMPSON, J.

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LA RUE v. BARR. (S. F. 13016.)

Supreme Court of California. Nov. 4, 1929.

Appeal and error ⚷979(2)—Appellate court will not interfere with granting of new trial, supported on theory that evidence did not support finding of jury.

Since order granting new trial may be supported on theory that evidence does not support finding of jury that services of plaintiff of reasonable value of $12,000, in addition to value of plaintiff's board and lodging for over eight years, were rendered by plaintiff to decedent, Supreme Court cannot interfere with exercise of discretion of trial court, after its personal observation of witnesses.

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Jennie La Rue against Warden T. Barr, as administrator of the estate of Helen C. La Rue, deceased. Judgment for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

Superseding opinion in 279 P. 1019.

Lewis H. Smith, of Los Angeles, and Archie A. Smith, of Fresno, for appellant.

Frank Kauke, of Fresno, for respondent.

LANGDON, J. This is an appeal by the plaintiff from an order granting a new trial, after a verdict and judgment in favor of plaintiff for $12,000.

The plaintiff was the stepgranddaughter of defendant's decedent. Plaintiff lived in the home of decedent for over eight years prior to the death of the latter. During this period of time she was employed outside the home during the day for a considerable period, and it appears from the evidence that she assisted her grandmother with the household duties, attended to the household errands, and served as companion for the older woman during the evenings and when she was not employed otherwise. Upon the death of the grandmother, plaintiff contended that there was a contract between herself and decedent, whereby decedent promised to give by will all her property to plaintiff, if plaintiff would live with her, and aid and assist her in and about the household. This contract was pleaded in the first count of the complaint, but, not being in writing, was unenforceable, and a demurrer to that count was sustained. Plaintiff pleaded in a second count a cause of action for the reasonable value of her services, which she alleged to be $12,000, which was slightly more than the value of the estate.

The evidence is conflicting as to the amount of service rendered by plaintiff, and as to the demands made upon her by her grandmother. Even the impersonal printed pages of the record leave doubt as to whether the arrangement was for the benefit of the grandmother, or for the benefit of plaintiff, or for their mutual benefit, and, while the jury has found for the plaintiff in a sum in excess of the value of the estate, the trial court, in its discretion, has granted a new trial upon the ground of the insufficiency of the evidence.

Appellant contends that, since the motion for a new trial was based upon several grounds, including that of excessive damages, and was granted upon the ground of insufficiency of the evidence, we may not support it upon the ground of excessive damages, even though we are of the opinion that the trial court had in mind the question of excessive damages in awarding the new trial. The case of Smith v. Royer, 181 Cal. 165, 183 P. 660, restating a well-established rule, holds that the granting of a new trial rests very largely in the discretion of the trial court, and such an order will not be disturbed, if it can be upheld upon any ground shown by the record. To the same effect is the case of Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L. R. A. 124.

Since the order granting a new trial may be supported upon the theory that the evidence does not support the finding of the jury that services of the reasonable value of $12,000, in addition to the value of plaintiff's board and lodging for over eight years, were rendered by plaintiff to decedent, we cannot interfere with the exercise of the discretion of the trial court after its personal observation of the witnesses.

The order appealed from is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.

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101 Cal. App. 503

CRABBE et ux. v. RHOADES et al.★ (Civ. 6945.)

District Court of Appeal, First District, Division 2, California. Oct. 28, 1929.

Rehearing Denied Nov. 26, 1929. Hearing Denied by Supreme Court Dec. 26, 1929.

1. Negligence ⚷61(2)—However much negligence of third party might contribute to injury, such negligence is no defense for one whose negligence helps to bring about injury.

Negligence of third party, if any, however much it might contribute to injury of another, is no defense for one whose negligence helps to bring about such injury.

2. Automobiles ⚷244(2, 36)—Evidence of defendant's negligence and proximate cause of collision held to support judgment for plaintiff for injury received in automobile collision while turning into private driveway.

In action for injury received in automobile collision while turning into private driveway, evidence of defendant's negligence and proximate cause of collision *held* to justify verdict for plaintiff.

★Rehearing denied. Hearing denied by Supreme Court.

3. Trial 🔑133(6)—Statement of counsel that defendant in personal injury action was presumably wealthy held not grossly improper, in view of instruction to disregard.

In action for injuries received in automobile collision, statement of plaintiff's counsel in argument to jury that defendant was presumably wealthy could not be said to be either grossly improper or highly prejudicial, where court instructed jury to disregard it, and it was not claimed that verdict was excessive.

4. Trial 🔑127—Question whether defendant selected place to which automobile was taken for repairs held proper cross-examination, and not prejudicial, as suggestive of insurance.

In action for injury received in automobile collision where inquiry was being made about repairs, question whether defendant selected name of place to which his automobile was taken for repairs *held* proper cross-examination, and not prejudicial, as being suggestive of insurance.

5. Evidence 🔑382—Discretion of trial court in admitting photograph of party injured in automobile accident, taken after accident, held not abused.

In action for injuries received in automobile collision, admissibility of photograph of injured party, taken shortly after accident and after her first operation, was within discretion of trial court.

6. Automobiles 🔑171(13)—Automobilist has right to assume that others will so operate automobile as to permit drivers exercising ordinary care to operate automobiles without endangering others.

Person operating automobile has right to assume that others will so operate their automobiles as to permit drivers exercising ordinary care to operate their automobiles without endangering life, limb, and property.

7. Appeal and error 🔑1170(9)—Instruction, erroneous in unduly favoring negligent defendant as against his codefendant, held not to justify granting such codefendant new trial (Const. art. 6, § 4½).

In passenger's action for injuries received in automobile collision, instructions, erroneous in unduly favoring one negligent defendant as against his codefendant, *held* not to justify granting of new trial on part of such codefendant, who was guilty of negligence proximately causing or contributing to injury, on ground that miscarriage of justice resulted, under Const. art. 6, § 4½.

8. Appeal and error 🔑880(3)—Negligent defendant cannot be heard to complain on ground that his codefendant unjustly escaped liability.

Fact that one codefendant unjustly escaped liability is not ground for complaint on part of negligent defendant.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by John H. Crabbe and another against Ira O. Rhoades and another. From a judgment for plaintiff against the named defendant, such defendant appeals. Affirmed.

C. H. Sooy and Redman & Alexander, all of San Francisco (Geo. Allan Smith, of Monterey, of counsel), for appellant.

John H. Crabbe, of San Francisco, for respondents.

LUCAS, Justice pro tem. The appeal in this case is taken from a judgment on a verdict for $35,000, obtained in the court below as damages for personal injuries sustained by Mary F. Crabbe in a collision between two automobiles and for the resulting loss of her services to John H. Crabbe, her husband. The drivers of both colliding cars were joined as parties defendant, and negligence on the part of both was alleged. By the verdict of the jury, however, defendant Olive Gaston, driver of the car in which Mrs. Crabbe was a guest passenger, was impliedly found free from negligence, and the full amount of the verdict in favor of plaintiffs was rendered against the defendant Rhoades, appellant herein.

Without conceding that there was sufficient evidence of negligence on his part to warrant the case going to the jury, appellant takes the position that, even if the evidence might be considered sufficient for that purpose, it is nevertheless so slight and unsatisfactory as to call for a reversal, if any errors occurred in the trial, or if any prejudicial matters were injected into the case. He then proceeds to point out several matters and things wherein it is claimed the court erred, and directs attention to alleged prejudicial misconduct on the part of respondents' attorney. A casual examination of the record is sufficient to warrant the conclusion that the case was properly one for the jury on the question of the negligence of Rhoades; but a careful analysis of the evidence is necessary, in order to determine whether the conduct complained of or the alleged errors of the court were such as to warrant a reversal of the judgment.

The undisputed facts are that plaintiffs and respondents, John H. and Mary F. Crabbe are husband and wife; the husband being for many years a practicing attorney in San Francisco, and the wife, prior to her injury, being active in social affairs and club work. Mrs. Crabbe was 52 years of age at the time of trial. At about 11 o'clock a. m. on the morning of June 20, 1925, the defendant Olive Gaston, driving an inclosed Studebaker car weighing about 3,400 pounds, and accompanied by Mrs. Crabbe, Mrs. Rose Hepburn, and Mrs. Cordelia Page, left the Clift Hotel, in San Francisco, en route to a charitable affair at Menlo Park, San Mateo county. Mrs. Crabbe sat beside Mrs. Gaston in the front seat; Mrs. Hepburn and Mrs. Page occupying the rear seat. They had arranged to meet for luncheon another group of ladies at the Café de Paris, a café situated on the east side of the state highway leading from San Francisco to San Jose, immediately north of and adjoining the northerly limits of the incorporated city of Atherton.

At about 10:30 a. m. the same day appellant Ira O. Rhoades, a man past 60 years of age, left the city of San Jose in a Paige sedan, the weight of which was approximately 4,300 pounds, and proceeded in a northerly direction on said state highway toward San Francisco. Mr. Rhoades was alone in the driver's seat, while the rear seat was occupied by his wife, Katherine Rhoades, and a Mrs. Lillian G. Thomas. Mrs. Rhoades, who had been confined to her bed in a San Jose hotel for about two weeks with a severe heart attack, was being taken to her San Francisco home. The two cars came together at a point about opposite the Café de Paris. Here the paved portion of the highway is 30 feet wide and runs in a generally northerly and southerly direction. The Gaston car was proceeding south on the westerly side of the highway; the Rhoades car was traveling north on the easterly side.

As Mrs. Gaston's car approached the vicinity of the café she lessened its speed, and as she was passing, or had about passed, the café building proper, she made a left turn across the highway to the east for the purpose of entering the south driveway of the café grounds. When her automobile, heading in an easterly direction, and at right angles to the highway, had practically crossed the paved portion thereof, so that only about two feet of the rear of the car extended over the pavement on the east side of the road, the Paige sedan, driven by appellant, Ira O. Rhoades, came into collision with the rear of the Gaston car. Neither car was overturned. The Rhoades car proceeded about 35 feet in a northerly direction after the impact; the Gaston car came to rest against a cement post and curbing about 20 feet easterly of the east edge of the pavement and directly in front of the café. This point was about 20 or 25 feet north of the point of impact. Previous to making the turn, the Gaston car had been going in a southerly direction, but when it came to rest after the impact it was 20 or 25 feet further back toward the north than it was when crossing the highway. It was also turned completely around, for, while it had been facing east when the collision happened, when it came to rest the rear end was against the curb, and the front was facing approximately due west.

Either at the time of the collision of the two cars or at the time the Studebaker struck the cement post and curb, Mrs. Crabbe was thrown against some part of the automobile in which she was riding and sustained the injuries complained of. While these facts are necessary to an understanding of the case, they, of course, shed no light upon the subject of proximate cause. On this subject the evidence is decidedly conflicting

As to negligence on the part of defendant Gaston, it is practically admitted that she was guilty of negligence per se in not complying with the provisions of the Motor Vehicle Law then in force (St. 1923, p. 558, § 130), requiring that "(a) the driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety; then, if the operation of any other vehicle may reasonably be affected by such movement, the driver shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement. * * * Whenever the signal is given by means of the hand and arm, the driver shall indicate his intention to turn to the left by extending his hand and arm horizontally from and beyond the left side of the vehicle. * * * The signal herein required to be given * * * shall be given continuously during the last fifty feet traveled by the vehicle before turning."

[1] Whether or not Mrs. Gaston's violation of the above statute proximately contributed to the collision and the resulting injuries of Mrs. Crabbe is an entirely different question, which, whether rightfully or wrongfully, the jury answered in Mrs. Gaston's favor. Likewise all questions of negligence in fact were resolved in her favor. With the correctness of these findings we are not here concerned, for the fault of Mrs. Gaston, if any, however much it may have contributed to the injury, is no defense for one whose negligence helped to bring the injury about. Pastene v. Adams, 49 Cal. 87.

Negligence has been frequently defined as "the want of such care as a person of ordinary prudence would exercise under the circumstances of the case; the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a reasonable and prudent man would not do. Negligence may be active or passive in character and may consist in heedlessly doing an improper thing or in heedlessly refraining from doing a proper thing. One who does not do what he should do is chargeable with negligence equally with him who does that which he should not." 19 Cal. Jur. 548.

[2] Both an act of commission and one of omission are by plaintiffs and respondents attributed to appellant as negligence proximately contributing to the injury, namely, excessive speed and failure to ever so slightly turn his car to the left, so as to avoid the collision. On the latter subject it is undisputed that at the time of the impact prac-

tically all of the Gaston car was easterly of the paved portion of the highway, the rear of the car extending but two feet westerly over the easterly line of the pavement. It is clear, therefore, that if at that point appellant's car was traveling at a distance of but 2½ feet or more westerly of said line the collision would not have occurred. It is also made clear from the evidence that appellant observed the Gaston car when he was some 40 or 50 feet southerly from it, that his view was unobstructed, and that there was nothing to interfere with his veering to the west on the paved portion of the highway sufficiently far to avoid the collision.

Concerning the rate of speed at which his Paige car was traveling, there is considerable conflict in the evidence. Rhoades himself testified that he was traveling at a rate of speed not to exceed 25 miles per hour, at a place where the speed limit was said by the court in its instructions to be 35 miles an hour. The credibility of this party, however, was somewhat impaired by his subsequent testimony to the effect that at the time of the collision his car had come to a full stop and that the Gaston car ran into it. This testimony was impeached by the testimony of several witnesses and by the physical condition found to exist immediately after the impact. Several witnesses, including two state motor officers, testified that from the point of impact northerly for a distance of something like 35 feet or more there were black skid marks on the pavement leading to the point where appellant's car finally came to rest. These marks could not have been made, had it been true, as appellant testified, that he stopped before the impact and then drove his car forward to its final stopping place.

Evidence tending to show that appellant was not traveling at an excessive speed was given by Bert L. Hackett, apparently a disinterested witness, who was driving northward behind Rhoades, and who testified that appellant was traveling at about 25 miles per hour. The force of this testimony, however, is materially lessened by the testimony of the two traffic officers that, immediately after the accident Hackett had said that appellant passed him "going like hell," and that "the man ought to be hung." Furthermore, as opposed to the testimony of Rhoades and Hackett is the testimony of Mrs. Hepburn, a guest of Mrs. Gaston, who testified that in her opinion the Rhoades car was traveling between 55 and 60 miles an hour when she first saw it, about 300 feet away, and that as a result of the impact the Gaston car (admittedly traveling at a slow rate of speed) was turned end for end by the impact, and the further physical fact that, when it came to rest, it was back from 20 to 25 feet in the direction from which it had been coming.

This and other evidence appearing in the record, which it is not necessary to set forth in full, not only made out a case of negligence on the part of appellant sufficient to warrant it being submitted to the jury, but is of such probative value as to justify this court in holding that, on the questions of appellant's negligence and proximate cause, the judgment appealed from is amply supported by the evidence.

[3] The acts claimed by appellant to constitute prejudicial misconduct on the part of respondents' attorney are said to disclose an attempt to prejudice the jury against appellant and his attorneys, and to lead the jury to believe the appellant was both wealthy and fully protected by insurance, while his codefendant was a poor, unprotected widow. After examining the record and the remarks of counsel assigned as error, we find them to consist principally of side-bar remarks, reflecting the ordinary attempt of a trial lawyer to ingratiate himself with the jury. These, while uncalled for, cannot be held to constitute prejudicial error. As incidencing the conduct complained of, attention is directed to the following statement made by respondents' counsel in his argument to the jury: "Mr. Rhoades is a man of importance. But we are not going to be appalled by that fact surely. The fact that he happens to be a man of power in the community, and presumably wealthy—that is not going to frighten me."

The statement of counsel that appellant was "a man of importance" was justified by the showing in the record of the positions he had held and by the argument advanced by his own counsel in an endeavor to impress the jury with his client's integrity. The statement that appellant was presumably wealthy was entirely outside of the record and unjustified by the evidence. Immediately upon this statement being made, however, appellant's attorney assigned the remark as misconduct, and asked that the jury be discharged. The court thereupon, while denying the motion, stated that there was no evidence in the record concerning the wealth of any of the parties, and instructed the jury to that effect, and that wealth was not a proper subject of discussion before the jury. There then ensued between counsel considerable argument in reference to the expression "presumably a man of wealth," resulting in a further instruction by the court to the jury to disregard the statement, a request by respondents' counsel that the court instruct the jury to disregard it, and a further statement by said counsel that there was no evidence before the jury with respect to the wealth of any one, and that he did not claim there was any such evidence.

As was said in the case of Perez v. Crocker, 86 Cal. App. 288, 293, 260 P. 838, 840: "The question is whether or not the argument falls within that class of argumentative statements which are grossly improper and highly prejudicial, and whose evil influence and effect cannot be eradicated from the minds of the jury by any admonition from the trial judge. There is no horizontal rule by which we may be governed to determine these qualities, but each case is to be decided on its own merits, much depending upon the issues, the parties, and general atmosphere of the case." Applying this rule to the occurrences just detailed, and bearing in mind that there is no claim of the verdict herein being excessive, we cannot say that the statement complained of was either grossly improper or highly prejudicial.

[4] The following questions by respondents' counsel to appellant are also assigned as error:

"Q. Where was it [appellant's car] repaired? A. I don't know the name of the concern.

"Q. Did you select the name of the place to which it was taken for repairs?" On objection this question was withdrawn. Thereupon, after appellant's attorney had given the name of Harding & Keene as the name of the firm repairing appellant's car, the following questions were asked:

"Q. Did you receive a bill from Harding & Keene? A. No, sir.

"Q. Did you see the bill? A. No, sir.

"Q. Did you pay the bill? A. No, sir.

"Q. I asked you yesterday on the stand the place of your residence in San Francisco. What did you reply? A. I replied 1665 Eighth avenue.

"Q. Do you live there at the present time? A. Temporarily I have not been living there.

"Q. You live at the Fairmont, don't you? A. No; I don't live at the Fairmont.

"Q. Where do you live? A. I've been sleeping temporarily at the Mark Hopkins. I have been unable to sleep in my house in the evening."

References to the Fairmont and Mark Hopkins Hotels, known to all San Franciscans as hostelries of the better class, are said to have been made for the purpose of showing that appellant was a man of means, and the questions concerning the place where his car was repaired, and whether or not he received or paid the bill therefor, are said to have been asked for the purpose of suggesting to the jury that some insurance company was paying the bill.

The record shows, however, that preceding the question, "Where was it [appellant's car] repaired," counsel had asked about the injuries to the car, where it was taken after the accident, and whether the witness remembered the name of the garage in Redwood City where it was taken, and then asked, "Did you select the place where it should go to?" Counsel objected, and the court said: "They have a right to inquire where it was brought, so they can inquire there what repairs were made." The question was again asked, and, upon objection, withdrawn. Then came the question: "Did you receive a bill for the repairs?" After objection, the court said: "If you have the bill, produce the bill, and they can inquire there what repairs were made."

Appellant's counsel then furnished the name of the firm repairing the car, and respondents' counsel asked: "Did you receive a bill fom Harding & Keene's?" This was not objected to. Counsel asked that the answer be stricken out, and the court, in denying the motion, said: "Suppose he had a bill, and it said that such and such a part of the machine was repaired; * * * if he does not remember, he can look at the bill and refresh his memory." The question, "Did you see the bill?" was asked by the court, and was not objected to; and the question, "Did you pay the bill?" asked by respondents' counsel, was likewise not objected to.

It is quite apparent that in this series of questions the only one that counsel could possibly assign as error is the one that was withdrawn; i. e., "Did you select the name of the place to which it was taken for repairs?" Appearing in the place it does in the record, where inquiry was being made about repairs, it is proper cross-examination, and not prejudicial, as being suggestive of insurance. To say that the other questions asked in reference to appellant's residence constitute or tend to constitute reversible error, we feel, would be to greatly exaggerate their importance. Furthermore, they were not objected to.

[5] The trial court's action in admitting in evidence a photograph of respondent Mary F. Crabbe, taken a short time after the accident and after her first operation, is also assigned as reversible error. The facts are that Mrs. Crabbe was frightfully injured about the head and face, one cheek bone was crushed, the sight of one eye destroyed, and the eye itself removed. Owing to the destruction of the cheek bone, she will never be able to wear an artificial eye. The photograph objected to was taken by Dr. Smith before the plastic surgery was done, or, as he expressed it, before he "commenced the big job of trying to mold back her face into presentable shape." It is true that there is a shocking contrast between the photograph of Mrs. Crabbe taken before the accident, and offered and received in evidence, and the one taken after the preliminary operation and before the plastic surgery was done, and it is also true that Mrs. Crabbe was present in court and the jury had an opportunity of seeing her in person; but they could not get a proper appreciation of her appearance, and the attendant physical and mental suffering that must have been hers prior to the plastic surgery, without such a photograph. In the opinion of this court it was clearly admissible on the question of damages, and, there being no complaint that the damages awarded are excessive, appellant's point appears to be without merit. In urging the point, however, appellant cites authority from Wigmore on Evidence (2d Ed.) vol. 2, p. 97, § 792(2), as follows: "There may

be an objection * * * to the reproduction of a corporeal injury * * * calculated unduly to excite sympathy for one party and unfair prejudice against the other."

In the original text the language quoted is followed, in the same sentence, by the statement that the objection referred to therein is identical with an objection considered in subsequent sections of the text-book. An examination of these sections shows the true rule to be that the admissibility of such evidence is clearly within the discretion of the trial court. There was no abuse of discretion here.

Another claim of error is based upon the admission of a certain conversation claimed to be prejudicial. This conversation was said by a disinterested witness, who was present immediately after the accident, to have taken place between Mr. Rhoades and Mrs. Gaston. The record follows:

"Q. Did you hear any conversation between them? A. Yes, sir.

"Q. Can you tell us what that conversation was? (Objected to and overruled.)

"Q. Will you tell what it was? A. Mr. Rhoades said to Mrs. Gaston, 'Why didn't you hold out your hand?' And she said, 'I did; you must have been going at a fearful rate of speed.'

"Q. Is that all the conversation? A. Well, that is the conversation I heard.

"Q. That is all the conversation you heard? Now, were you occupied— A. In attending this lady; yes, stopping the blood."

The substance of the conversation was really an accusation and a counter-accusation on the part of the drivers of the two colliding automobiles, each attributing negligence and wrongdoing to the other. The difference between the two is that Mrs. Gaston denies Rhoades' accusation, while the witness did not hear Rhoades' reply to Mrs. Gaston. The reply not being given, there is no proof that the accusation by Mrs. Gaston was admitted by Rhoades. The accusation of excessive speed, therefore, had little or no weight, particularly since Rhoades in his examination was given the opportunity to, and did, deny it.

Coming now to the subject of instructions, our attention has been directed to some 20 or more which are said to be contradictory, erroneous, or prejudicial. With respect thereto it is urged that, since it is practically an admitted fact in the case that Mrs. Crabbe was entirely free from negligence, the real contest is one between appellant, Rhoades, and his codefendant Mrs. Gaston; that, therefore, each of the codefendants was vitally interested in and affected by the instructions of the court bearing on the conduct and rights of the other, and that anything tending to relieve the defendant Gaston of responsibility, or to unduly favor her, was prejudicial against appellant's defense that Mrs. Gaston, and not he, was to blame. Much of the criticism we find unmerited; some of it is well taken.

We feel that it is unnecessary to here discuss all of the instructions which we find to be erroneously assigned as error, or which, while containing some slightly objectionable matter, are on the whole more favorable to appellant than to defendant Gaston, but will more particularly confine our discussion to those which we believe to be error and to an endeavor to determine whether that error is sufficiently prejudicial, under the law and the facts of the case, to warrant a reversal.

Instruction 55 is an example of one erroneously assigned as error. It reads:

[6] "LV. I instruct you that defendant Olive Gaston had a right to assume that other persons, using said highway at the time and place in question, would so operate their automobiles as to permit other persons operating automobiles, and in the exercise of ordinary care, to do so without endangering life, limb, or property."

This is a correct statement of the law. A person operating an automobile has the right to assume that others will so operate their automobiles as to permit drivers exercising ordinary care to operate their automobiles without endangering life, limb, or property.

Instruction 15 may be used as an example of an instruction containing slightly objectionable matter, but which on the whole was more favorable to appellant than to Mrs. Gaston, and was therefore not prejudicial. This instruction contains the expression: "If you further find that she [Mrs. Gaston] observed the car of the defendant Ira O. Rhoades approaching at an *exceedingly fast rate of speed* for that time and place, she, the defendant Olive Gaston, was no longer entitled to rely upon the presumption that the defendant Rhoades would comply with the rules of the road, and she was bound to take such reasonable measures as she could, under the circumstances, to prevent a collision."

The instruction is attacked upon the ground that it contains the expression "exceedingly fast rate of speed," which of itself does not imply an illegal rate of speed, and, furthermore, on the ground that the liability of Mrs. Gaston was predicated upon her failure to use ordinary care only after having seen the Rhoades car approaching. As a matter of fact, the instruction contained the admonition that a motorist must at all times use due care to avoid colliding with another, and must be ever alert and watchful, so as not to place himself in danger.

The following instructions may be said to be more or less objectionable:

(1) Instruction 69: "LXIX. I instruct you that if you find from the evidence that defendant Rhoades was operating his automobile at a high rate of speed at the time defendant Olive Gaston saw his automobile approaching, and that she turned her automobile to the left after seeing his automobile approaching, this would not necessarily be negligence on her part. She cannot be held to be

negligent on this account unless the speed of the approaching Rhoades car was apparent to and realized by her."

This instruction would have more correctly stated the law had it read: "She cannot be held negligent on this account [turning after seeing appellant approaching at a high rate of speed], unless the speed of the approaching car was or *should have been* apparent to and realized by her." A person is chargeable, not only with what they know, but with what a reasonably prudent person ought to know.

(2) Instruction 26: This instruction contains the language: "The state Motor Vehicle Act also provides that the operator of a vehicle shall yield the right of way at the intersection of their paths to a vehicle approaching from the right, unless such vehicle approaching from the right is further from the point of intersection of their paths than such first named vehicle."

At one time this was the law. St. 1919, p. 215, § 20(f). But under the provisions of section 131 of the Motor Vehicle Act of 1923 (St. 1923, p. 560), in force at the time of the accident in question, it appears that this rule is applicable only at street intersections. This erroneous rule was injected into the instruction as a basis for an admonition to the jury that "it does not follow that one who changes his course to the left to cross the highway is entitled to the whole protection of this rule, for common sense tells us that he is bound to exercise great care to avoid colliding with machines that are on the highway and across whose path he must travel. That was what the Legislature had in mind when it provided that a vehicle, before starting to turn, 'shall see first that there is sufficient space for such movement to be made in safety,' so that the practical effect of this provision is to cast upon motorists intending to turn the duty of exercising greater care than is ordinarily required of them."

(3) Instruction 66: "The jury are instructed that the defendant Olive Gaston, at the time she made the turn on the highway, was not bound to assume that the defendant Rhoades would abandon any reasonable precautions or violate any obligation imposed upon him by the laws of the land. The defendant Olive Gaston in this case was authorized to assume that the defendant Rhoades, and all other persons using the road, would do so with ordinary care and would observe the rules of the road as established by law. In other words, the defendant Olive Gaston, when turning her car on the highway, was entitled to assume that the defendant Rhoades would comply with the requirements of the Motor Vehicle Act that he drive his car at such a speed as not to endanger the life, limb or property of any person."

The vice of this instruction is that, while Mrs. Gaston might be entitled to certain assumptions, those assumptions would avail her nothing, unless she herself were free from negligence.

(4) Instruction 68: The same criticism may be leveled at this instruction, which contains the words: "I instruct you that defendant Olive Gaston had a right to presume that drivers of other automobiles would not operate them at an unlawful rate of speed." According to the case of Carroll v. Central Counties Gas Co., 74 Cal. App. at page 309, 240, P. 53, 55, the correct rule is: "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another. * * * But reliance upon this presumption does not excuse one who is himself negligent."

(5) Instruction 61: "LXI. I charge you that the law presumes that a person saw that which, in the exercise of ordinary care, he could have seen. If you find from the evidence that defendant Olive Gaston did give a signal of her intention to turn her automobile to the left in the direction of the entrance to said Café de Paris, and if you find that an automobile driver operating an automobile in the place at which, from the evidence, you find that defendant Rhoades was operating his automobile at the time said signal was given on the day of said accident, would have seen said signal, then the failure of said defendant Rhoades to see said signal would be negligence on the part of said defendant Rhoades."

In view of the fact that Mrs. Gaston herself testified that she did not give the 50-foot turning signal required by law, appellant would hardly be chargeable for failing to observe a last-minute signal. Furthermore, the instruction omits the qualification of the automobile driver being a reasonably prudent person.

(6) Instruction 63: "LXIII. If you find from the evidence that a person operating an automobile at the place at which defendant Rhoades was operating his automobile at the time defendant Olive Gaston signaled her intention to make the turn into Café de Paris, if you find she did give such signal, could have seen such signal, and in the exercise of ordinary care could have stopped or turned his automobile, and thereby have avoided said collision, then the failure of said defendant Rhoades so to do was negligence on his part."

This instruction likewise omits the qualification of the person driving the automobile being a reasonably prudent person, and omits reference to the duty of Mrs. Gaston to give the 50-foot turning signal.

(7) Instruction 51: "LI. If you find from the evidence that the defendant Olive Gaston, at the time she started to turn her automobile to the left, misjudged the distance be-

tween her automobile and that of defendant Rhoades, or if she misjudged the speed of the automobile of defendant Rhoades, this would not necessarily be evidence of negligence on the part of defendant Olive Gaston. She was only bound to use ordinary care to avoid collision between her automobile and other vehicles. If you find that an ordinarily prudent person, in the exercise of ordinary care, would have misjudged such distance, or speed, or both, under the same circumstances, then I instruct you that such misjudgment was not negligence, and your verdict will be in favor of defendant Olive Gaston."

This instruction practically directs a verdict in favor of defendant Gaston, if her act of misjudging speed and distance were the act of an ordinarily prudent person. This instruction eliminates all other negligence on the part of Mrs. Gaston, of which she might have been guilty, including negligence per se in turning without complying with the provisions of the Motor Vehicle Act.

(8) Instruction 14: "XIV. If you find that the separate, but concurrent, negligence, if any, of the drivers of both automobiles proximately contributed to the injuries to Mary F. Crabbe, if any, then and in that event I instruct you that the plaintiffs are entitled to recover from either the defendant Olive Gaston or the defendant Ira O. Rhoades, or from both the defendants Olive Gaston and Ira O. Rhoades."

This instruction is erroneous, for, were the jury to find that the negligence of the drivers of both automobiles proximately contributed to Mrs. Crabbe's injuries, they should in that event find against both drivers.

Other instructions, given on the subject of damages, were complained of, but we feel that, owing to the character of the injuries sustained by Mrs. Crabbe and the fact that approximately $5,000 was expended by Mr. Crabbe for medical and hospital services alone, and since no question is raised as to excessive damages, such technical objections as may be raised thereto are without merit.

The foregoing instructions we believe to constitute all of those concerning which appellant has any cause for complaint. However, before concluding what effect, if any, these instructions had upon the jury, it is only fair to call attention to other instructions which were given.

On the subject of proximate cause the jury was fully instructed in general language, and, so far as appellant Rhoades is concerned, it was advised in instruction 29 that: "If the operation of Mr. Rhoades' automobile might reasonably have been affected by the turn of Mrs. Gaston's automobile, then it was Mrs. Gaston's duty to give a signal plainly visible to Mr. Rhoades of her intention to make such turn. Such signal could have been given by the use of her hand and arm, or by means of a mechanical or electrical device; therefore, if you find that Mrs. Gaston turned her automobile across the road, and if you also find that the turn reasonably affected the movement of Mr. Rhoades' automobile, then it was Mrs. Gaston's duty to give a signal of her intention to make the turn; and if you find that she failed to give a signal, and if you also find that this was the entire proximate cause of the accident, then Mr. Rhoades is exonerated from liability in this case, and your verdict must be in his favor."

The jury was also instructed as to the provisions of the Motor Vehicle Act in reference to the giving of signals before turning on the highway, the section first above quoted herein having been read in full to the jury. It was also instructed:

"XXXI. Even if Mrs. Gaston gave a signal of her intention to turn, that did not exonerate her from the duty of looking to see whether she could make such turn in safety. Therefore, even if you find that she gave a signal of her intention to make the turn but if you also find that she did not first observe whether the turn could be made in safety, and if you further find that her failure to see if the turn could be made in safety was the sole proximate cause of the accident, then this completely exonerates Mr. Rhoades, regardless of the fact whether Mrs. Gaston did, or did not, give any signal."

"XXXIII. If you find that Mr. Rhoades, driving the Paige automobile, exercised ordinary care and caution in driving it, that is to say, if he exercised such care and caution as a reasonably prudent person would have exercised under the same or similar circumstances, then he is not legally chargeable with responsibility for the accident, and in such case your verdict must be in favor of Mr. Rhoades and you must not award any damages against him."

"XXXVIII. If in this case you find that the evidence is so equally balanced that the scales of proof hang even on the question whether Mr. Rhoades was or was not negligent, then your verdict must be in his favor, and you cannot award any damages against him, regardless of what your verdict may be as to Mrs. Gaston."

"XLV. If you find that Mrs. Gaston was driving in a southerly direction along the highway, and if you also find that she intended to turn to cross the road, and did so, and if you also find that automobiles were approaching from the south, but that Mrs. Gaston failed to use ordinary care in making the turn, and that by reason of her lack of care in making the turn she drove directly in the path of Mr. Rhoades' automobile, and if you also find this was the entire cause of the accident, then this completely exonerates Mr. Rhoades, and you must not award any damages against him."

These constitute only a few of many instructions eminently fair to appellant and fully charging the jury as to the responsibilities of Mrs. Gaston. From the foregoing statement concerning instructions, and in the analysis thereof, it is apparent that error has been committed. Whether such error is sufficient to warrant a reversal of the case is the sole question for this court to decide.

As to the law, the appellant cites the case of Scarborough v. Urgo, 191 Cal. 341, 216 P. 584, 588, as illustrative of a case where the unduly favoring of one defendant in the giving of instructions prejudiced the rights of the other. The court there said: "Moreover, the rules of the road were stated in the instructions more favorably to the defendant Urgo than is warranted by the law. To be sure, the defendant transit company is not entitled in law to complain of the fact that its codefendant unjustly escaped liability, * * * but it is, we think, entitled to complain of an incorrect instruction as to the rules of the road applicable to its codefendant," etc.

In that case the judgment of the lower court was reversed, not on account of the giving of an incorrect instruction, however, but because the court refused to give one to which appellant was *clearly entitled*. This, it was held, resulted in a miscarriage of justice.

[7] It has also been held that a defendant may not complain because instructions given are too favorable to his codefendant (19 Cal. Jur. 765), and that, even if instructions be held erroneous as unduly favoring one defendant against his codefendant, this would not justify the granting of a new trial upon the part of such codefendant who himself was guilty of negligence proximately causing or contributing to the injury. (Goehring v. Rogers, 67 Cal. App. 255, at page 259, 227 P. 687; comment of Supreme Court in denying the petition to have cause heard in said court.)

With these rules in mind, it is clear that the liability of appellant Rhoades depended entirely upon the answer to the questions whether he himself was or was not negligent, and whether or not such negligence, if it existed, proximately caused or contributed to the injuries complained of. These questions are wholly independent of the question as to whether or not his codefendant Gaston was also liable.

Had this been an action brought by Mrs. Gaston against Rhoades, undoubtedly the giving of the instructions criticized herein would have constituted reversible error, but, being an action by an innocent third party against both, the situation is entirely different. "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Article 6, § 4½, Const. Cal. Can it be said, after an examination of the entire cause, including the evidence, that the giving of the instructions in question resulted in a miscarriage of justice?

[8] The record shows that the trial of the cause began on May 16, 1927; the instructions were read to the jury 10 days later. During that period of time testimony filling over 600 pages of the printed transcript was taken. At the conclusion of the hearing the court gave to the jury some 83 instructions, which fill 36 pages of the transcript. Conservatively estimated, it took the court fully an hour to read the instructions to the jury. Without commenting on the capacity of a jury to comprehend and apply to the facts all of the fine distinctions of the law presented to it in such circumstances, we feel that, unless it is made clearly to appear that there has been a miscarriage of justice and that the cause thereof was the errors complained of, a new trial should not be had. Taking a broad view of the situation, we cannot say that there has been any miscarriage of justice. Through no negligence on the part of Mrs. Crabbe she suffered frightful and permanent injuries, which can hardly be compensated for in dollars and cents. The evidence is sufficient to warrant a court and jury in holding the appellant guilty of negligence proximately causing or contributing to these injuries. He cannot be heard to complain of the fact that his codefendant unjustly escaped liability. Scarborough v. Urgo, supra; 19 Cal. Jur. 765; Goehring v. Rogers, supra.

Had the verdict gone against both Mrs. Gaston and Mr. Rhoades, the latter would be in no better position than he is to-day, with the judgment standing against him alone, for respondents could hold him responsible for the entire judgment.

The judgment appealed from is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

101 Cal. App. 664

CHARLES M. WOODS CO. v. ARMSTRONG et al. (Civ. 6260.)

District Court of Appeal, Second District, Division 2, California. Nov. 4, 1929.

Partnership 🔑55—Agreement to form corporation as soon as practicable held insufficient to overturn finding that partnership existed, where goods were delivered after incorporation.

In action for balance due on account for goods sold and delivered, provision in agreement that, as soon as practicable, corporation shall be formed, and stock issued to parties hereto in proportion to their respective interests, where goods were delivered on November 28th and corporation was formed under agreement on November 17th previous, *held* insufficient to overturn finding that partnership did in fact exist at time goods were delivered, since copartnership for one reason or another might have continued to exist for a considerable period of time subsequent to incorporation and strictly for purpose of fulfilling objects of association.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Charles M. Woods Company against H. B. Armstrong and others. Judgment for plaintiff, and defendant W. D. Edwards appeals. Affirmed.

Emmons & Aldrich, of Bakersfield, and Chas. R. McCarty, of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondent.

IRA F. THOMPSON, J. The plaintiff filed a complaint to recover the balance of an account for goods, wares, and merchandise sold and delivered, alleging the existence of a copartnership between the defendants. An agreement was introduced in evidence dated October 27, 1923, which it is conceded establishes the fact that the defendants did enter into a partnership undertaking on that date. On this basis, and after proof that the goods were ordered a week or two before November 28 by one of the partners, H. P. Zumwalt, the date in November being that of delivery, the trial court rendered a judgment against all of the defendants over whom the court had acquired jurisdiction. The defendant W. D. Edwards alone appeals from the judgment.

The agreement to which we have referred contains the following closing paragraph: "As soon as practicable a corporation shall be formed, and stock shall be issued to the parties hereto in proportion to the respective interests of the parties hereto, as hereinbefore set out." The corporation thus agreed to be brought into being was incorporated on November 17, 1924. Appellant contends that without any proof of the transfer to the corporation of the partnership assets or without proof of dissolution we must assume that the copartnership ceased to exist on the date of the incorporation, or eleven days before the delivery of the merchandise. We cannot give our assent to this proposition. The copartnership for one reason or another might have continued to exist for a considerable period of time subsequent to the incorporation and strictly for the purpose of fulfilling the objects of the association. Let us assume, for example, that the corporation commissioner had not been satisfied to approve the issuance of the stock in the amount and proportion contemplated by the parties and the defendants had continued to pursue the business of the association in full accord with the agreement, is it not clear that the partnership relation would have continued? We do not find in the quoted paragraph sufficient to overturn the finding of the court that a partnership did in fact exist.

Appellant also suggests that it was competent for the defendant Zumwalt to contract on his own account and responsibility. The answer to this is that the court upon evidence justifying its conclusion found that the sale was made to the defendants.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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101 Cal. App. 666

BLEY v. STATE BOARD OF DENTAL EXAMINERS et al. (Civ. 3884.)

District Court of Appeal, Third District, California. Nov. 4, 1929.

1. Appeal and error 🔑790(2)—Questions presented on attempted appeal from original minute order inadvertently made and granting prohibition, where case was not heard on merits and new order made, held moot.

Where transcript of proceedings on petition for writ of prohibition, prepared pursuant to Code Civ. Proc. § 953a, showed that case was never heard on merits, nor did record on appeal contain any formal order for issuing writ nor any such writ or findings of fact, clearly showing that minute order overruling demurrer to petition and granting prohibition was inadvertently made, and subsequently trial court modified original minute order to provide for temporary writ only, issues presented by attempted appeal from original order became moot, and remedy under circumstances was for parties to proceed to try action on its merits.

2. Appeal and error 🔑843(1)—Appellate court, where questions raised by appeal have been settled and are therefore moot, will not consider them.

Where questions raised by an appeal have been settled and are therefore moot, appellate court will not consider them.

3. Appeal and error 🔑76(1)—Minute order, reciting that court made order that prohibition issue as prayed for and overruled demurrer to petition on file herein, held not final decree authorizing appeal.

Minute order in action for prohibition providing that, cause having been tried and submitted for consideration and decision, court made order that writ of prohibition issue as prayed for and overruled demurrer to petition on file herein, *held* not such final decree from which an appeal could be taken, since it was a mere minute order or court memorandum reciting that court had that day ordered that writ of prohibition issue as prayed for.

4. Appeal and error 🔑338(1)—Notice of appeal from order if entered on November 22 filed on January 26 following held filed too late (Code Civ. Proc. §§ 939, 940).

If order attempted to be appealed from was duly made and entered on November 22 as recited in notice of appeal, notice of appeal filed on January 26 following *held* filed too late, under Code Civ. Proc. §§ 939, 940, requiring notice of appeal to be filed with clerk within 60 days from entry of judgment or order.

5. Appeal and error 🔑348(1)—Limitation of time for filing notice of appeal is not dependent upon notice of entry of judgment or order (Code Civ. Proc. §§ 939, 940).

Limitation of time for filing notice of appeal as provided in Code Civ. Proc. §§ 939, 940, is not dependent upon notice of entry of judgment or order.

6. Appeal and error 🔑356—Statute limiting time in which an appeal may be taken is jurisdictional and mandatory (Code Civ. Proc. §§ 939, 940).

Code Civ. Proc. §§ 939, 940, requiring notice of appeal to be filed with clerk within 60 days from entry of judgment or order appealed from, *held* jurisdictional and mandatory, and, if appeal is not taken within time specified, appellate court has no power to entertain it.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Petition by Frederic A. Bley for writ of prohibition to restrain the State Board of Dental Examiners and others from proceeding to investigate certain charges of alleged misconduct on the part of petitioner in the practice of dentistry. From a minute order overruling the demurrer to the petition and granting a writ of prohibition, defendants appeal. Appeal dismissed.

Frank B. Graves, of Oakland, and Jesse W. Carter, of Redding, for appellants.

Levinsky & Jones, of Stockton, for respondent.

R. L. THOMPSON, J. This is a motion to dismiss an appeal. The respondent filed in the superior court of San Joaquin county a petition for a writ of prohibition asking that the appellant board of dental examiners of the state of California be restrained from proceeding to investigate certain charges of alleged misconduct on the part of respondent in the practice of dentistry. Upon the filing of this petition, a temporary restraining order was signed and issued, together with an order to show cause why it should not be made permanent. To this petition a demurrer and answer were filed. Upon hearing the demurrer and order to show cause on the return day which had been fixed, the court, on November 22, 1928, made the following minute order: "The above entitled cause having been heretofore tried by the Court and submitted to the Court for consideration and decision, the Court this day made an order that a writ of prohibition issue as prayed for, and overruled the demurrer to the petition on file herein."

From this order the appellant served and filed a notice of appeal "from the judgment * * * *made* and *entered* in said action on the 22nd day of November, 1928. * * *" This notice of appeal was not filed until January 26, 1929. On January 29th the appellant served notice on the clerk to prepare a transcript of proceedings pursuant to section 953a, Code of Civil Procedure, which was done. From this transcript it appears the case was never heard on its merits. Nor does the record contain any formal order for the issuing of a writ of prohibition, nor any such writ or findings of facts. The foregoing minute order was therefore clearly inadvertently made. From the affidavit and certificate of the county clerk which were filed in support of the motion to dismiss this appeal, it appears that the trial court subsequently, on February 15, 1929, modified its former minute order in the following language: "The minute order made herein on November 22, 1928, was inadvertently made, and does not express the intention of the court, and is for that reason amended to read as follows: * * * The court this day made an order that a *temporary* writ of prohibition pending the trial of said action should issue herein. * * *" This amendment of the court minutes is not refuted by the appellants.

[1, 2] From the foregoing amendment to the former minute order it appears that the issues presented by the attempted appeal have become moot. When questions which have been raised by an appeal have been settled and are therefore moot, an appellate court will not consider them. 2 Cal. Jur. 804, § 472. The remedy in the present case is for the parties to proceed to try the action on its merits.

[3] Moreover, the original minute order from which the appeal was taken does not purport to be such a final decree as the statute contemplates from which an appeal is authorized. It is a mere minute order or court memorandum reciting that the court had that day ordered that "a writ of prohibition issue as prayed for." The clear inference is that the court had authorized this by means of another

written document, which does not appear in the clerk's certified record of the proceedings.

[4-6] The appellants assume that this order was duly *made* and *entered* on November 22, 1928, for its notice of appeal is specific in that regard. Assuming that the order was duly made and entered on November 22, 1928, as the appellants declare it was, the notice of appeal was filed too late and was therefore ineffectual. Sections 939 and 940 of the Code of Civil Procedure require the notice of appeal to be filed with the clerk "within sixty days from the entry of said judgment or order." The limitation of time for filing the notice of appeal is not dependent upon notice of the entry of the judgment or order. The notice of appeal was not filed with the clerk until January 26, 1929, which was 65 days after the date alleged by the appellants to have been the actual time of the entry of the order. The statute limiting the time in which an appeal may be taken is jurisdictional and mandatory. If the appeal is not taken within the time allowed by law, the appellate court has no power to entertain it. Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; Smith v. Questa, 58 Cal. App. 1, 4, 207 P. 1036; Bates v. Ransome-Crummey Co., 42 Cal. App. 699, 184 P. 39; Donaldson Inv. Co. v. Shay, 86 Cal. App. 763, 261 P. 499.

The respondent's motion is granted, and the appeal is hereby dismissed.

I concur: FINCH, P. J.

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101 Cal. App. 541

PATENTS PROCESS, Inc., v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6675.)

District Court of Appeal, Second District, Division 1, California. Oct. 29, 1929.

1. Divorce 🔑267—Statute authorizing appointment of receiver to enforce requirement that husband provide maintenance did not authorize court to appoint receiver for corporation to which husband had conveyed community property (Civ. Code, § 140).

Civ. Code, § 140, authorizing appointment of receiver to enforce requirement that wife or husband, as case may be, provide maintenance or specified payments, does not authorize court, on petition of wife, to appoint receiver for corporation to which husband had conveyed property in which wife had community interest.

2. Divorce 🔑267—Court could consider affidavits in passing on its power to appoint receiver for corporation to which husband had conveyed community property.

Court, on wife's petition for appointment of receiver for corporation to which husband had conveyed community property, could consider affidavits before court in passing on its power to appoint receiver.

3. Corporations 🔑552—Court had power to appoint receiver for corporation created for purpose of depriving plaintiff of her rights (Code Civ. Proc. § 564).

Where husband created corporation to which he conveyed property in which wife had community interest for purpose of depriving wife of her rights, there being no adequate remedy at law, court had power to authorize appointment of receiver for such corporation, notwithstanding provisions of Code Civ. Proc. § 564, relative to right of court of equity to appoint receiver for property of corporation.

Original application for writ of prohibition by the Patents Process, Inc., prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles and others. Application denied.

Superseding opinion in 279 P. 174.

Milton M. Cohen and R. D. Knickerbocker, both of Los Angeles, for petitioner.

William R. Millar, of Los Angeles, for respondents.

CONREY, P. J. The case now comes before the court upon hearing granted after the court had entered an order denying the application for the writ. On both hearings, the cause was heard upon notice, and upon demurrer to the petition, and upon the petition and the answer of respondents. The opinion which accompanied said former order reads as follows:

There is pending in the superior court an action, No. 273—391, of Mildred Williams, Plaintiff, v. Frank D. Williams, Patents Process, Inc., a Corporation, and Others Defendants. In that action the plaintiff sets forth facts showing her right to an interest in described property owned by the plaintiff and by the defendant Williams, as community property, particularly as shown by the terms of an interlocutory decree of divorce granted to Mrs. Williams against her said husband. The complaint in action 273—391, after a statement of facts concerning said interlocutory decree of divorce, proceeds to state another series of facts which tend to show that defendant Frank D. Williams has been and is endeavoring to prevent the plaintiff from receiving her share of the community property awarded to her in the divorce action; that sundry other persons have been induced to confederate and conspire with Williams to accomplish his stated purpose; that, in order to more effectually carry out said plan and purpose, the defendant Patents Process, Inc., was created and organized; that sundry properties held by defendant Williams, and belonging wholly or in part to the plaintiff, were by said Williams caused to be transferred and placed in the name of said corporation; that practically all of the shares of capital stock of said corporation belong to defendant Williams, and those shares which have been issued to names of other persons are in reality his property; that defendant Williams is general manager, and is in actual control of said corporation and of said properties conveyed by him pursuant to said alleged purpose, plan, and conspiracy. The foregoing indicates the foundation and the nature of the action, but we do not attempt to make a complete statement of the complaint, or of the proceedings therein. Upon the filing of said complaint and, upon application made to a judge of respondent court, an order was made whereby a receiver was appointed of the property of the defendant corporation, Patents Process, Inc. The defendant duly presented a motion to vacate the order appointing the receiver, which motion was denied by an order of May 13, 1929. On the same day the court ordered that defendant Williams deliver to the receiver said described property of Patents Process, Inc., together with all other property of said corporation. The notice of motion to vacate did not state the grounds on which the motion would be made, but the affidavits filed therewith indicate a complaint against the qualifications of the appointee, rather than any challenge of the power of the court to appoint a receiver. In this present proceeding, application is made for a writ of prohibition to restrain the respondent court and the judges thereof from taking further proceedings in connection with the appointment or continuance in office of a receiver for the business of petitioner, and that the appointed receiver be restrained from acting as such receiver, notwithstanding said order of appointment.

In applying for the writ, petitioner relies upon a series of decisions which deny that there is any jurisdiction vested in a court of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party, or in any case not directly authorized by the provisions of section 564 of the Code of Civil Procedure. Among these decisions are the French Bank Case, 53 Cal. 495, 550; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; A. G. Col. Co. v. Superior Court, 196 Cal. 604, 614, 238 P. 926; Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 237, 133 P. 1155.

We are satisfied that the case stated in the complaint in the action in respondent court brings that action within a well-recognized exception to the general rule referred to in the preceding paragraph, and that respondent court had jurisdiction to appoint the receiver. Section 140 of the Civil Code (in the chapter relating to actions of divorce) reads as follows: "The court may require the husband [or wife, as the case may be,] to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." The allegations of the complaint, duly verified, are sufficient to show that the corporation Patents Process, Inc., is but the alter ego of defendant Frank D. Williams, and that the plaintiff, Mrs. Williams, although not a stockholder of the corporation, is an owner of at least a half interest in the property held by said corporation. It follows that the directors of the corporation owe to her, as such owner, a duty similar to that which is owed to the stockholders. Upon those alleged facts the directors are charged with the duty of administering a trust in which, so far as plaintiff's interest in the property is concerned, she is the primary beneficiary. That this trust is involuntary and unacknowledged only adds to the seriousness of the situation. Upon facts which as to the principles involved are the same, it was held that, where such a trust existed, and was being violated, the court had authority to appoint a receiver. As the court there said: "We cannot conceive a state of the law, under the enlightened principles which govern the exercise of the jurisdiction of courts of equity, which would deny the appointment of a receiver, under the allegations of the Charle complaint, merely, upon the ground that the plaintiffs were not stockholders of the corporation." Lieberman v. Superior Court, 72 Cal. App. 18, at page 37, 236 P. 570, 577.

[1] In the petition for rehearing it was pointed out that in Mayberry v. Whittier, 144 Cal. 322, 78 P. 16, it was decided that the provisions of section 140 of the Civil Code, relating to the giving of security for providing maintenance or making any payments required under provisions of the chapter in which the section is contained, cannot be extended "so as to embrace the matter of the division of common property." That decision is clear and positive on the point involved. It follows that said section 140 may not be relied upon as furnishing authority for the appointment of a receiver in the court below as shown in the present proceeding. Counsel for respondents suggests that the decision in Mayberry v. Whittier, supra, has been practically overruled by the decision in Meyer v. Meyer, 184 Cal. 687, 195 P. 387, but we are satisfied that in the latter case it was not intended to overrule said earlier decision.

It is conceded by petitioner that there are no decisions by our Supreme Court directly bearing upon the question as to whether or not a receiver can be appointed to take over the business of a corporation where there is an allegation to the effect that the corporation is the alter ego of an individual. It is claimed, however, that in the case of Fischer v. Superior Court, 110 Cal. 129, 42 P. 561, the point was in principle determined against the power to appoint such receiver. In that case it was held that a mere averment that the corporation was only a medium of the partnership and not an independent corporation was not sufficient to remove the case from the general rule against the appointment of receivers of actually existing and operating corporations. It was admitted that the corporation was duly organized, and for some years had been actually operating the business of the properties conveyed to it, which properties were the real subject of controversy.

[2] In the case at bar there are additional elements tending to support the contention in favor of the power to appoint a receiver. In addition to the complaint, the court had before it several affidavits, which contain direct evidence of some of the principal facts which the plaintiff in her complaint had been obliged to allege only on information and belief, since they were not personally known to her. This removes from further consideration a large part of petitioner's argument based upon the fact that many of the allegations of the complaint were made upon information and belief. The facts thus shown in these affidavits, and which the court was entitled to consider in passing upon the question of its power to appoint the receiver, are facts tending to prove, not only that the corporation, Patents Process, Inc., is the alter ego of Williams and entirely owned by him, but, further, that said corporation was organized by said Williams and certain of his codefendants acting in concert with him for the purpose of secreting assets which were the community property of said Frank D. Williams and said Mildred E. Williams, and for the purpose of depriving said Mildred E. Williams of any interest in said property.

[3] In Elliott v. Superior Court, 168 Cal. 727, 734, 145 P. 101, 105, the Supreme Court, after again affirming its adherence to the general rule against the power to appoint a receiver of the entire assets of a corporation in a suit prosecuted by a private party, said: "This opinion is not to be construed as an authority opposed to the appointment of a receiver of specific property of a corporation, where such appointment would be proper under section 564 of the Code of Civil Procedure in certain actions between private parties. Our views must be taken as applying to an action of the kind now before the court *and not as applicable to all kinds of cases against corporations.*" The general rule to which we have referred is based in part upon those provisions of law which declare that the powers of a corporation must be exercised, managed and controlled by its board of directors, and that to take away that control from the board of directors at the suit of a private person, whether creditor or stockholder, is in effect to bring about a dissolution of the corporation in a manner not authorized by law. But, if a case is presented wherein it appears that the corporation, in the very creation thereof, is nothing but a fraudulent mask fabricated for the purpose of depriving the plaintiff of his rights, and there is no remedy at law adequate to meet the situation, we believe that the powers of equity are broad enough to authorize the appointment of a receiver, not for the purpose of dissolving a genuine corporation, but for the purpose of reaching the man hidden behind the mask and compelling him to do equity. Of course, we cannot now know what the ultimate finding of facts will be when the case has been tried on its merits. In deciding upon the appointment of a receiver, the superior court is dealing with the prima facie case made by the pleadings and affidavits upon which it acts in making its order. Marblehead Land Co. v. Superior Court, 62 Cal. App. 408, 410, 217 P. 536. The case so made was, in our opinion, sufficient to sustain the jurisdiction of the court which it exercised in appointing the receiver in this case.

The application for writ of prohibition is denied.

We concur: HOUSER, J.; YORK, J.

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101 Cal. App. 659

BUTCHART v. MOORHEAD et al. ★

(Civ. No. 3892.)

District Court of Appeal, Third District, California. Nov. 2, 1929.

Rehearing Denied Dec. 2, 1929. Hearing Denied by Supreme Court Dec. 30, 1929.

1. Appeal and error 🔑339(3)—Appeal from judgment on notice served 61 days after order dismissing action as to certain defendants was ineffectual as to them (Code Civ. Proc. § 939).

Where two of defendants in mortgage foreclosure suit were eliminated in filing of amended complaint and their answer thereto was stricken and the action dismissed as to them, and they failed to appeal from order of dismissal and were not necessary parties, appeal taken from the judgment under notice of appeal not served or filed until 61 days after the order dismissing such defendants was ineffectual as to them, since notice of appeal came too late under Code Civ. Proc. § 939, and appeal did not purport to have been taken from the preliminary order.

2. Mortgages 🔑571—Defendants in foreclosure suit who had disposed of interest, who were eliminated in amended complaint, and whose answer alleging usury was stricken, could not on appeal from judgment complain of dismissal.

Defendants who had disposed of their interest in mortgaged property, and who were eliminated as parties in filing of amended complaint in mortgage foreclosure suit, were not necessary parties and could not on appeal from the judgment complain of striking of their answer alleging affirmative defense of usury and of dismissal of action as to them, since special defense could be made subject of action, and elimination of such defendants in the amended complaint operated as dismissal as to them.

3. Dismissal and nonsuit 🔑27—Filing amended complaint omitting defendants named originally operated as dismissal as to them.

Filing of amended complaint in mortgage foreclosure suit omitting defendants who were

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★Rehearing denied. Hearing denied by Supreme Court.

named in original complaint operated as dismissal of action as to such abandoned parties, who were without legal standing as litigants or appellants, where there was no order of court authorizing them to answer or intervene.

4. Mortgages ⚷490—Taxes and costs and counsel fees are allowable under general prayer for relief in foreclosure where mortgage attached to complaint so provides.

Taxes, street assessments, charges for searching title, and costs and counsel fees may be allowed under general prayer for relief in foreclosure proceeding, where mortgage provides for reimbursement of such items and is attached to complaint as an exhibit.

5. Mortgages ⚷490—In foreclosure suit complaint seeking general relief permitted recovery of taxes, assessments, penalties and costs of redemption, counsel fees, and charges for searching title.

Where mortgage was incorporated as part of complaint in foreclosure suit and recited that it was given to secure principal and interest and advancements made by holder of note for paying taxes and assessments, and services performed in searching title and fees for services of attorney and expenses and costs of suit in case of default and foreclosure, and complaint recited default of mortgagor in payment of delinquent taxes and street assessments and incurring of costs and counsel fees and prayed for judgment for relief, delinquent taxes, street assessments, penalties and costs of redemption, counsel fees, and charges for searching title incident to foreclosure were properly allowed without supplemental pleadings.

Appeal from Superior Court; Los Angeles County; Stanley Murray, Judge.

Action by J. H. Butchart against Paul G. Moorhead, the Title Insurance & Trust Company, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. B. Turnbull and R. L. Horton, both of Los Angeles, for appellants.

Bernard Petter, of Los Angeles, for respondent.

ROLFE L. THOMPSON, J. [1] This is an appeal on the part of certain defendants from a decree foreclosing a mortgage. In filing an amended complaint the names of Paul G. Moorhead and wife were eliminated and they were abandoned as defendants. They, however, voluntarily appeared and answered without securing permission of the court. On motion duly made their answer was stricken from the record and the action dismissed as to them. From this order they failed to appeal. No deficiency judgment was sought or secured. They were not necessary parties, having disposed of their interest in the property. The appeal was therefore ineffectual as to these defendants.

The plaintiff as assignee of a note and mortgage instituted this action of foreclosure against Paul G. Moorhead and wife, who were the makers of the note and mortgage. Many others were also made party defendants. The original makers of the instruments had parted with their interest in the mortgaged property. Separate demurrers in behalf of the respective defendants were filed, presented, and sustained. In due time an amended complaint was filed, in which neither Paul G. Moorhead nor his wife was included as a defendant. Their names were purposely omitted therefrom. The amended complaint was not served upon them. No decree against them was sought and no deficiency judgment was asked for or recovered. Nevertheless, the Moorheads voluntarily appeared and without leave to answer or intervene filed a separate demurrer and answer to the amended complaint attempting to set up a special defense charging the mortgagee, Builders' Mortgage Company of Los Angeles, with exacting usurious interest and failure to pay to the mortgagors $9,500 of the principal sum for which the note and mortgage were executed. These defenses were made by none of the other appellants. To this answer the plaintiff demurred and at the same time gave notice of motion to strike it from the records and dismiss the action as to these defendants. On March 15, 1927, this motion was granted. The court then ordered that the "motion to dismiss action as to defendants Moorhead is granted." From this order no appeal was taken. The cause was tried upon the issues presented by the answers of the other defendants, and a decree of foreclosure was rendered in favor of the plaintiff for the principal sum represented by the original loan, no part of which had been paid, together with deferred interest, cost, taxes paid, a street assessment, and counsel fees. The findings disregarded the issues tendered by the Moorhead answer which had been stricken from the record. No judgment was rendered against them and no deficiency judgment was awarded. The decree of foreclosure was entered April 19, 1927. The notice of appeal was from "the judgment therein entered in the said Superior Court on the ——— day of ———, 1927, and from the whole thereof." This notice of appeal was served and filed May 16, 1927. This appeal does not purport to have been taken from the order and judgment striking the Moorhead answer from the records and dismissing the action as to them. Indeed, the notice of appeal was too late to become effectual for that purpose. Section 939, Code Civ. Proc. That order was made in the presence of the attorney for these defendants March 15, 1927, and the only notice of appeal which was given in this case was not served or filed until 61 days thereafter. The attempted appeal of the Moorheads was therefore ineffectual for any purpose whatever.

[2] Moreover, Mr. and Mrs. Moorhead were not parties to this action and had no standing as interested litigants either at the trial or upon appeal. The filing of the amended complaint in which the names of these defendants were omitted operated as a dismissal of the action as to them. The decree in this case deprived them of no rights or remedies which they may not assert in a proper action against the proper parties, if there be merit in the special defense which they attempted to plead. They made no application to the court in this case to file an answer or to intervene. It is immaterial that their pleading asked for affirmative relief.

[3] The filing of an amended complaint omitting defendants who were named in the original complaint operates as a dismissal of the action as to the abandoned parties, and in the absence of an order of court authorizing them to answer or intervene, they are without legal standing as litigants or appellants. Schlake v. MacConnell, 69 Cal. App. 207, 230 P. 974, 975; Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 P. 339; Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537.

In the case of Schlake v. MacConnell, supra, it is said: "The filing of an amended complaint, omitting a defendant named in the original complaint, operates as a dismissal of the action as to such defendant. 18 C. J. 1166; MacLachlan v. Pease, 171 Ill. 527, 49 N. E. 714; San Antonio & A. P. Ry. Co. v. Mohl (Tex. Civ. App.) 37 S. W. 22. Upon the foregoing authorities it is apparent that at the time defendant attempted to file its purported answer and cross-complaint it was not a party to the action and had no right to file the same. It recognized this situation and requested leave to intervene, which was denied. It did not appeal from that order, which was its only remedy at the time, but decided to ignore the same, as well as the amended complaint, and filed an answer and cross-complaint to the original complaint, which had become functus officio. The only way this so-called cross-complaint could have any standing would be to treat the same as a complaint in intervention, and, as permission to file such a document had been refused to appellant, the same was properly stricken from the files when called to the attention of the court."

[4, 5] Taxes, street assessments, charges for searching title, costs, and counsel fees may be allowed under the general prayer for relief in a foreclosure proceeding where the mortgage provides for the reimbursement of such items and is attached to the complaint as an exhibit thereto. McKelvey v. Wagy, 157 Cal. 406, 108 P. 268. In the present case the mortgage was incorporated as a part of the complaint and recited that it was given to secure "the principal and interest * * * all advancement made by the holder of the note for paying liens prior to this mortgage, taxes and assessments including the tax on the money secured hereby, services performed in the care of the premises, premiums paid for insurance on the buildings, and in case of a default and foreclosure, searching of the title therefor, fees for the services of any attorney, expenses and costs of suit. * * *" Paragraph V of the complaint also recited the default of the mortgagor in the payment of delinquent taxes and street assessments and alleged the sale of the property therefor together with the incurring of costs and counsel fees, and that the same "now remains due, owing and unpaid." The complaint then prayed for judgment for the principal, interest, counsel fees, and costs, and "such other sums that have been or may be expended by plaintiff under the terms and provisions of said mortgage, * * * and that the plaintiff may have such other or further relief in the premises as * * * may seem meet and agreeable to equity." Under such pleadings delinquent taxes, street assessments, penalties and costs of redemption, counsel fee, and charges for searching title incident to foreclosure proceedings were properly allowed without supplemental pleadings. The allowance of such items is not without the issues under such pleadings. The findings are proper and adequate.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

101 Cal. App. 669

In re PRINCIPAL'S GUARDIANSHIP.

MOOSLIN v. PRINCIPAL.

(Civ. 7028.)

District Court of Appeal, First District, Division 2, California. Nov. 5, 1929.

1. Trial 🔑388(2)—As no answer was required and none filed denying allegations in petition for appointment as guardian, no findings were required; "issue of fact," "issue joined" (Code Civ. Proc. §§ 590, 632, 1717).

As no answer was required by statute and none was filed denying allegations set forth in petition to be appointed as guardian of minor, there was no "issue of fact" within meaning of Code Civ. Proc. §§ 590, 632, and no "issue joined" within meaning of section 1717, so that no findings were required.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Issue Joined; First, Second, and Third Series, Issue of Fact.]

2. Guardian and ward 🔑13(8)—Appellate court must assume trial court believed evidence that father failed to maintain child and based decree appointing another guardian thereon.

Where petitioner seeking to be appointed guardian of minor alleged that minor's father, having ability to do so, failed to maintain his minor child for more than two years previous thereto and allegation was supported by abundance of evidence, District Court of Appeals must assume, nothing to contrary appearing, that trial court believed it and based its decree granting petition thereon.

3. Guardian and ward 🔑10—That father failed to maintain child warranted holding that father forfeited rights to be guardian or have minor's custody (Civ. Code, § 246, subd. 4).

That father failed to maintain his minor child for more than two years before petition of another to be appointed guardian and father had ability to do so, that fact alone warranted trial court in holding that father had forfeited his rights to be appointed guardian or to be awarded custody of minor under Civ. Code, § 246, subd. 4, providing for forfeiture of rights to guardianship by abandoning support of child.

4. Guardian and ward 🔑13(3)—Incompetency of minor's father, not alleged in another's petition to be appointed guardian, was not in issue where application to modify divorce decree was not called for hearing.

Where petition to be appointed guardian of minor contained no allegation on subject as to whether minor's father as defendant was competent and application to modify decree of divorce was not called up for hearing, trial court did not err because it made no finding as to father's incompetency, since there was no issue of competency on which to base finding.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceedings, by Pearl Mooslin to be appointed guardian of Leon Principal, Jr., a minor, against Leon Principal. From an order granting the petition, the defendant appeals. Affirmed.

A. A. Garrett and Stoner & Gardner, all of Los Angeles, and A. V. Dalrymple, of San Francisco, for appellant.

Joseph A. Brown, of San Francisco, for respondent.

STURTEVANT, J. The petitioner applied to be appointed guardian of Leon Principal, Jr., a minor. Notice of the application was served on the father of the minor and a hearing was had before the trial court. The court made an order granting the petition, and from that order the father has appealed and has brought up a typewritten record.

[1-3] The parents were married October 28, 1922. They were divorced by a final decree of divorce September 14, 1928. The mother died September 27, 1928. On October 16, 1928, this petitioner filed a petition asking to be appointed guardian of the minor. Among other things she alleged probative facts to the effect that the child's father had forfeited his right to be appointed guardian. Civ. Code, § 246, subd. 4. On October 18, 1928, the father filed an application asking that the decree in the divorce action be modified and that the custody of the minor be awarded to him. Neither pleading was answered. By stipulation the petition for letters and the application to modify the divorce decree were set down for hearing in the same court at the same time. The application for a modification was not called up for hearing and the moving party did not attempt to introduce any evidence thereon. As no answer was required by the statute and none was filed denying the allegations set forth in the petition of Mrs. Mooslin, there was no "issue of fact" within the meaning of sections 590 and 632 of the Code of Civil Procedure, and no "issue joined" within the meaning of section 1717 of the Code of Civil Procedure. Waller v. Weston, 125 Cal. 201, 57 P. 892. Therefore findings were not required. No findings were asked and none, in name, was made. But in the order granting the petition for letters there were inserted some recitals, among others: "* * * That said minor has been abandoned by his father Leon Principal within the meaning of subdivision 4 of section 246 of the Civil Code of the state of California." The father contends that the trial court erred in finding that the said minor, Leon Principal, Jr., had been abandoned by his father. The point is not well taken for several reasons. As we have pointed out there were no findings. Nevertheless, if we call the passage above quoted a finding, it is apparent at once that it is a conclusion of law as distinguished from a finding of fact. Moreover, if we treat the language referred to as a finding of fact, and if we concede, as the applicant contends, that

it is not supported by the evidence, the judgment of the trial court may not be disturbed. This is so because the petitioner had alleged that the appellant, having the ability so to do, failed to maintain his minor child for more than two years prior to October 16, 1928. That allegation was supported by an abundance of evidence. Nothing to the contrary appearing, we must assume that the trial court believed it and based its decree thereon. As subdivision 4 of section 246 is in the disjunctive, this fact alone warranted the trial court in holding that the father had forfeited his rights to be appointed guardian or to be awarded the custody of the minor.

[4] The appellant also contends that the trial court erred because it made no finding as to the incompetency of the father. The petition contained no allegation on the subject, and the application to modify the decree of divorce was not called up for a hearing; therefore there was no issue of competency on which to base a finding.

We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

208 Cal. 506

HANSEN v. MUNICIPAL COURT OF CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, et al. (L. A. 11685.) ★

Supreme Court of California. Nov. 22, 1929.
Rehearing Denied Dec. 19, 1929.

Criminal law ⚷1081—One is not precluded by giving oral notice of appeal from later and within time filing written notice thereof and perfecting appeal (Pen. Code, §§ 1239, 1467, 1468).

Although Pen. Code, § 1239, was not repealed by sections 1467, 1468, one is not precluded by giving oral notice of appeal from later and within time filing written notice thereof and perfecting his appeal.

In Bank.

Application by Helen Hansen for writ of mandate to be directed to municipal court of city of Los Angeles, Caryl M. Sheldon, Judge, and others, to compel certification of statement on appeal. Writ granted.

Rehearing denied; PRESTON, J., voting for a rehearing.

John A. Jorgenson, of Los Angeles, for petitioner.

Lloyd S. Nix, City Prosecutor, and Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for respondents.

LANGDON, J. This matter comes to us upon a petition for a writ of mandate directed to the judge and clerk of the municipal court of Los Angeles, to compel certification of statement upon appeal.

Petitioner was charged with vagrancy and convicted in said municipal court and sentenced to serve 90 days in the county jail on May 23, 1929. On the same day motion for new trial was made and denied and oral notice of appeal was given. Thereafter a substitution of attorneys occurred, and on June 7, 1929, petitioner filed written notice of appeal. On June 12, 1929, a written statement of grounds of appeal was served and filed. The court refused to certify said statement upon appeal upon the ground that it was filed too late; since the oral notice of appeal was

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★Rehearing denied.

given on May 23, 1929, it was held that the time for serving and filing said statement expired on May 28, 1929.

Petitioner seeks the writ of mandate upon the ground that the oral notice of appeal was ineffectual; that sections 1467 and 1468, Penal Code, have repealed section 1239, Penal Code, with reference to the procedure upon appeal. Although conceding that the argument is concluded against her upon this point, by the case of Lillywhite v. Sup. Ct., 80 Cal. App. 533, 251 P. 945, petitioner asks us to overrule that case.

We are satisfied with the reasoning and the rule announced in the case cited. However, that case is not conclusive of the rights of petitioner herein. While it has been held that an oral appeal is permissible under the provisions of section 1239, Penal Code, and that that method of appeal is coexistent with the written appeal to be filed within 15 days after entry of judgment, no case has been called to our attention which holds that, having given oral notice of appeal, one is precluded from later and within time filing a written notice of appeal and perfecting it in accordance with the statute. That is precisely what was done in this case: After the oral notice of appeal a written notice was filed in due time and the statement of grounds of appeal was filed within 5 days thereafter. The trial court should examine and settle the statement upon appeal therefor.

The writ should be granted as prayed and it is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; CURTIS, J.

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208 Cal. 501

COOK v. COOK. (L. A. 11582.)

Supreme Court of California. Nov. 15, 1929.

1. Divorce ⚷181—Appeal in divorce proceedings held not within time, where notice thereof was not filed until 180 days after entry of decree (Code Civ. Proc. § 939).

Where notice of appeal was not filed until 180 days after entry of interlocutory decree of divorce nor within 60 days from order denying motion to set aside decree and order denying motion to dismiss action, appeal *held* not taken in time under Code Civ. Proc. § 939.

2. Divorce ⚷181—Appellant could not justify delay in giving notice of appeal from decree of divorce on ground that he had not received written notice of entry thereof (Code Civ. Proc. § 953d).

Appellant could not justify delay in giving notice of appeal from interlocutory decree of divorce, order denying motion to set aside decree, and order denying motion to dismiss, on ground that written notice of entry was not given him, as Code Civ. Proc. § 953d, does not apply to notice of appeal which must be filed within 60 days after entry of judgment or order appealed from, but applies only to notice required by provisions of section 650, relating to settlement of bills of exception, and section 653a, relating to preparation of transcript on appeal, and section 659, relating to motion for new trial.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Suit by Emma Cook against George Cook. Judgment for plaintiff, and defendant appeals. On plaintiff's motion to dismiss appeal. Motion granted.

Geo. M. Cook, of Taft, for appellant.

Brittan & Brittan, of Bakersfield, for respondent.

WASTE, C. J. Respondent moves to dismiss the appeal taken by appellant from an interlocutory decree of divorce and from two orders subsequently made, which are not identified by date, but which we assume from the transcript to be an order denying a motion to set aside the interlocutory decree and an order denying a motion to dismiss the action. The motion to dismiss the appeal is made on the ground that the appellant failed to file his notice of appeal and his notice to prepare transcript, and to perfect his appeal within the time required by law.

[1] The notice of appeal was not filed until 180 days after the entry of the interlocutory decree, nor was it filed within 60 days after the entry of the orders sought to be appealed from. It follows, therefore, that the appeal was not taken in time. Code Civ. Proc. § 939.

[2] Appellant attempts to justify his delay by invoking the provisions of section 953d of the Code of Civil Procedure, and insists that, as written notice of the entry of the judgment was not given him, his appeal was taken within time. That section, however, does not help him, for it does not relate to notices of appeal which must be filed within 60 days after the entry of the judgment or order appealed from, but applies only to the notices required by the provisions of section 650 of the Code relating to settlement of bills of exception, section 659 relating to motions for a new trial, and section 953a relating to preparation of transcript on appeal.

The motion to dismiss is granted.

We concur: SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

101 Cal. App. 675

BARRIOS & CO., Inc., v. INDEMNITY INS. CO. OF NORTH AMERICA.★

(Civ. 6637.)

District Court of Appeal, First District, Division 1, California. Nov. 6, 1929.

Rehearing Denied Dec. 6, 1929. Hearing Denied by Supreme Court Jan. 2, 1930.

1. Banks and banking ⚷136—On insolvency of depositor, bank may declare due unmatured indebtedness owing from depositor and exercise bankers' lien.

Where depositor in a bank becomes insolvent, bank may declare due unmatured indebtedness owing from depositor and exercise its bankers' lien.

2. Attachment ⚷345—Surety in action on undertaking given to release attached property is estopped to deny debtor's ownership or liability of property to attachment.

Recitals of undertaking given to procure release of property from attachment are conclusive as between the parties thereto, and, in an action upon the undertaking, surety is estopped to deny that property levied on was subject to attachment or belonged to debtor.

3. Attachment ⚷331—Attachment undertaking constitutes original, independent, and absolute contract of sureties.

Attachment undertaking constitutes original, independent, and absolute contract on part of sureties.

4. Attachment ⚷331—Surety on undertaking for release of attachment providing for surety's redelivery of properly attached was bound to restore attached bank deposit, notwithstanding bank's application thereof under bankers' lien.

Where writ of attachment was issued and levied upon deposit in bank to credit of debtor, and attachment was released by undertaking providing that surety would redeliver property attached or pay full value of such property, surety, on creditor's recovery of judgment against debtor, was under duty to restore money on deposit with the bank, so that execution could issue thereon, and it was no defense that the bank had appropriated the amount of deposit under its bankers' lien to unpaid indebtedness of debtor who was insolvent, irrespective of whether bank exercised this right properly or wrongfully.

5. Attachment ⚷349—Complaint on undertaking given to release attached property must, as against general demurrer, show execution has been returned unsatisfied (Code Civ. Proc. § 552).

Complaint in action on undertaking given to obtain release of attached property, which does not show that remedy by execution has been regularly pursued and that execution has been regularly returned unsatisfied in whole or in part, is bad on general demurrer, under Code Civ. Proc. § 552.

6. Attachment ⚷349—Judgment creditor's complaint against surety on undertaking to release attachment, which alleged surety's refusal to pay on demand held not defective for failure to show return of execution unsatisfied where there was no demurrer and debtor was insolvent (Code Civ. Proc. § 552).

In judgment creditor's action against surety on undertaking given to obtain release of attached property of debtor, complaint alleging demand upon surety, and surety's refusal to pay *held* sufficient, where there was no demurrer, notwithstanding failure to allege that execution was issued and returned unsatisfied, as required by Code Civ. Proc. § 552, especially where record affirmatively showed that judgment debtor was insolvent and issuance of execution would be futile.

7. Attachment ⚷344—Creditor may sue surety on bond for release of attached property of insolvent debtor without issuing execution (Code Civ. Proc. § 552).

Issuance of execution against debtor, as required by Code Civ. Proc. § 552, is not a condition precedent to an action against surety on the bond given for the redelivery of attached property, where debtor is insolvent.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Barrios & Co., Inc., against the Indemnity Insurance Company of North America. Judgment for defendant, and plaintiff appeals. Reversed.

Goldman & Altman, of San Francisco, for appellant.

Glensor, Clewe & Van Dine and Harold H. Price, all of San Francisco, for respondent.

TYLER, P. J. This action was brought to recover the sum of $1,514.71 upon an undertaking executed by defendant for the release of an attachment levied in a case wherein appellant was plaintiff and G. V. Pettigrew Company defendant.

The complaint alleged the commencement of the action by plaintiff herein against G. V. Pettigrew Company, the issuance of a writ of attachment therein, and levy of the same upon moneys on deposit to the credit of Pettigrew Company in the American Bank of San Francisco, which sum, it was further alleged, was in excess of the amount sued for. The issuance of an order for the release of the attachment upon the filing of the undertaking above referred to was then alleged, as was also the obtaining of a final judgment in favor of plaintiff and against the Pettigrew Company for the amount heretofore stated. Further allegations recited that the judgment remained wholly unpaid; that demand was made upon defendant herein for the return by it of the money attached, which demand was refused. Defendant, by answer, in substance, alleged that there was no money or property levied upon under or pursuant to

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★Rehearing denied. Hearing denied by Supreme Court.

the writ of attachment, and there was therefore no property to be redelivered by it. The trial court found that at the time the writ of attachment was levied by plaintiff there was on deposit in the name of the Pettigrew Company with the said bank a sum in excess of $3,000, and it further found that at that time the Pettigrew Company was indebted to the bank in the sum of $10,000. It also found that the company was insolvent, and the bank, by reason thereof, had no money in its possession or under its control belonging to such insolvent company. The finding that the bank had no funds in its possession belonging to the company was based upon evidence that it had applied the amount of the account under its bankers' lien to the unpaid indebtedness of such company, and accordingly made return to the sheriff that there was no balance due. Judgment went in favor of defendant surety company, and plaintiff appeals.

The contention is made, in support of the appeal, that the filing of the bond for releasing the attachment made it incumbent upon the defendant in this action, upon the final determination of the case of Barrios v. Pettigrew in favor of plaintiff, to place plaintiff in the same position as it was at the time of the levy of the attachment, namely, to have available in the bank to the order of the Pettigrew Company a sum sufficient to satisfy the judgment against it, and, upon failure so to do, plaintiff was entitled to a judgment against the surety company for the amount of its claim against the Pettigrew Company in the amount fixed by the final judgment. Defendant, on the other hand, contends that the bank had a lien upon the funds attached and had a right to exercise its lien, and, when it did in fact do so, there was no money on deposit with the bank subject to attachment in the action against the Pettigrew Company, and, this being so, there was nothing to redeliver.

[1-4] There can be no question that, where a depositor in a bank becomes insolvent, the bank may declare its unmatured indebtedness due and payable and exercise its bankers' lien. Pendleton v. Hellman Com. Bank, 58 Cal. App. 448, 208 P. 702. But whether it rightfully or wrongfully exercises this right is a question with which we are not here concerned. Whether the fund belongs to a third party or for any reason was not legally subject to the attachment, is a question to be litigated between the claimants, and it in no manner affects the surety's express covenant to restore. It was its duty under the terms of its bond to redeliver the attached property to the proper officer. By the filing of the bond, the writ of attachment was released, and with it the claim of plaintiff to the fund attached. The bond here sued upon provided that, upon the release of the attachment, defendant would redeliver the property attached, or, in default thereof, would pay the full value of the property released. The recitals of an undertaking given to procure the release of property from attachment are conclusive as between the parties thereto, and, in an action upon the undertaking, the surety is estopped to claim that the property levied upon was not subject to an attachment, or that it did not belong to the debtor. Pierce v. Whiting, 63 Cal. 538. Whether the property belongs to a third person, or for any legal reason was not subject to the attachment, are, as we have said, questions to be litigated between the adverse claimants, and they in no manner affect the covenants of the surety. McCormick v. National Surety Co., 134 Cal. 510, 66 P. 741; Hesser v. Rowley, 139 Cal. 410, 73 P. 156; Tormey v. McIntosh, 43 Cal. App. 411, 184 P. 1012. The attachment undertaking constitutes an original, independent, and absolute contract on the part of the sureties. Heine v. Wright, 76 Cal. App. 338, 244 P. 955; 3 Cal. Jur. p. 531. Upon the determination of the action in which the attachment issued in plaintiff's favor, it was the duty of the surety, on demand, to restore the money on deposit with the bank to the sheriff, so that execution could have issued thereon.

[5-7] From what has been said, it follows that the findings of the trial court are not supported by the evidence. Respondent urges the further claim in support of the judgment that the action was prematurely filed, for the reason that no execution was issued and returned unsatisfied before the commencement of the action, as required by section 552 of the Code of Civil Procedure. There can be no question that a complaint in an action on an undertaking, given to obtain the release of attached property, which does not show that the remedy by execution has been regularly pursued, and that the execution has been regularly returned unsatisfied in whole or in part before the action was commenced, is bad on general demurrer. But no demurrer was here interposed, nor was any such question raised in the court below. The complaint alleged the demand upon the surety and its refusal to pay. While the complaint does not allege that the demand was made through execution, the demand as alleged is sufficient in the absence of demurrer. Then again it affirmatively appears from the record that the Pettigrew Company was insolvent, and the issuance of an execution against it would be a futility. The issuance of an execution against an insolvent debtor is not a condition precedent to an action on an undertaking against a surety on the bond given for the redelivery of attached property. Rosenthal v. Perkins, 123 Cal. 240, 55 P. 804; 3 Cal. Jur. 518.

For the reasons given, the judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

LOWERY v. HALLETT. (Civ. 3835.) ★

District Court of Appeal, Third District, California. Nov. 21, 1929.

Rehearing Granted Dec. 21, 1929.

1. **Automobiles 🔑245(87)—Guest held not contributorily negligent as matter of law in making no protest or suggestion to automobile driver respecting speed.**

One injured when automobile in which he was riding ran into tree after going around curve in road at speed of over 50 miles on hour *held* not guilty of contributorily negligence as matter of law in making no protest or suggestion to driver respecting speed, though he was watching speedometer and knew speed at which car was going.

2. **Automobiles 🔑244(35)—Prima facie evidence of violation of statute in exceeding speed limit becomes conclusive on failure of other evidence to contradict and overcome it (California Vehicle Act, § 113, as amended by St. 1927, p. 1436, § 30).**

Prima facie evidence of violation of California Vehicle Act (St. 1923, p. 553) § 113, as amended by St. 1927, p. 1436, § 30, in exceeding speed limit fixed by subdivision (b), as declared by subdivision (c) becomes conclusive on failure of other evidence to contradict and overcome it.

3. **Trial 🔑296(4, 5)—Instructions not referring to issue of contributory negligence held not prejudicially erroneous, in view of other instructions and rulings on evidence (California Vehicle Act, § 113, as amended by St. 1927, p. 1436, § 30).**

In action for injuries to guest in automobile, instructions to find for plaintiff, if defendant drove car faster than 35 miles per hour in violation of California Vehicle Act (St. 1923, p. 553) § 113, as amended by St. 1927, p. 1436, § 30, and such violation was proximate cause of accident, instruction that defendant was negligent as matter of law, if he drove car in violation of subdivision (a), and instruction to find for plaintiff if defendant failed to exercise ordinary care, and plaintiff was injured by reason thereof, *held* not prejudicially erroneous because not referring to issue of contributory negligence, in view of other instructions and court's rulings on evidence.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Jeff Lowery against L. P. Hallett. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr & Kennedy, of Redding, and Irving D. Gibson, of Sacramento, for appellant.

Carter & Smith, of Redding, for respondent.

FINCH, P. J. This is an appeal by the defendant from a judgment in favor of the plaintiff for damages. The facts upon which the judgment is based are as follows:

At the time the alleged injuries were suffered by the plaintiff, he and the defendant were residing on a ranch near Redding. The defendant "wanted to see the country over there at Goose Valley," and he asked the plaintiff "to go along with him and show him the country"; the plaintiff being familiar therewith and the roads leading thereto, while the defendant was not. The plaintiff accepting the invitation, the parties proceeded on the contemplated journey in the defendant's Buick touring car, driven by the defendant. A part of their course was along the highway running easterly from Redding to Burney. When they had reached a point within about 3 miles of Burney, they came to a straight and comparatively level stretch of road about a mile in length, at the end of which the highway curves to the left. The defendant drove over this stretch of road at a speed of between 50 and 55 miles an hour, and continued around the curve at the same speed until his automobile ran off to the right and into a large tree about 290 feet from the commencement of the curve, thereby causing the injuries for which the plaintiff claims damages. During all this time the plaintiff, who is a half-blood Indian, was watching the speedometer, and knew the speed at which the automobile was going, but he made no protest or suggestion to the defendant in relation thereto. The plaintiff testified that he did not not make any protest because he was "afraid he would go faster," and that he "thought he would slack up a little" at the curve.

[1] Appellant contends that the plaintiff was guilty of contributory negligence as a matter of law, and that a nonsuit should have been granted. A similar contention was considered and answered in the negative by the Supreme Court in Shields v. King, 277 P. 1043, and in Benjamin v. Noonan, 277 P. 1045. Those cases and the authorities cited therein are deemed decisive of this.

[2, 3] Complaint is made of the following instruction, given at the plaintiff's request:

"You are instructed that the maximum speed at which a motor vehicle was permitted to travel on the public highway in the State of California on the 21st day of August, 1927, was thirty-five miles per hour, and if you believe from the evidence that the defendant, L. P. Hallett, was driving the automobile in which the plaintiff was riding, at a rate of speed in excess of thirty-five miles per hour at the time the accident happened, the said defendant was operating said automobile in violation of the law of the state of California, and if said violation was the proximate cause of the accident, defendant was guilty of negligence as a matter of law, and if said negligence was the proximate cause of the injury to plaintiff, your verdict must be in favor of the plaintiff.

Another instruction to the same effect was given. Admittedly the instruction is erroneous in stating that the speed limit was 35

★Rehearing granted.

miles an hour at the time of the accident, August 21, 1927. California Vehicle Act (St. 1923, p. 553) § 113, as amended by St. 1927, p. 1436, § 30. Subdivision (b) of that section provides that "it shall be lawful," except as otherwise provided, to drive a vehicle at the speeds therein enumerated, and subdivision (c) provides: "In all charges for a violation of this section, speeds in excess of those set forth in subdivision (b) of this section shall be taken as prima facie but not as conclusive evidence of a violation of this section." If it be conceded that it is ordinarily a question of fact for the jury to determine whether a speed in excess of any of those enumerated in subdivision (b) of section 113 as amended is a violation of that section, still the prima facie evidence of violation of that section, referred to therein, becomes conclusive upon failure of other evidence to contradict and overcome it. Miller & Lux, Inc., v. Secara, 193 Cal. 755, 771, 227 P. 171. The plaintiff testified that the defendant was driving in excess of 50 miles an hour at the time of the accident. No attempt was made to overcome this evidence. The defendant did not testify in the case, and his silence tends to strengthen the case made by the plaintiff.

The court, after reading subdivision (a) of section 113 as amended, instructed the jury that, if the defendant drove his automobile in violation of that subdivision, "he was guilty of negligence as a matter of law, and if such negligence was the proximate cause of the injury to plaintiff, your verdict must be in favor of the plaintiff." In another instruction the court stated that, if the defendant "failed to exercise ordinary care in the operation of the automobile, * * * and that by reason of the failure of said defendant to exercise ordinary care in the operation of said automobile, plaintiff received the injuries complained of, it is your duty to return a verdict in favor of the plaintiff." No reference is made in any of the four instructions mentioned to the issue of contributory negligence. Appellant contends that all of such instructions are prejudicially erroneous by reason of such omission. It may be conceded that, considering the instructions abstractly, they are incomplete and inaccurate, but, under the circumstances of this case, later to be considered, they are not deemed prejudicial. Two subsequent instructions, given at the defendant's request, are as follows:

"If you find from the evidence that plaintiff was guilty of any negligence which proximately contributed to his alleged injury, or was guilty of any lack of ordinary care, whether by doing an act or by omitting to do what a person of ordinary care and prudence would have done under the same or similar circumstances, and such lack of ordinary care, act or omission, if any such there was, proximately contributed in any degree to the accident, and without which the accident would not have occurred, then you cannot go further and apportion the negligence, if any, between the parties, but in such event plaintiff was guilty of contributory negligence which defeats his recovery and your verdict must be in favor of defendant and against plaintiff."

"I further instruct you that a passenger in an automobile operated by another not for hire is required to use ordinary care for his own safety. If he is aware that the operator is carelessly operating the automobile, or is carelessly rushing into danger, it is incumbent upon him to take such steps as an ordinarily prudent person would take under the same circumstances for his own safety.

"I therefore instruct you that if you find from the evidence that said plaintiff, while a passenger in the automobile in which he was injured, by the exercise of ordinary care could have avoided the injuries which he received, and that such failure of plaintiff to exercise ordinary care proximately contributed to his injuries then your verdict should be for the defendant."

Since the evidence shows that the defendant was guilty of negligence as a matter of law, the only issue in the case, other than as to the amount of damages, was the alleged contributory negligence of the plaintiff. During the cross-examination of the plaintiff he repeatedly stated that he made no protest or suggestion to the defendant in relation to the speed of the automobile. Thereafter counsel for the plaintiff, misconceiving the effect of the decision of this court in Brown v. Davis, 84 Cal. App. 180, 257 P. 877, moved the court, in the presence of the jury, to strike out all such testimony. The court granted the motion, saying in effect that the plaintiff's conduct, or omissions, did not constitute contributory negligence. Thereafter, counsel for the plaintiff, thinking that possibly he had led the court into error, moved the court to change the ruling striking out the aforesaid evidence, and the court granted the motion, saying:

"The motion to withdraw the objection to the questions as propounded and also the motion to strike out the answers of the plaintiff, and the motion to withdraw the objection to said answers will be granted and the objection will be overruled and the answers will stand and the court will instruct the jury that they are to disregard the remarks of the court in regard to whether or not such acts proximately contributed to the injury of the plaintiff, and that it will be the duty under the instructions of the court and the law and the evidence as offered to determine whether such acts on the part of the plaintiff proximately contributed to his injury and not to consider the remarks of the court in determining that question as to whether or not such acts were contributory negligence."

After all the things mentioned had occurred, and after the court had given the instructions on contributory negligence quoted herein, it seems impossible that the jurors could have been misled by the omission of any reference to the issue of contributory negligence in the first four instructions referred to herein. Presuming that they were persons of ordinary intelligence, they must have understood that any contributory negligence on the part of the plaintiff was sufficient to bar a recovery. It is by no means certain that jurors would understand such instructions, standing alone, to exclude the consideration of contributory negligence. It has been held that the use of the words "the proximate cause" of negligence "necessarily implies that it is the only proximate cause." Straten v. Spencer, 52 Cal. App. 98, 106, 197 P. 540, 543. See, also, Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237, and Saltzen v. Associated Oil Co., 198 Cal. 157, 161, 244 P. 338. If the word "proximate," as used in the instructions under reconsideration, had been proceeded by the word "only" or "sole," there would have been no error in the omission of any reference to contributory negligence. What is said herein is not intended as an approval of the form of those instructions, but only as reasons for holding that, under the particular facts of this case, they are not prejudicially erroneous.

Appellant complains of the court's refusal to give other requested instructions on the subject of contributory negligence, but the instructions on that subject herein set forth clearly cover the questions of law involved, and, from what has already been said, it appears that the jurors must have fully understood their duty in that connection.

The judgment is affirmed.

We concur: JAMISON, Justice pro tem.; THOMPSON, J.

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101 Cal. App. 691

BLINN v. RITCHIE et al. (Civ. 5631.)

District Court of Appeal, Second District, Division 1, California. Nov. 6, 1929.

1. Partnership 🔑55—Testimony that party was silent partner held insufficient to support judgment against such party on basis of copartnership.

In action against copartnership, testimony of plaintiff that prior to his employment one partner had told him that another was silent partner and not actively engaged in business, and testimony of one that the other acted as silent partner, *held* insufficient to support judgment against alleged silent partner on basis of copartnership.

2. Evidence 🔑317(12)—Plaintiff's testimony that one partner told him that another was silent partner held hearsay.

In action against copartnership for services rendered, testimony of plaintiff that one partner told him that another was silent partner *held* hearsay.

3. Evidence 🔑471(32)—Statement of one that another was his silent partner held conclusion of law and not evidence.

In action against partnership for services rendered, testimony of one that another was his silent partner *held* a conclusion of law and not evidence.

4. Partnership 🔑55—Court refused to consider contention that testimony of one that another was his silent partner would support judgment against alleged silent partner because not denied, where other was not shown to have been present.

In action against partnership, court refused to consider contention that testimony of one that another was his silent partner was sufficient to support judgment against alleged silent partner because not denied, where it was not shown that alleged silent partner was present in courtroom at time of testimony.

5. Partnership 🔑213(1)—Alleged silent partner held not to have admitted existence of partnership by filing answer.

In action against alleged silent partner, such partner *held* not to have admitted existence of partnership by filing answer.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Irving L. Blinn against James Ritchie and another, individually and as copartners doing business under the fictitious name and style of the Walnut Park Lumber Company. Judgment for plaintiff, and defendants appeal. Reversed.

Irving P. Austin, of Compton, for appellants.

I. R. Rubin, of Los Angeles, for respondent.

HAHN, Justice pro tem. In the action which gives rise to this appeal, which was originally filed in the municipal court of the city of Los Angeles, the complaint is cast in the form of a common count alleging that the plaintiff had performed certain services "for and at the request of the defendants" and the reasonable value thereof. The title of the action, as it appears in the caption of the complaint, reads as follows: "Irving L. Blinn, Plaintiff, vs. James Ritchie and Joseph F. Knopf, individually, James Ritchie and Joseph F. Knopf, copartners doing business under the fictitious name and style of Walnut Park Lumber Company."

Judgment for $400 was ordered "in favor of the plaintiff Irving L. Blinn, and against the defendants, James Ritchie and Joseph F. Knopf, individually, and James Ritchie and Joseph F. Knopf, copartners, doing business under the fictitious name and style of Walnut Park Lumber Company."

Upon an appeal taken by the defendants to the superior court in and for the county of Los Angeles, the judgment of the municipal court was affirmed. From this judgment of affirmation by the superior court this appeal is taken by "Joseph F. Knopf, James Ritchie and Joseph F. Knopf, copartners doing business under the fictitious name and style of Walnut Park Lumber Company."

Appellants in their brief present and argue several reasons for reversal of the judgment, but, in view of the conclusions we have arrived at, we deem it necessary to discuss but one proposition.

[1] The judgment must be sustained, if at all, upon the basis of the existence of a copartnership between the defendants Ritchie and Knopf. There is no finding that such a copartnership existed, nor is there competent evidence in the record to sustain such a finding, if one had been made. It is not contended that the defendant Knopf had anything to do personally with the hiring of the plaintiff, or even that he had any knowledge of such a hiring, or of any services rendered by the plaintiff to the Walnut Park Lumber Company. The defendant Knopf can be held for plaintiff's claim only upon a showing that Ritchie, who admitted the hiring of the plaintiff, was a partner of Knopf at the time. The only evidence in the record touching upon the question of copartnership is the testimony of the plaintiff that, prior to his employment by Ritchie, Ritchie had told him that "Knopf was a silent partner in the business, and was not actively engaged in the conduct of the business," and the testimony of the defendant Ritchie: "That he and defendant Joseph F. Knopf were the owners of the Walnut Park Lumber Company; that he was in active charge of said business, and that Mr. Knopf acted as a silent partner."

[2, 3] Appellants' contention that the foregoing testimony is insufficient to support a judgment against Knopf on the basis of a copartnership existing between Ritchie and Knopf must be sustained. The testimony of the plaintiff as to what Ritchie told him about Knopf's connection with the business was mere hearsay; while the testimony of Ritchie that Knopf was his silent partner is clearly a conclusion of law. There is not a scintilla of evidence in the record as to any contract of copartnership, nor as to any acts of Knopf relating to the conduct of the business of the Walnut Park Lumber Company, that would justify an inference of the existence of a copartnership agreement.

In the case of Hammond v. Borgwardt, 126 Cal. 611, 59 P. 121, the court, having under review evidence markedly similar to that contained in the instant case, held that the evidence was insufficient to warrant a finding of the existence of a copartnership. In the case of Doudell v. Shoo, 20 Cal. App. 424, 129 P. 478, the court, in approving the language used in Hammond v. Borgwardt, supra, emphasized the rule that a contract of copartnership must be proved in the same manner that any other contract must be established, and that the mere declaration of a witness that another person was his partner is a mere conclusion of law, and does not furnish the evidentiary facts necessary to support a finding of copartnership.

[4] Respondent endeavors to avoid the consequences of the rule requiring evidentiary facts instead of conclusions of law to support a finding of copartnership by asserting that an exception to the rule exists where one makes the statement that he and another party were partners in the presence of the alleged partner and such alleged partner makes no denial. Respondent claims the benefit of this asserted rule on the theory that defendant Knopf was present in the municipal court during the trial, and that the testimony of the defendant Ritchie was given in his presence, and that Knopf made no denial. Without determining the legal question involved in this contention, the fact that there is nothing in the record to show defendant Knopf was present in the courtroom when Ritchie testified disposes of this point adversely to appellants' contention.

[5] Nor is there merit in respondent's contention that the defendant Knopf, by filing an answer in the action, admitted the existence of the claim of partnership between himself and Ritchie. This contention is based upon the introductory language used in the answer, which reads as follows: "Comes now defendants, Joseph F. Knopf and Walnut Park Lumber Company, a copartnership, and answering plaintiff's complaint herein, admit, allege and deny as follows:" By no theory of pleading can this language be construed as being an admission of any essential element necessary to support the judgment. Maclay Co. v. Meads, 14 Cal. App. 363, 112 P. 195, 113 P. 364. Furthermore, there is nothing in the quoted introductory statement that indicated who constituted the Walnut Park Lumber Company, a copartnership.

The judgment is reversed as to defendant Joseph F. Knopf as an individual, and James Ritchie and Joseph F. Knopf, copartners, doing business under the fictitious name and style of Walnut Park Lumber Company.

We concur: HOUSER, J., Acting P. J.; YORK, J.

101 Cal. App. 748

BENCE v. TEDDY'S TAXI et al.★

(Civ. 3832.)

District Court of Appeal, Third District, California. Nov. 12, 1929.

Rehearing Denied Dec. 12, 1929. Hearing Denied by Supreme Court Jan. 9, 1930.

1. Automobiles 🔑220(3)—Pedestrian leaving street car had no right to assume passing automobile would stop until he reached curbing (Motor Vehicle Act, § 134).

Pedestrian leaving street car had no right to assume passing automobile would stop until he reached curb, especially in view of Motor Vehicle Act, § 134 (St. 1923, p. 560), not requiring vehicle to stop while passing street car halted at street corner, but merely providing that vehicle shall at all times be operated with due care and caution for safety of passengers alighting.

2. Municipal corporations 🔑705(10)—Failure of pedestrian to look in direction from which vehicles may approach, in absence of excusable circumstances, constitutes contributory negligence.

Pedestrian while crossing city street has duty to carefully look in direction from which he may anticipate approach of vehicles immediately before venturing into pathway of traffic, and failure to do so, in absence of excusable circumstances, will constitute contributory negligence.

3. Automobiles 🔑220(7)—Pedestrian struck by taxicab after leaving street car held contributorily negligent as matter of law in not looking in direction from which vehicles might be expected to approach.

In action for personal injuries resulting when pedestrian was struck by taxicab after leaving street car and walking to curbing, evidence *held* to show plaintiff was guilty of contributory negligence as a matter of law in failing to look in direction from which vehicles might be expected to approach.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by R. L. Bence against Teddy's Taxi and others. Judgment for plaintiff, and defendants appeal. Reversed.

Irving D. Gibson, of Sacramento, for appellants.

Fred J. Harris and M. F. Shelley, both of Sacramento, for respondent.

THOMPSON, J. This is an appeal from a judgment for damages for injuries sustained by the plaintiff as a result of having been struck by a taxicab while crossing a street after leaving a street car at an intersecting corner in Sacramento. The appellant relies chiefly upon the alleged contributory negligence of the plaintiff as a cause for reversal. The plaintiff failed to look to his right, whence the automobile which caused his injuries approached, before he proceeded to cross the street.

The plaintiff, who was 75 years of age, was employed as a janitor at the courthouse in Sacramento. The morning of June 16, 1928, he entered a street car for the purpose of going to his work. Proceeding westerly along K street this car stopped at about 5:30 o'clock a. m. at the corner of Seventh street, opposite the post office building. Except for the taxicab which was involved in the accident, no other traffic was present at this point. There were but two other passengers on the street car. The pedestrians' pathway across K street where it intersects Seventh street was indicated by broad white bands painted on the pavement. A safety zone 4 feet in width was likewise outlined on the pavement, adjacent to and parallel with the street car track on the north side for a distance of 44 feet east of the easterly intersecting line of Seventh street. The distance from the northerly line of this safety zone to the northerly curbing of K street was 12½ feet. This space was reserved for machines traveling westerly along K street.

For a distance of about a block the defendants' taxicab had been following the street car upon which the plaintiff was riding. As the street car stopped at the corner of Seventh and K streets, the taxicab slackened its speed, but did not stop. The plaintiff left the street car from its front end, grasping the upright bar with his left hand, as he stepped down onto the pavement at the extreme westerly end of the safety zone. He failed to look for vehicles along the street toward the rear of the street car either before he descended from the car or immediately afterward. Promptly stepping into the pedestrians' pathway, without looking to his right, from which direction he might expect approaching vehicles, he proceeded to cross K street to the northerly curbing. After reaching a point about 8 feet from the place where he alighted, for the first time he looked to his right and observed the taxicab rapidly bearing down upon him. He jumped forward to escape the imminent danger, but was struck and seriously injured. There is ample testimony to support the implied findings that the defendants were guilty of negligence.

In answer to the complaint for damages which was filed in this case, the defendants pleaded and relied upon the charge of contributory negligence on the part of the plaintiff for failure to look for approaching vehicles before stepping into the pathway of danger. After a careful examination of the record we are unable to find evidence of any circumstances which may excuse this necessary exercise of ordinary care. The evidence is without conflict to the effect that the plaintiff did fail to exercise this precaution for his own safety. It therefore appears to be imperative to hold that he was therefore guilty of negligence as a matter of law, which direct-

★For opinion denying rehearing, see 283 P. 86.

ly contributed to the injuries which he sustained.

The plaintiff testified that when the street car stopped at the corner of Seventh and K streets with the front end of the car at the white mark indicating the pedestrians' pathway across K street, he "stepped right off the (front end of the) car in the pedestrians' lane. Q. Which way were you facing when you got off the car? A. Northwest—west and north. * * * I started across the street * * * toward the postoffice on Seventh street. * * * I got about eight feet across the street, and I turned around this way and saw the car coming. * * * I turned around towards the east, I was facing this way (indicating), * * * the (taxi) car was coming down K street on the north side, * * * going on west. * * * It (the taxicab) was about 16 or 18 feet from me when I saw it first * * * coming in the same direction as the street car was progressing. * * * I jumped for my life to get out of the way of it. * * * The car hit me and knocked me down. * * * I didn't know anything for a little while."

Upon cross-examination he further testified:

"Q. And you faced to the north, or northwest (when you alighted from the street car)? A. West of north; I thought I was facing north.

"Q. You faced, looking down K street, did you, as you got off the car? A. Yes towards that Bon Marche corner there, * * * the northwest corner of Seventh and K streets, * * * the opposite corner from the postoffice. * * *

"Q. And then you turned and walked directly toward the sidewalk in front of the postoffice. A. I did.

"Q. And you had gotten about eight feet, you say, when you first saw the taxicab coming? A. Approximately. * * *

"Q. That was the first time that you saw the taxicab, * * * wasn't it? A. Yes sir.

"Q. And at that time the taxicab was about sixteen feet away from you? A. Sixteen or eighteen, approximately, yes sir. * * *

"Q. As soon as you alighted from the street car you started to walk over towards the sidewalk, is that right? A. Yes sir. * * *

"Q. Then you had come about half the distance from the street car to the curb when you first looked around to see the taxicab coming on your right, isn't that right? A. Pretty near that. * * * I turned around about the time I saw it. * * * It came right down on the north side of the zone. * * *

"Q. Did you see it before it got within 16 or 18 feet of you? A. No, I did not, it was coming pretty fast. * * *

"Q. Now when you first got off the street car and put your foot down on the street for the first time, you didn't look up K street towards Eighth street, did you? A. How could I look up K street if my face was turned the other way. * * * I didn't have time to look up the street. * * *

"Q. I think you have made that quite clear, you didn't look, *at any time* before you got at least eight feet away from the edge of the safety zone, you didn't look up K street, that is right, isn't it? A. I think that is right."

[1] The plaintiff makes it very clear that he utterly failed to look to his right along the public street, from which direction he should have anticipated the approach of vehicles. He took no precaution for his own safety before stepping into the pathway of danger. The record contains no evidence to the contrary. Nor are there any circumstances which may excuse this failure to exercise ordinary precaution. It was broad daylight. The street car was not crowded with passengers so as to obscure his view to the rear. The street was almost free from traffic. The record indicates that the defendants' taxicab was the only automobile in sight. A glance to the rear before the plaintiff alighted from the street car, or before he walked out into the pathway of the automobiles, would have disclosed this approaching car. The plaintiff had no right to assume that a passing automobile would stop until he reached the curbing. The law as it then existed did not even require a machine to stop while passing a street car which had halted at a street corner. Section 134 of the Motor Vehicle Act (St. 1923, p. 560) then read: "In passing any * * * street car while passengers are alighting from or boarding the same, vehicles shall be operated or driven on the right-hand side of such cars and at a rate of speed not exceeding ten miles an hour * * * and shall at all times be operated with due care and caution so that the safety of such passengers shall be assured. * * *"

[2] It is the invariable rule of law, which is in accordance with good reason, that it becomes the duty of a person, who purposes to cross a city street, to carefully look in the direction from which he may anticipate the approach of vehicles, immediately before venturing into the pathway of traffic. In the absence of excusable circumstances, the failure to do so will constitute contributory negligence. Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 P. 185; Davis v. Breuner Co., 167 Cal. 683, 140 P. 586; Lord v. Stacy, 68 Cal. App. 517, 229 P. 874; Finkle v. Tait, 55 Cal. App. 425, 432, 203 P. 1031; Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174; Filson v. Balkins (Cal. App.) 268 P. 445, superseded by opinion in (Sup.) 273 P. 578.

[3] Conceding the negligence of the defendants in the present case with respect to the careless manner in which the taxicab was operated, the undisputed evidence showing a lack of due caution on the part of the plaintiff precludes his right to recover. It there-

fore becomes unnecessary to consider the other points presented by the appellants.

The judgment is reversed.

We concur: FINCH, P. J.; JAMISON, Justice pro tem.

101 Cal. App. 754

OHLHAUSEN v. MILLS, City Clerk.
(Civ. 74.)

District Court of Appeal, Fourth District, California. Nov. 12, 1929.

1. Elections 🔑8—City charter, making general state law governing elections applicable and providing for nomination under state primary law, made all state laws governing primary and general elections applicable (Const. art. 2, § 2¾).

City charter, making provisions of general law of state governing municipal elections *held* separate from general elections applicable to elections in city, and provisions of state law governing elections for state and county officers applicable to city elections in matters not provided for in charter, and providing in another section that candidates for city offices should be nominated at primary election to be held as provided for in direct primary law of state, makes all of state law governing both primary and general elections for all state and county officers applicable, irrespective of result at primary, since method of election provided by freeholders' charter governs, under Const. art. 2, § 2¾.

2. Municipal corporations 🔑58—Each part of city charter must be given effect (Code Civ. Proc. § 1858).

City charter should be so construed as to give meaning and effect to instrument as a whole and to each part thereof, under Code Civ. Proc. § 1858, requiring such construction of statute.

3. Elections 🔑172—Where city charter made general state law applicable to city elections, only highest candidate for municipal office at primary could have name on ballot in general election (State Primary Law, § 23; Const. art. 2, § 2¾).

Only name of candidate for municipal office as council member who received largest number of votes at primary should be placed on ballot to be used at general municipal election under city charter, making provisions of general law of state applicable and providing for nominations of candidates for city offices as provided in direct primary law of state of California, since such charter provisions made applicable State Primary Law, § 23 (Deering's Gen. Laws 1923, Act 2256), providing that, in case only one person was elected to judicial, school, county, or township office at November election, candidate receiving majority at primary should alone have his name printed on ballot; Const. art. 2, § 2¾, allowing variation in method of election under freeholders' charter.

4. Elections 🔑159—Where state law, made applicable to city elections, permitted only one name on ballot at final election, voters could write in name of another person (Const. art. 2, § 2¾; State Primary Law, § 23).

Municipal charter, making provisions of general state law governing municipal elections *held* separate from general state elections applicable as law governing city elections and making provisions of general state law governing elections for state and county officers apply in matters not provided for in charter, gave right to electors at general election to write in name of person other than successful candidate in primary, though but one person's name appeared on ballot at general election, under Const. art. 2, § 2¾, and State Primary Law, § 23 (Deering's Gen. Laws 1923, Act 2256), relative to elections.

Original petition by Charles A. Ohlhausen for a writ of mandate to be directed to G. Albert Mills, City Clerk of Riverside. Temporary writ denied.

Joseph Seymour, of Riverside, for petitioner.

Eugene Best, of Riverside, for respondent.

Alphonse E. Ganahl, of Corona, amicus curiæ.

BARNARD, J. This is an original petition for a writ of mandate to compel the respondent, as city clerk of the city of Riverside, to place the name of petitioner upon the ballots to be used at the general municipal election, to be held in the city of Riverside on the third Tuesday of November, 1929, as a candidate for election to the office of member of the council of said city from the fourth ward thereof.

The petitioner alleges:

That he is a resident and qualified elector of said fourth ward in said city of Riverside. That the respondent is the duly elected, qualified, and acting city clerk of said city. That said city of Riverside is a duly organized and established city of more than 3,500 inhabitants, and that there is now in force in said city a freeholders' charter, duly ratified by the electors of said city, and approved by the Legislature of the state of California on March 22, 1929. That, pursuant to the provisions of said charter, a primary election for the purpose of nominating candidates for city offices, including, among others, the office of member of the council of said city from the fourth ward thereof, was held in said city on September 17, 1929. That at said primary election there were only two candidates for member of the council for the fourth ward, and votes cast at such primary election for said particular office were canvassed and the result duly announced as follows:

Candidates	Votes
Fred M. Lindsley	473
Charles A. Ohlhausen	446
Total	919

That the petitioner herein is the same Charles A. Ohlhausen who received votes as above indicated, and that he has complied with all the requirements of law regarding a candidate for said office. That, under the terms of said charter, a general municipal election will be held in said city for the purpose of electing various city officers, including a member of the council from the fourth ward, on the third Tuesday of November, 1929. That said election will be a separate city election. That it is the duty of respondent, as clerk of said city, to prepare, cause to be printed, and provide for the use of the electors, the sample and official ballots required by law for said election. That it is the duty of respondent to place upon said sample ballots, and the said official ballots, as candidates for the office of member of the council for the fourth ward of said city, to be voted upon at said general municipal election, the names of both said Fred M. Lindsley and Charles A. Ohlhausen, being the names of the two candidates who received the highest number of votes cast for said office at said primary election. That the respondent city clerk has prepared and caused to be printed, sample and official ballots bearing only the name of one candidate for the said member of said council for the fourth ward of said city, to wit, the name of Fred M. Lindsley. That, although demand had been made upon said city clerk to place the name of petitioner upon said ballot as one of the candidates for said office, respondent has refused and still refuses to so place petitioner's name upon said ballot. That, if the name of petitioner is not placed upon said sample and official ballots, the qualified electors of the fourth ward of said city will be deprived of their right to vote for any candidate, other than the said Fred M. Lindsley, by writing in the name of any such other candidate, and that petitioner will be deprived of his right to have his name so placed upon the ballot, to be used at said general election.

The respondent city clerk filed a general demurrer and also an answer, the material part of which denies that it is his duty as such city clerk to place on the official ballots and sample ballots, to be used at such general election, the name of Charles A. Ohlhausen as a candidate for member of the council for the fourth ward of said city. Because of the necessity for the utmost haste, if the decision in this matter is to be of any practical use, in view of the date of the general election involved, counsel for both parties appeared at the hearing and stipulated that all matters of time, notice, and the filing of briefs should be waived, and the matter was submitted upon the argument presented at the hearing.

Section 2¾ of article 2 of the Constitution of California, reads as follows:

"Any candidate for a judicial, school, county, township, or other nonpartisan office who at a primary election shall receive votes on a majority of all the ballots cast for candidates for the office for which such candidate seeks nomination, shall be elected to such office. Where two or more candidates are to be elected to a given office and a greater number of candidates receive a majority than the number to be elected, those candidates shall be elected who secure the highest votes of those receiving such majority, and equal in number to the number to be elected. Where a different method of election is provided by a freeholders' charter, the charter provision shall govern."

It is conceded that the office involved in this action is a nonpartisan office, and that the said Fred M. Lindsley received a majority of all the votes cast for this office at the primary election referred to in the petition; therefore, unless under the provisions of the charter of the city of Riverside, a *different method* of election is provided, under the terms of this constitutional provision the said Fred M. Lindsley was elected at the primary election. It becomes necessary, then, to examine the provisions of said charter to determine whether or not a different method of election is thereby provided.

Sections and portions of sections of the charter of the city of Riverside which throw any light upon this subject are as follows:

"Sec. 186. Elections to be held in said city for the purpose of electing the officers thereof and for all other purposes, are of three kinds:

"1. General municipal elections;

"2. Special elections;

"3. Primary elections.

"Sec. 187. General municipal elections shall be held in the city as follows: The first election shall be held on the third Tuesday in November, nineteen hundred and twenty-nine; the second election shall be held on the third Tuesday in November, nineteen hundred thirty-two. Said elections shall be held on the third Tuesday of November every two years thereafter. * * *

"One member of the council from each of the third, fourth, sixth and seventh wards of the city shall be elected by the electors of said wards, and two members of the board of education shall be elected by the electors at large at the first general municipal election. * * *

"Sec. 188. The officers elected at a general municipal election shall, after they have qualified as provided in this charter, take office and enter upon the discharge of their duties at ten o'clock a. m., of the first Monday in January next succeeding their election, or if said day falls on a holiday, then upon the day following."

"Sec. 190. The provisions of the general law of the state governing municipal elections where the same are held separate from the general state elections, are hereby adopted as the law governing city elections, and the provisions of the general laws of the state governing elections for state and county officers shall govern city elections in matters for which no provision is made in this charter, and the council and the city clerk respectively shall exercise the powers and perform the duties conferred on, or imposed by, such laws or boards of supervisors and county clerks concerning elections; provided, that where this charter makes provision relating to any matters contained in such general laws, the said charter provisions shall govern. * * *

"Sec. 191. All candidates for city offices shall be nominated at a primary election to be held on the third Tuesday in September next preceding each general municipal election, as provided for in the direct primary law of the State of California as now in force, or as may hereafter be amended, provided, however, that the council may by ordinance provide that any primary election may be consolidated with the state election held in the same year, and in such case the said primary election shall be held at the same time and place and together with said state election within the limits of the city, in accordance with the provision of any general law of the state providing for such consolidation.

"Sec. 192. When candidates for any office are nominated as specified in section 191, it is hereby provided and directed that no party name or designation shall appear on the certificates or ballots and that the names of the candidates for each office shall be arranged alphabetically on said ballot."

It will be noted that section 191 of the charter provides that all candidates for said office shall be nominated at the primary election held on the third Tuesday in September, "as provided for in the direct primary law in the state of California." That portion of the State Primary Law which seems to throw any light on the question here involved, is a portion of section 23 thereof (Deering's Gen. Laws 1923, Act 2256), which is as follows:

"Except in the case of a candidate for nomination to a judicial, school, county, township or municipal office the person receiving the highest number of votes at a primary election as the candidate for the nomination of a political party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot voted at the ensuing election; provided, he has paid the filing fee as required by section seven of this act; and provided, further, that no candidate for a nomination for other than a judicial, school, county, township or municipal office who fails to receive the highest number of votes for the nomination of the political party with which he was affiliated thirty-five days before the date of the primary election, as ascertained by the secretary of state from the affidavit of registration of such candidate in the office of the county clerk of the county in which such candidate resides, shall be entitled to be the candidate of any other political party. * * *

"In the case of a judicial, school, county, township, or municipal office, the candidates, equal in number to twice the number to be elected to such office, or less, if the total number of candidates is less than twice the number of offices to be filled, who receive the highest number of votes cast on all the ballots of all the voters participating in the primary election for nomination to such office, shall be the candidates for such office at the ensuing election, and their names as such candidates shall be placed on the official ballot voted at the ensuing election; provided, however, that in case there is but one person to be elected at the November election to any judicial, school, county, or township office, any candidate who receives at the August primary election a majority of the total number of votes cast for all the candidates for such office shall be the only candidate for such office whose name shall be printed on the ballot at the ensuing election. * * *"

[1] If section 191 of the charter stood alone, it would seem clear that the machinery provided for taking care of the results of the primary election as outlined in the portions of section 23 of the State Primary Law as quoted would govern; and, in that event, no different method of election would be provided, and, under section 2¾ of article 2 of the Constitution, the one receiving the majority of votes for the office would be elected. But we have in the charter not only the provisions of section 191, but also those of section 190, in which it is especially provided that "the provisions of the general laws of the state governing elections for state and county officers," shall also govern election in this city, in matters for which no provision is made under its charter. The word "elections" as here used, includes both general municipal and primary elections, under the terms of section 186 of the charter. These provisions amplify section 191 of the charter, by making applicable not only the direct primary law of the state, but all the general laws of the state governing elections for state and county officers. One of these general laws is the right to write in at the general election the name of a person not nominated at the primary. Section 187 of the charter provides specifically that members of the council and other city officers are to be elected, not only at a general municipal election, but at a particular general municipal election, to wit, the first one to be held under the terms of this charter, the exact day thereof being named. In thus specifically providing that the first officers be elected on a definite date, at a *general* election, which is in the charter differentiated from a *primary* election, and in specifically applying to both the primary election and the general municipal election, the machinery and method of procedure provided for not only by the State Primary Law, but also by the laws of the state applying to and governing the election of state

and county officers at all elections, thereby including those portions of the state law permitting the writing in of the names of a person not nominated in the primary election, and in making no specific provision as to how names shall go upon the ballots after the primary election, it must be held that the framers of the charter and the people in adopting the charter, had something in mind other than the application of the earlier parts of section 23 of the State Primary Law, as might be indicated in section 191 of the charter. If all they had in mind was to apply the general provisions of the state primary law, so far as they affect municipal elections, it would have been sufficient to leave the entire matter as provided for by section 191 of the charter; but they saw fit to insert also, and first, the additional provisions in section 190 of the charter, heretofore referred to.

Since they did not leave it entirely to be governed by the provisions of the State Primary Law, but specifically added the additional provisions, a different method of election is provided by this charter, than would have been the case had section 191 of the charter stood alone. In effect, section 190 of the charter adds the word "municipal" to the latter part of the quoted portion of section 23 of the State Primary Law, and *also* makes all other state election laws, both for primary and general elections, apply to this particular city, except as otherwise provided in the charter.

Section 2¾ of article 2 of the Constitution excludes the operation of a part of the general law of the state, in certain circumstances, by providing that no further right to write in the name of another person exists, where a certain result occurs in the primary election. But it expressly allows any particular city to provide to the contrary. While the charter involved in this case is inartificially drawn, in this particular respect, it is apparent that in its entirety it has made all the laws of the state governing both primary and general elections for all state and county officers applicable, no matter what the result at the primary, and thus a different method of election has been provided.

[2-4] It is fundamental that wherever possible, a statute or Code section shall be construed so as to give meaning and effect to the instrument as a whole, and to each part thereof. Code Civ. Proc. § 1858. The same rule of interpretation applies to a city charter. From the extremely hasty examination which has been made necessary by the circumstances attending this case, we are of the opinion that, if all portions of this charter in question be given effect, as they should be, there is provided a different method for proceedings after the primary election, than those provided for in the State Primary Law alone, and that this different method consists in refusing to adopt alone the first part of section 23 of the State Primary Law, as it applies to municipal elections, which provides for placing the names of the two candidates receiving the highest vote on the ballot, and in lieu thereof, this charter provides for adding, in effect, the word "municipal" to the list of officers named in the latter part of the quoted portion of section 23, and for adding also all other provisions of the state law, applying to the election of state and county officers, including the right to write in the name of a person not appearing on the ballot. Therefore, under the circumstances set forth in the petition herein, the name of Fred M. Lindsley should alone go on the ballot, with the right preserved to the electors to write in the name of any other person if they so desire.

If our views as thus hastily formed are not correct, then the only alternative possible is to hold that there is no different method provided for in the charter of the city of Riverside than that contemplated in section 2¾ of article 2 of the Constitution. In that event, the constitutional provision applies, and, a person already having been elected to the office in question, the right of the petitioner to have his name included on the ballot necessarily fails. For the reasons given, the demurrer is sustained, and the issuance of a peremptory writ as prayed for, is refused.

We concur: SLOANE, P. J.; MARKS, J.

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101 Cal. App. 709

KOLB et al. v. RUSCO et al. (two cases).
(Civ. 6796.)

District Court of Appeal, First District, Division 2, California. Nov. 7, 1929.

Evidence ⚷417(9)—Parol evidence was admissible to establish number of persons that were to be furnished for theater performance under written contract silent thereon.

Where written contract for performance at theater at certain time and place contained no specific agreement relating to number of persons who should take part in play, parol evidence was admissible to establish number of persons that were to be furnished under contract.

Appeals from Superior Court, Alameda County; James G. Quinn, Judge.

Actions by William C. Kolb and another, doing business as Kolb & Dill, against W. A. Rusco and another, and by C. William Kolb and another, copartners doing business under the firm name and style Kolb & Dill, against W. A. Rusco and another. Judgments for defendants, and plaintiffs appeal. Affirmed.

J. W. Dorsey, W. E. Cashman, and Theodore Hale, all of San Francisco, for appellants.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Silverstein & Silverstein, of Oakland, for respondents.

STURTEVANT, J. The plaintiffs commenced an action to recover moneys alleged to be due under a contract of employment. The defendants answered and filed a cross-complaint. The plaintiffs answered the cross-complaint, and a trial was had before the court sitting without a jury. The court made findings in favor of the defendants, and, from a judgment entered thereon, the plaintiffs have appealed.

On the 16th day of March, 1927, the parties entered into a written contract which contained among others, the following:

"Memorandum of agreement, entered into this 16 day of March, 1927, between Kolb and Dill, party of the first part, and W. H. Rusco, party of the second part.

"Whereby it is mutually agreed that said party of the first part hereby engaged to play Kolb and Dill in 'Queen High' at Alameda, Cal. for the term of One Night, and no Matinee, beginning Tuesday, March 29, 1927 and terminating ——— making in all One performance.

* * * * * *

"The said party of the first part, in consideration of one dollar in hand (the receipt of which is hereby acknowledged) and of certain payments herein named, made by said party of the second part, agrees to faithfully perform at the above theatre for the above time and will not perform previously at any other place of entertainment in said city during the season, furnishing entire entertainment on the stage, and such display printing as necessary, with dates for same, and conform to the rules and regulations which govern said place of entertainment.

* * * * * *

"For the faithful observance and fulfillment of said party of the first part of each and all of the above conditions, the said party of the second part agrees to pay him or his representatives the sum resulting from the following terms: Said party of the second part agreed to pay to said party first part the sum of sixteen hundred dollars ($1600.) for the said one performance. Said sum to be paid at eight o'clock on the night of the performance. * * *"

The plaintiffs claim that on the evening of March 29, 1927, they, together with their associates, eleven persons in all, appeared at the theater ready, able, and willing to perform their contract, and that they were refused admittance to the theater. In reply the defendants contend that the plaintiffs appeared with only a part of their cast, eleven persons instead of eleven persons and a chorus consisting of twelve women and six men. The plaintiffs do not dispute the fact, but claim that under their contract they were not bound to produce a chorus of twelve women and six men. The same contention arose in the trial court. The trial court admitted certain evidence over the objection of the plaintiffs and decided the controverted question against the plaintiffs and in favor of the defendants. The case presents many attacks, all of which depend on whether the trial court erred in admitting evidence to enable it to interpret the contract. The plaintiffs planned and organized the performance as a musical comedy on or about the 1st day of November, 1926, carrying a cast of eleven persons, together with a chorus of twelve women and six men. As so organized, the musical comedy was produced by the plaintiffs at many places in California and Arizona between the 24th day of November, 1926, and down to and including the 22d day of March, 1927. When the performance was being so produced at the Wilkes in San Francisco during said season, the defendants attended, and later the contract above set forth was entered into. The chorus had been organized and taken from Los Angeles. At the time the contract was executed, the troupe was at San Diego. On its return from San Diego and while at Los Angeles, on the 22d day of March, 1927, the chorus was dispensed with and disbanded. When the defendants heard that the plaintiffs had dismissed the chorus, they immediately notified the plaintiffs that the plaintiffs must bring the chorus to Alameda or the defendants would refuse to accept the performance as a compliance with the terms of the contract. Many other items of evidence of a similar nature were introduced by the defendants. The plaintiffs do not specially complain of any one item, but they complain generally that the trial court should have confined the parties to the facts stated on the face of the written contract. In this connection they take the position that the written contract was clear and unambiguous and therefore that extrinsic evidence was not admissible for any purpose. They say, "In the absence of any specific agreement relating to the number of persons who should take part in the play, other than the principals, it is hardly necessary to observe that the contract, omitting any such provisions, left the plaintiffs at liberty, in the absence of any allegations or showing of fraud, to cut down the cast and arrange and rearrange the cast in any manner they saw fit, irrespective of what might have been in the minds of the defendants at the times the contracts were executed." The foregoing contention is vehemently controverted by the defendants. They cite and rely on Nelson v. Dutton, 63 Cal. App. 717, 220 P. 12; Reid v. St. John, 68 Cal App. 348, 229 P. 863; 22 C. J. 1261, § 1683; Balfour v. Fresno C. & I. Co., 109 Cal. 221, 224, 225, 41 P. 876. The authorities cited clearly support the defendants, and the trial court did not err in admitting the evidence complained of.

At the same time the above entitled case was tried, another case entitled Kolb and Dill v. Rusco and Giesea, was also tried. Except as to the name of the theater, the name of the place, and the date of the engagement, the facts are the same. Both cases were tried together in the trial court, and both records are contained in the transcripts on file. One set of briefs was prepared. All that has been said regarding the first case is applicable to the second.

We find no error in the record. Both judgments are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

101 Cal. App. 741

LUNDBLADE v. BOYES et ux. (Civ. 6734.)★

District Court of Appeal, First District, Division 1, California. Nov. 12, 1929.

Rehearing Denied Dec. 12, 1929. Hearing Denied by Supreme Court Jan. 6, 1930.

1. Fraud 🔑58(2)—Evidence in action for deceit held to sustain conclusion that plaintiff erected dwelling in reliance on defendants' promise to convey premises, without intention to perform.

Evidence in action to recover damages for deceit *held* to sustain conclusion of trial court that plaintiff erected a dwelling on premises owned by defendants in reliance on promises of defendants to convey, which they did not intend to perform when the same were made, and which they subsequently refused to perform.

2. Appeal and error 🔑1010(1)—Findings supported by sufficient evidence cannot be disturbed.

Findings of trial court supported by sufficient evidence cannot be disturbed on appeal.

3. Tender 16(2)—Tender was unnecessary where it was certain that it would have been refused.

Where it was certain that owners of lot on which building was erected pursuant to promise to convey would not have accepted tender of reasonable value thereof, thereby in effect repudiating contract, a tender was unnecessary.

4. Fraud 🔑12—Promise to convey premises on which building was erected, without intention of performing, constituted willful deceit, for which damage was recoverable (Civ. Code, §§ 1709, 1710).

Promise of owners to convey premises on which building was erected, without any intention of performing the same, constituted willful deceit within Civ. Code, § 1710, for which they were liable for any damage thereby suffered in accordance with section 1709.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Charlotte Lundblade against William Boyes and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Puter & Quinn, of Eureka, for appellants.
Nelson & Ricks, of Eureka, for respondent.

PER CURIAM. An action to recover damages for deceit, in which judgment was entered for the plaintiff.

Defendants, who are husband and wife, own a ranch consisting of 320 acres of timber and farm land situated in Humboldt county. The plaintiff alleged that, induced by the oral promises of the defendants to convey to her for its reasonable value a lot approximately one-fourth of an acre in area which formed a part of the above ranch, she built a dwelling house upon the lot; that the defendants did not intend to perform their promises when the same were made, and have since failed and refused to perform, all to the damage of plaintiff in the amount expended for the construction of the dwelling.

The court found in conformity with the above allegations of the complaint, and further that the dwelling cost $849.36, for which sum judgment was entered.

Defendants, who have appealed, contend that the findings are unsupported; that plaintiff as a consequence of her own default was not entitled to recover; and that the judgment was not in accord with the correct measure of damages in actions for deceit.

That the boundaries of the lot were marked by defendants, and the dwelling house erected thereon with their permission is undisputed. No price for the lot was agreed upon previous to the erection of the dwelling, but, according to the plaintiff, she was told by defendants "* * * not to worry about the price; everything would be fixed up and the price would be the smallest thing. * * *" She testified that she was ready and willing to pay the reasonable value thereof, but, after the erection of the dwelling, defendants demanded $1,000 for the lot, which she declined to pay.

According to the testimony of William Boyes, he would not have sold for less, although the evidence shows the value of the timber land in which the lot was situated to have been between $500 and $1,000 per acre.

[1, 2] The position of the defendants with respect to the transaction is not clear from their testimony. After the controversy arose, they claimed that the agreement was for a lease of the lot, and caused the dwelling to be insured for $1,000 as their property. At the trial they claimed that they had offered to convey the lot to the plaintiff for $1,000 after the survey and location of a proposed public highway through the land. Despite the conflict in the testimony, there was sufficient evidence to support the conclusion of the trial court that the dwelling was erected in reliance upon promises which the defendants did not intend to perform when the same were made, and which they subsequently refused

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★Rehearing denied. Hearing denied by Supreme Court.

to perform. Under such circumstances, the findings cannot be disturbed on appeal. Sherman v. Sandell, 106 Cal. 373, 39 P. 797; Waer v. Waer, 189 Cal. 178, 207 P. 891; Aronson & Co. v. Pearson, 199 Cal. 295, 249 P. 191.

[3] We cannot agree with the claim that plaintiff was in default. The testimony shows that she was ready and willing to pay the reasonable value of the lot, which at most was but one-fourth of the amount demanded by defendants, and that she visited their residence for that purpose. It is true that no actual tender was made; but, the defendants having in effect repudiated the contract found by the court, and it being certain that it would have been refused, a tender was unnecessary. Dowd v. Clarke, 54 Cal. 48; Scribner v. Schenkel, 128 Cal. 250, 60 P. 860; Pierce v. Lukens, 144 Cal. 397, 77 P. 996; Liver v. Mills, 155 Cal. 459, 101 P. 299; Burg v. Harris, 72 Cal. App. 379, 237 P. 399; Retsloff v. Smith, 79 Cal. App. 443, 249 P. 886.

[4] The promise made by defendants without any intention of performing the same constituted under the circumstances shown willful deceit (Civ. Code, § 1710), for which they were liable for any damage thereby suffered by the plaintiff (Civ. Code, § 1709). Here the damage which proximately resulted was the amount found by the court to have been expended in constructing the dwelling, and for which the judgment was entered.

We find no merit in the appeal, and the judgment is accordingly affirmed.

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101 Cal. App. 726

LEIPSIC v. TAGGART. (Civ. 5711.)

District Court of Appeal, Second District, Division 1, California. Nov. 8, 1929.

Brokers ⇨49(2)—Denying commissions on selling mortgage held by bank for pledgee held justified, where defendant's proposal was conditioned on bank's taking up loan.

Where defendant's written proposal to broker to sell mortgage contained provision that defendant had "borrowed at my bank against this mortgage and the sale to you is predicated on their allowing me to take loan up immediately," and where pledgee for whom the bank held the mortgage refused to allow his loan on the mortgage to be paid up and exercised option to purchase it, receiving the mortgage from the bank, trial court was justified in finding for defendant in broker's action for commissions for securing purchaser for the mortgage.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Harry Leipsic against M. W. Taggart. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas J. Pitts, of Ontario, for appellant.

Robert F. Shippee, of Los Angeles, for respondent.

YORK, J. The plaintiff brought an action against the defendant to recover a broker's commission, alleging that he produced a buyer ready and willing to buy and who offered to buy the mortgage, which defendant had offered to sell, on terms made by the defendant, and that the defendant's offer was accepted by the buyer and he agreed to pay 2 per cent. commission to the plaintiff upon consummation of the transaction.

This mortgage, prior to this time, had been hypothecated by the defendant at the Citizens' National Trust & Savings Bank to secure a loan made by one Feigenbaum to defendant, which loan had been negotiated *at* the bank, and the mortgage and note were being held and handled by the bank when the following offer was signed by the defendant. Defendant's only offer to sell and pay commission was the following:

"September Fourteenth, 1925.

"Mr. Harry Leipsic, 3809 Wilshire Blvd., Los Angeles, Calif. Dear Sir: "I hereby offer to sell for your client an existing first mortgage dated August 22nd, 1925, on the house and property at 49 Fremont place, known as lot 49, tract 89, as per map recorded in book 14, pages 166–167 of maps.

"This mortgage is for $35,000.00 payable on or before three years from August 22nd, 1925, to the order of Charles P. Fisher at 8% made by A. A. Cochrane.

"You are authorized to offer this at 4% discount and 2% commission to you on consummation of the transaction.

"At the present time, I have borrowed at my bank against this mortgage and the sale to you is predicated on their allowing me to take the loan up immediately.

"Very truly yours,

"M. W. Taggart."

At the time this offer was signed, however, the defendant explained the last paragraph of this letter by stating that the last condition was inserted because he did not know if the bank would accept the money, and that, if the bank would accept the money, he would be very glad to allow the customer McGuire to buy the mortgage as soon as he found out whether the bank would allow such payment to be made, and whether it could be arranged by defendant so that he could deliver the mortgage to the customer of the plaintiff. As soon as the request was made at the bank, Feigenbaum refused to allow his loan to be paid up and forthwith exercised an option to purchase the mortgage, which option Feigenbaum had as a part of his loan agreement, and the bank forthwith turned over to said Feigenbaum the mort-

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⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes gage in question. The misunderstanding between the parties seems to have arisen from the fact that the loan was negotiated by and at the Citizens' National Trust & Savings Bank, and that the bank continued to hold the mortgage only for Feigenbaum and subject to such rights as Taggart had therein.

The last paragraph of the letter of defendant Taggart, which we have heretofore set out, to wit: "At the present time I have borrowed at my bank against this mortgage and the sale to you is predicated on their allowing me to take the loan up immediately," is not necessarily in conflict with this explanation of the fact, and it is not in conflict with the statement made by Mr. Taggart as testified to by Mr. McGuire, the prospective purchaser furnished by plaintiff herein.

There was sufficient evidence for the trial court to make its finding in favor of the defendant, and the judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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101 Cal. App. 733

LOS ANGELES PRINTING CO. et al. v. LOS ANGELES ROUND-UP et al. (GANAWAY, Intervener). (Civ. 7096.)

District Court of Appeal, First District, Division 2, California. Nov. 9, 1929.

Appeal and error ⚿151(6)—Labor claimant, who failed to file claim in attachment suit or intervene, was not aggrieved and could not appeal from stipulated judgment (Code Civ. Proc. §§ 1206, 1207).

In attachment suit in which labor claimants filed claims with sheriff under Code Civ. Proc. §§ 1206, 1207, and judgment was entered by stipulation, labor claimant, who was not shown to have joined in claim under statute or to have received funds in sheriff's hands, and who failed to intervene in action but merely filed notice of motion for intervention, was not an aggrieved party, and therefore could not appeal from the judgment.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by the Los Angeles Printing Company and another against the Los Angeles Round-Up and others, in which George H. Ganaway filed notice of motion for intervention. From the judgment George H. Ganaway appeals. Appeal dismissed.

George H. Ganaway, in pro. per.

Fredericks, Hanna & Morton, of Los Angeles, for respondents Los Angeles Round-Up and others.

KOFORD, P. J. Several parties plaintiff filed attachment suits against defendants and levied attachments. Various labor claimants came forward, claiming a preference upon the property and funds attached. Thereafter a judgment was entered pursuant to stipulation. The stipulation was signed by the attorneys for the several parties plaintiff and by the attorneys for the defendants and also by a firm of attorneys who the stipulation said represented at that time all of the labor claimants who had filed claims with the sheriff pursuant to sections 1206 and 1207 of the Code of Civil Procedure. The stipulation provided the judgment might be entered for the plaintiffs as prayed in their several complaints and that upon execution being issued the sheriff would pay out of the moneys in his hands $2,791.14 as full satisfaction of all labor claims and that the balance should be applied in satisfaction of the plaintiffs' judgments. A judgment was made by the court upon reading and filing this stipulation on the 15th day of April, 1926.

Thereafter the appellant herein, George H. Ganaway, a labor claimant, gave notice of a motion to vacate said judgment. The said motion was apparently denied by the court, although the clerk's transcript does not show such a minute order. The said George H. Ganaway thereupon filed a notice of appeal to the Supreme Court from the judgment rendered in said action and from the whole thereof and stated that said judgment appealed from was entered on the 15th day of April, 1926.

It is the claim of respondent, in answer to appellant herein, that the said appellant is not a party to said action, is not aggrieved, and cannot prosecute the appeal from the said judgment. Our examination of the record, which is a clerk's transcript, shows that said Ganaway, in propria persona, filed a notice of motion for intervention November 10, 1925, and that the court upon the same day granted the said motion for leave to intervene in the said actions. No complaint in intervention was filed by him and nothing further was done until he made the motion to vacate the stipulated judgment. The record fails to show whether or not the said Ganaway filed a claim with the sheriff under sections 1206 and 1207 of the Code of Civil Procedure. Furthermore, it does not appear whether, if he filed such a claim, he was represented by the attorneys joining in the stipulation for the judgment. Neither does it appear whether he received his pro rata share of the fund in the hands of the sheriff which was distributed amongst the labor claimants. The record is therefore insufficient to show whether or not the said Ganaway has any cause for complaint in this proceeding.

The said appellant, never having intervened in the action and not being a party to the action, is not aggrieved by the judgment which was entered by stipulation. If he was not a party to the stipulation, he is neither

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

bound by the judgment nor is he aggrieved thereby in any way which entitles him to appeal. If he were a party to the stipulation, of course, he would have no complaint whatever under the other facts appearing in the record. It is therefore ordered that the said appeal be and the same is hereby dismissed.

We concur: STURTEVANT, J.; NOURSE, J.

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101 Cal. App. 715

PACIFIC ELECTRIC RY. CO. v. PETROLEUM MIDWAY CO., Limited. (Civ. 5595.)

District Court of Appeal, Second District, Division 1, California. Nov. 7, 1929.

Carriers ⚷196—Evidence, in action to recover demurrage, supported finding that cars were held in order to permit railroad to determine applicable tariff rates.

Evidence, in railroad's action to recover demurrage charges, *held* to support finding that cars were not held in storage yard for consignee's order, but were held in order to permit railroad to determine matter of tariff rates applicable.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by the Pacific Electric Railway Company against the Petroleum Midway Company, Limited. Judgment for defendant, plaintiff appeals. Affirmed.

Frank Karr, C. W. Cornell, and R. E. Wedekind, all of Los Angeles, for appellant.

Morgrage & Stanley and R. K. Barrows, all of Los Angeles, for respondent.

HAHN, Justice pro tem. Appeal by plaintiff, Pacific Electric Railway Company, from a judgment for the defendant Petroleum Midway Company, Limited, in an action brought to recover judgment for $657 claimed by plaintiff as owing from defendant for demurrage charges on certain carloads of freight consigned to the defendant.

The record fairly justifies the following brief statement of the material facts necessary to a consideration of the legal question which, in our opinion, is determinative of this appeal.

Plaintiff and appellant is a public carrier with tracks located in and about Wilmington, Cal. The defendant and respondent operates an oil refinery at Wilmington. During the month of June, 1923, an ocean freighter carrying a consignment of manufactured steel for respondent, instead of docking at its usual wharf at San Pedro, where the respondent expected to receive the steel, unloaded its cargo at East San Pedro, and delivered to the Union Pacific Railroad Company the steel in question to be delivered over its rails to respondent at Wilmington. It required 32 cars to carry the steel, these cars being loaded and delivered in lots of 6 to 8 cars at a time. The Union Pacific moved the cars over its tracks to Wilmington, where it delivered the cars to appellant's tracks for delivery by it to respondent. Upon receipt of the cars on appellant's track, Mann, appellant's agent at Wilmington, caused them to be placed in the general storage yards, because appellant's published tariff provided no rates for spotting cars received under the conditions affecting these cars on its public unloading track. Thereupon, Mann telephoned to A. P. Lee, traffic manager for respondent, advising him that appellant had these cars of steel for delivery to respondent in its general storage yards, and that he could not spot them on its public unloading track because of the tariff difficulty. Lee protested the fact that the steel was in the hands of the railroad company, pointing out that under respondent's orders the steel was to be delivered to it by the steamship company at a wharf at San Pedro. In this conversation, it was suggested by Mann that the tariff difficulty might be avoided if permission were obtained from some utility having a private side track connected with appellant's track to place the cars of steel on such side track for unloading. The conversation ended without any determination of the question as to where the cars were to be spotted but with a definite declaration by Mann that before the cars could be spotted on appellant's public unloading track as requested by Lee, permission would have to be secured from the traffic department of appellant at Los Angeles.

Appellant contends that the result of the conversation was that Lee would take the necessary steps to solve the problem, either by securing permission from some private interest to use its side track, or secure a ruling from the traffic department of appellant at Los Angeles that would enable the placing of the cars on appellant's public unloading track.

Respondent contends that the result of the conversation was that the matter of determining when and where the cars would be spotted was left entirely to appellant.

The testimony as shown by the record relating to the conversation in question does not indicate clearly what, if any, agreement was reached concerning the matter. However, it appears that P. H. Mann, appellant's agent at Wilmington, while on the witness stand was asked the following question and gave the answer which follows:

"Q. As I understand, the reasons why these cars were not switched immediately onto the switch track was that you had no tariff to permit you to receive a car from another line and put it on your particular delivery track? A. That is right."

It appears that in due course the traffic department of appellant decided that the cars in question could be spotted on its public unloading track, and a charge of $2.50 per car made therefor. This was agreed to by respondent and the cars were so placed. The cars were promptly unloaded by respondent after they were placed on the unloading track.

The controversy here arises over the question as to whether or not the appellant is entitled to collect demurrage charges on the cars during the time they lay in its general storage yards awaiting determination of the question as to where they were to be placed for unloading.

The appellant's published tariff regulations contained the following rules relating to the matter under consideration:

"Rule 1: Section A: 'Cars * * * held for or by consignors or consignees for loading, unloading, forwarding direction or for any other purposes * * * are subject to these demurrage rules.'

"Rule 3: Section B-1: 'On cars held for orders * * * whether such cars have been placed in position to unload or not, time will be computed from the first 7:00 a. m. after the day on which notice of arrival is sent or given to the consignee or party entitled to receive the same.'

"Rule 2: Section A: 'Forty-eight hours' (two days) free time will be allowed for loading or unloading all commodities.'

"Rule 7: Section A: '* * * After the expiration of free time allowed, the following charges per car per day, or fraction of a day, will be made until car is released:

" 'For each of the first four days, $2.00.

" 'For each succeeding day, $5.00.' "

It is appellant's contention that a "constructive placement" was made of the cars when they were placed in its general storage yards and respondent notified of their arrival. This contention has for its basis the assumption that after the conversation between Mann and Lee the cars were held by appellant "for orders" from respondent, and rule 3 of appellant's tariff regulations is pointed out as applying to the situation.

Respondent contends that the record does not support appellant's position that the cars were held awaiting respondent's orders, but that the delay was entirely due to appellant's difficulty in determining what placement it could make of the cars under its tariff regulations.

The court found that: "Defendant did not detain or retain any of said cars in excess of the forty-eight hours free time allowed by said tariff, but on the contrary unloaded each and every one of said cars promptly upon the delivery thereof to it and redelivered and released the same to plaintiff within said forty-eight hour period."

We are of the opinion that respondent's contention must be sustained, for the reason that there is abundant evidence in the record to support the conclusion that the cars in question were not held by appellant in its storage yard for respondent's orders, but were held for appellant to determine the matter of tariff rates applicable. With this conclusion, it readily follows that the finding complained of is supported by the evidence and that the judgment finds support both in the evidence and in law.

The judgment is affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

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101 Cal. App. 723

PEOPLE v. BABA. (Cr. 1543.)

District Court of Appeal, First District, Division 1, California. Nov. 8, 1929.

1. Criminal law 🔑511(2)—Evidence corroborating accomplice's testimony is sufficient if it tends to connect defendant with commission of crime charged (Pen. Code, § 1111).

While testimony of an accomplice must be corroborated by other evidence tending to connect defendant with commission of the offense, under Pen. Code, § 1111, such corroborating evidence need not extend to all the elements of the offense, but is sufficient if it tends to connect defendant with commission of crime charged; weight of such evidence being for jury.

2. Criminal law 🔑511(4)—Defendant's explanation of circumstances of forgery, testimony respecting his business relations with accomplice, and evidence of his misrepresentations in cashing check, corroborated accomplice's testimony (Pen. Code, §§ 470, 1111).

In prosecution for forgery of check drawn by codefendant, under Pen. Code, § 470, defendant's attempted explanation of circumstances under which check was made, his testimony respecting his business relations with codefendant, with evidence of misrepresentations at time check was cashed, corroborated testimony of accomplice with respect to defendant's guilty knowledge, within requirement of Pen. Code, § 1111.

3. Criminal law 🔑370—Other false checks drawn by defendant and codefendant about time of forgery complained of were admissible to show guilty knowledge (Pen. Code, § 470).

In prosecution under Pen. Code, § 470, for forging and uttering check, other false checks drawn by defendant and codefendant about the time of the forgery complained of were admissible for purpose of showing guilty knowledge or intent.

4. Forgery 🔑44(½)—Evidence held sufficient to support conviction for forgery (Pen. Code, § 470).

In prosecution under Pen. Code, § 470, for forging check and knowingly uttering and passing the same as genuine, evidence, including proof of other false checks drawn about the same time, *held* sufficient to support conviction.

5. Forgery ⟹48—In prosecution for forgery by aiding another in false drawing of check and by utterance thereof, instruction calling attention to statute making signing of another's name to check without authority forgery held not error (Pen. Code, §§ 31, 470).

In prosecution under Pen. Code, § 470, for forgery, it was not error for the court to call the attention of the jury to that portion of the statute providing that one signing another's name to check without authority is forgery, where the evidence sufficiently showed that defendant aided and abetted his codefendant in affixing forged name; defendant being principal under Pen. Code, §§ 31, 470, whether he aided in drawing check or uttered it as genuine with knowledge of forgery.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Malcolm Baba was convicted of forgery, and he appeals. Affirmed.

Leo A. Sullivan, of Oakland, and W. H. Older, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

PER CURIAM. Appellant was charged by an information filed in the superior court of Alameda county with the violation of section 470 of the Penal Code, it being alleged that he, with one Elbert Pimental, forged a certain check, and knowingly uttered and passed the same as genuine. He was found guilty, and has appealed from the judgment of conviction and from an order denying his motion for a new trial.

As grounds for the appeal it is contended that the evidence was insufficient to establish an intent to defraud, and also that the court failed to instruct the jury as to matters material to the defense.

The check in question purported to have been drawn by Manuel Pimental, whose name was signed thereto by Elbert Pimental. The date, amount of the check, and appellant's name as payee were written thereon by the latter, who indorsed the instrument and procured it to be cashed. The evidence shows that the name of Manuel Pimental, who is the father of Elbert Pimental, was attached to the check without authority, and the latter testified that appellant knew the fact and was the moving spirit of the transaction. It was also shown that other false checks were drawn by appellant and his codefendant about the same time.

[1-4] While a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense (Pen. Code, § 1111), such corroborating evidence need not extend to all the elements of the offense (People v. Jones, 87 Cal. App. 482, 490, 262 P. 361), and it is sufficient if it tends to connect the defendant with the commission of the crime charged; its weight being a question for the jury (People v. Barker, 114 Cal. 617, 46 P. 601). Here appellant's attempted explanation of the circumstances under which the check was made, his testimony respecting his business relations with his codefendant, together with evidence of misrepresentations at the time the check was cashed, strongly tended to prove his knowledge of the falsity of the check, and in this respect corroborated the testimony of his accomplice. Moreover, the other checks mentioned were admissible for the purpose of showing guilty knowledge or intent (People v. McGlade, 139 Cal. 66, 72 P. 600; People v. Hansen, 62 Cal. App. 105, 216 P. 399; People v. Lucas, 67 Cal. App. 452, 227 P. 709), and, with the other evidence sufficiently supported the conclusion of the jury on that issue.

[5] Appellant complains that the court in its instructions improperly called attention to that portion of section 470 of the Penal Code which provides that "every person who, with intent to defraud, signs the name of another person, * * * knowing that he has no authority so to do, to, * * * check * * * is guilty of forgery." While it is conceded that appellant did not sign the name of the purported drawer to the check, the evidence sufficiently shows he aided and abetted his codefendant in affixing the forged name thereto, and, under section 31 of the Penal Code, he was a principal to the forgery, whether the same was accomplished by the above method or by uttering, publishing, or passing such instrument as true and genuine, knowing the same to be forged; the latter acts being also denominated forgery by the section first mentioned.

The jury was fully and fairly instructed as to the law of the case, and a review of the record convinces us that its findings are supported and that no error occurred in the proceedings which reasonably sustains the conclusion that the result was a miscarriage of justice.

The judgment and order appealed from are accordingly affirmed.

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102 Cal. App. 124

HARE v. CANFIELD. (Civ. 6261.)

District Court of Appeal, Second District, Division 2. California. Nov. 20, 1929.

1. Automobiles 🔑245(72)—Contributory negligence of pedestrian, struck by automobile while on crosswalk after passing safety zone, when car was 100 feet away, held for jury.

Contributory negligence of pedestrian on diagonal crosswalk about 18 inches from curb opposite public house of worship when struck by automobile, which was apparently 250 or 300 feet away when she first saw headlights and in middle of street about 100 feet distant when she reached safety zone 11 feet 4 inches from curb, *held* for jury.

2. Negligence 🔑136(9)—Contributory negligence is law question only when evidence compels such inference.

Contributory negligence is a question of law only when the evidence compels one inference, that is, plaintiff's negligence.

3. Appeal and error 🔑203(3)—Physician's qualifications to testify as to nurses' average charges and reasonableness of charges made need not be considered on appeal, in absence of appropriate objection and evidence below.

Where no objection was interposed in court below to physician's testimony as to average charge for outside nurse, on ground that he did not qualify as expert on question of usual charges by practical nurses, and there was no showing that nurse employed to care for plaintiff was not a professional nurse, such witness' qualifications and reasonableness of nurse's charges need not be considered on appeal.

Appeal from Superior Court, Los Angeles County; Michael J. Roche, Judge.

Action by Nellie Hare against M. E. Canfield. Judgment for plaintiff, and defendant appeals. Affirmed.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

Harry D. Parker, of Los Angeles, for respondent.

CRAIG, J., Acting P. J. The respondent was injured by appellant's automobile while attempting to walk across a public street in the city of Los Angeles, and this is an appeal from a judgment rendered in her favor, holding that respondent was negligent, and rejecting a plea of contributory negligence.

Appellant concedes that the determination of the question here presented must be governed by the evidence given on behalf of the respondent. It is also agreed that respondent walked from her automobile on the westerly side of Glendale boulevard, to the safety zone, on the easterly side thereof, and that appellant was driving in a northerly direction upon said thoroughfare. Respondent testified that she first saw appellant's headlights when he appeared to be 250 or 300 feet away; that as she reached the middle of the street it was about 200 feet from her, and that it was in the middle of the street and about 100 feet distant when she arrived at the safety zone which a diagram indicated as being 11 feet 4 inches from the easterly curb. It appears that, as she approached within about 18 inches of the curb, appellant struck her with his machine.

[1, 2] It is argued that respondent, seeing the automobile at a distance upon a busy street, should have anticipated danger, that there is an easterly curve at the point of contact, and that it was negligence upon her part in attempting to cross after observing the lights of the approaching car. She testified, however, that she did not know the speed of the machine, that she was in the diagonal crosswalk provided for pedestrians, and that she watched the automobile nearly all of the time until she neared the easterly safety zone. The trial court may well have concluded that respondent was justified in anticipating that one approaching from far down the street, with headlights, would be alert for pedestrians upon a crosswalk. It is admitted that the accident occurred in front of a public house of worship where pedestrian and vehicular traffic might at any time be heavily congested, and a photograph which was introduced in evidence shows that the curve in the street, which appellant stresses, is not such as to obstruct the view of drivers. Reliance is attempted to be placed upon Lord v. Stacy, 68 Cal. App. 517, 229 P. 874, wherein a pedestrian was struck by an automobile whose lights she first saw when stepping from the curb. The distinction is obvious. The rule of ordinary care with which pedestrians are charged in such cases, and to which the appellant here assiduously adheres, cannot be invoked to the exclusion of other considerations. Resolving all intendments in favor of the judgment, and in view of appellant's admission that he did not see the respondent in full view of his lights nor know of her presence in the street until he felt the impact, we do not deem it necessary to further discuss the evidence in this respect, nor do we think the court erred. Minor v. Foote (Cal. App.) 280 P. 197. Contributory negligence is a question of law only when the evidence in a given case compels one inference, that is, the negligence of the plaintiff. Power v. Crown Stage Co., 82 Cal. App. 660, 256 P. 457.

[3] The only other contention of appellant is that the trial court allowed excessive damages for nursing and caring for the respondent. It appears that she remained for a period of about three months at the home of a Mrs. Richardson, who, it is argued, was not a professional nurse. The attending physician testified that the average charge for an outside nurse is "around $40 a week, when they give them nursing, care and board." For

aught that the record may reveal, Mrs. Richardson may have been a professional nurse. We are unable to find in her testimony or that of the doctor that she was not. It is also objected that this evidence was incompetent and irrelevant for the reason that the doctor did not qualify as an expert upon the question of usual charges when practical nurses are employed. No objection was interposed in the court below as to the evidence offered in these respects, and we are not called upon to consider the qualifications of the witness nor the reasonable character of the charges presented for the first time upon appeal.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

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102 Cal. App. 24

Ex parte HUEWITT. (Cr. 1095.)

District Court of Appeal, Third District, California. Nov. 15, 1929.

1. Criminal law 🔑258(2)—Language of memorandum of judgment, reciting defendant should be punished by $400 fine or six months in jail, held sufficient compliance with statute (Pen. Code, § 1446).

Language of memorandum of judgment entered in justice's docket, reciting that defendant should be punished by "Fine of four hundred dollars or serve term of six months in county jail of county of H.," *held* sufficient compliance with Pen. Code, § 1446.

2. Fines 🔑12—Where justice court had jurisdiction of offense of possessing liquor, statute providing defendant may be imprisoned until fine be satisfied at rate of $1 per day prevails (Pen. Code, § 1446).

Where justice court had jurisdiction of offense of possessing intoxicating liquor, Pen. Code, § 1446, providing that judgment that defendant pay fine may also direct that he be imprisoned until fine be satisfied in proportion of one day's imprisonment for every dollar of fine, prevails.

3. Criminal law 🔑258(4)—Language of justice's court docket memorandum of judgment for possessing liquor was not controlling and could be amended.

Language of justice's docket memorandum of judgment in prosecution for possessing liquor was not controlling, and docket could be amended by justice to conform to judgment as it was actually rendered.

4. Fines 🔑12—Justice's judgment for possessing liquor imposing fine of $400 or imprisonment of one day for each dollar, but not exceeding six months, held valid (Pen. Code, § 1446).

In prosecution in justice's court for possessing intoxicating liquor, judgment in effect ordering that defendant be fined $400, or in event of failure to pay fine that he be imprisoned in county jail for one day for each unpaid dollar of fine, provided, however, that term of imprisonment was not to exceed six months' duration, *held* valid judgment which neither violated the provisions of Pen. Code, § 1446, nor exceeded maximum penalty for the offense described by statute.

5. Fines 🔑12—That statute provided no penalty of imprisonment for offense did not preclude commitment to jail for nonpayment of fine (Pen. Code, § 1446).

That statute provided no penalty of imprisonment for first offense of possessing liquor did not preclude court from committing prisoner to jail, as provided by Pen. Code, § 1446, for nonpayment of fine which court was authorized to impose.

6. Fines 🔑12—In justice court, no limitation of term of imprisonment for possessing liquor as means of enforcing fine exists, except that it may not exceed one day for each dollar (Pen. Code, § 1446).

In justice court, no limitation of term of imprisonment for possessing liquor as means of enforcing fine exists, except that it may not exceed one day for each dollar of fine under Pen. Code, § 1446.

7. Criminal law 🔑260(11)—Defendant could not complain of discretion exercised in his favor in limiting imprisonment for nonpayment of fine (Pen. Code, § 1446).

Defendant could not complain of discretion which court exercised in his favor of limiting imprisonment for nonpayment of $400 fine to 180 days, where maximum term of 400 days was permissible under Pen. Code, § 1446.

8. Criminal law 🔑1213, 1214—Judgment for possessing liquor imposing fine of $400 or imprisonment for nonpayment, but not exceeding six months, did not violate constitutional inhibition against excessive fines or cruel punishment (Const. art. 1, § 6).

Judgment of justice of the peace, in prosecution for possessing liquor, imposing fine of $400 or imprisonment, but not exceeding six months, in county jail, for nonpayment of fine, in proportion of one day's imprisonment for every dollar of fine, *held* not to violate Const. art. 1, § 6, prohibiting excessive fine or cruel and unusual punishment.

9. Fines 🔑12—Imprisonment for nonpayment of fine is not distinct punishment (Pen. Code, § 1446).

Imprisonment for nonpayment of fine under Pen. Code, § 1446, is not distinct punishment, but is merely a means of enforcing payment of fine.

Application by C. Huewitt for a writ of habeas corpus. Writ denied.

Henry L. Ford, of Eureka, for petitioner.

S. E. Metzler, Dist. Atty., and A. G. Bradford, Asst. Dist. Atty., both of Eureka, for respondent.

ROLFE L. THOMPSON, J. This is a petition for a writ of habeas corpus.

The petitioner was held upon two charges. Since the filing of this petition the second complaint was dismissed. We have to consider only the first proceeding.

The petitioner was charged in the justice's court of Eureka township, Humboldt county, with the offense of having possession of intoxicating liquor. To this accusation he pleaded guilty and was sentenced to pay a fine of $400, for the nonpayment of which he was committed to the county jail one day for every unpaid dollar thereof. The memorandum of this judgment, which was entered in the justice's docket, recited that the defendant should be punished by "a fine of four hundred dollars, or serve a term of six months in the county jail of the county of Humboldt." From the stipulation of facts which was filed in this proceeding, it appears that the judgment and order of commitment, which were actually made and signed by the justice, provided that the defendant should "pay a fine of four hundred dollars, and in case said fine be not paid that * * * (he) be imprisoned in the county jail of the county of Humboldt, State of California, until the fine be duly satisfied, in the proportion of one day's imprisonment for every dollar of the fine but not to exceed in all six months."

It is contended this judgment is void as to the provision imposing the sentence of imprisonment for the reason that the statute authorizes no penalty of imprisonment for the first offense, and because the docket entry of the judgment does not conform to the provisions of section 1446 of the Penal Code.

[1, 2] The language of the memorandum which was entered in the docket might well have been more specific, but this precise form has been repeatedly upheld as a sufficient compliance with the statute. In re Glavich, 74 Cal. App. 144, 239 P. 707, 708; In re Riley, 142 Cal. 124, 75 P. 665; In re Cohen, 198 Cal. 221, 225, 244 P. 359; People v. Magoni, 73 Cal. App. 78, 82, 238 P. 112. In the Glavich Case, supra, the judgment provided that "the defendant, * * * pay a fine of $500 or [that he] be imprisoned in the county jail for 500 days." In the Riley Case, supra, the language of the judgment was that the defendant "pay a fine of $30, or * * * serve 15 days in the county jail." These judgments were sustained on the assumption that where the intention of the court is clear and the sentence which is prescribed is within the law, the statute will be deemed to be a part of the judgment for the purpose of fixing the rate of credit to which the prisoner is entitled in serving his term of imprisonment. When the superior court has jurisdiction of the cause, section 1205 of the Penal Code applies in fixing the rate of credit and the maximum term of imprisonment. When the justices' or police courts have jurisdiction of the offense, section 1446 of the Penal Code prevails. This section provides that: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine."

Under this section the ratio of imprisonment is definitely fixed at one day for each dollar of the fine. The statute prescribes no limitation of the maximum term of imprisonment as a means of satisfying a fine which is applicable to inferior courts. In this regard, it has been held there is a clear distinction between the provisions of section 1205 of the Penal Code, which is applicable to the superior court alone, and section 1446 of the same Code, which governs the ratio of imprisonment for the payment of a fine imposed by an inferior court. In re Kennerly, 190 Cal. 774, 214 P. 857.

[3-7] The language of the justice's docket memorandum of judgment was not controlling. This docket entry may be amended by the justice to conform to the judgment as it was actually rendered. In re Glavich, 74 Cal. App. 144, 239 P. 707. The judgment which was actually rendered and signed by the justice in the present case, in effect, ordered that the defendant be fined $400, or in the event of a failure to pay the same, that he be imprisoned in the county jail one day for each unpaid dollar of the fine, provided, however, that the term of imprisonment was not to exceed six months' duration. This was a valid judgment which neither violated the provisions of section 1446 of the Penal Code nor exceeded the maximum penalty for this offense which is prescribed by statute. In re Glavich, 196 Cal. 723, 239 P. 708. It does not appear from the record whether the defendant was charged with a first or subsequent offense. Assuming that it was his first offense, he was subject to a fine of $500 or imprisonment one day for every one dollar thereof. For the first offense of this nature the statute provides for no penalty of imprisonment distinct from the authorization to impose a fine. But this omission does not preclude the court from committing the prisoner to jail as provided by law for the nonpayment of the fine which the court is authorized to impose. Ex parte Garrison, 193 Cal. 37, 223 P. 64. When a statute prescribes a maximum penalty of imprisonment for a crime of which the superior court has jurisdiction, the judgment may not exceed the maximum term, even as a means of enforcing the payment of the fine. Section 1205, Penal Code. This limitation of imprisonment to enforce the payment of a fine does not apply to judgments of inferior courts. In re Kennerly, 190 Cal. 774, 214 P. 857. No limitation of the term of imprisonment in the present case, as a means of enforcing the fine exists, except that it may not exceed one day for each dollar of the fine. A maximum term of imprisonment of 400 days to satisfy the fine might have been legally imposed, instead of only 180 days,

which the court did fix. The prisoner, however, may not complain of this discretion which was exercised in his favor. When the fine was satisfied by the payment thereof or by service of imprisonment for 180 days, the prisoner would be entitled to his liberty.

[8, 9] There is the further constitutional inhibition against excessive fines or cruel and unusual punishment. Const. of Calif. art. 1, § 6. The present judgment does not violate this constitutional provision. In re Kennerly, supra; People v. Magoni, 73 Cal. App. 78, 238 P. 112. It does not purport to impose a penalty of imprisonment independent of the commitment which is authorized as a means of enforcing the payment of the fine. It has been definitely determined that imprisonment for the nonpayment of a fine is not a distinct punishment, but is merely a means of enforcing the payment of a fine. Ex parte Garrison, 193 Cal. 37, 223 P. 64.

The judgment is therefore valid.

The writ is denied.

I concur: FINCH, P. J.

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102 Cal. App. 1

JOHN A. ECK CO. v. COACHELLA VALLEY ONION GROWERS' ASS'N. (Civ. 9.)

District Court of Appeal, Fourth District, California. Nov. 14, 1929.

1. Principal and agent 🔑103(7)—Agreement held to create sales agency, whereby agent was empowered to enter into contract with brokers to dispose of principal's onion crop.

Agreement providing, among other things, that agent agreed to market and sell as agent for onion growers' association onions grown as provided in contract, *held* to create sales' agency whereby agent was empowered to enter into contract with brokers in that line of business for disposal of association's onion crop.

2. Principal and agent 🔑161(2)—Deviation from stipulated price and time and quantity of shipment specified in agency contract justified principal's repudiation of contract agent made for disposal of onion crop.

Deviation from stipulated price at which onions were to be sold and time and quantity in which onions were to be shipped, specified in contract authorizing agent to enter into contract with brokers to dispose of onions, justified repudiation of contract with broker, when brought to attention of principal.

3. Principal and agent 🔑170(3)—Where agent made unauthorized contract March 12, principal, repudiating contract on April 23d on learning of unauthorized terms, did not ratify unauthorized acts, and was not estopped.

Where agent having authority to make contract for disposal of onions grown by onion growers' association made contract with brokers containing unauthorized terms on March 12 and 14, 1923, and association had no knowledge of unauthorized terms of contract until April 23, 1923, when it repudiated contracts and refused to perform under them, association did not ratify unauthorized acts of agent, and was not estopped from disputing agent's authority.

4. Principal and agent 🔑177(2)—Agent's knowledge of provisions of contract entered into by him beyond scope of employment could not be imputed to principal.

Where agent having authority to execute contracts for disposal of onions grown by onion growers' association on terms specified entered into contract with brokers containing provisions beyond scope of his employment, agent's knowledge of such provisions could not be imputed to association.

5. Principal and agent 🔑173(3)—Evidence supported finding that sales contracts executed by agent containing unauthorized provisions were not contracts of principal.

In action for breach of contract for sale of onions, court's finding that contracts sued on which had been executed by defendant's agent, and which contained unauthorized provisions, were not contracts of defendant, *held* supported by evidence.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action for damages for loss of profits arising from breach of contract, by the John A. Eck Company against the Coachella Valley Onion Growers' Association. From a judgment for defendant, plaintiff appeals. Affirmed.

Hickcox & Thomson, of Los Angeles, and A. Heber Winder, of Riverside, for appellant.

H. L. Carnahan, Harry Povey, and Walter S. Barrette, all of Los Angeles, for respondent.

SLOANE, P. J. This action was brought by the appellant, an Illinois corporation, engaged in a general fruit and brokerage business, against the defendant, a corporation organized under the laws of California, and engaged in the production of onions in the county of Riverside, state of California.

The action was brought to recover from the defendant damages for alleged loss of profits arising from breach of contracts purported to have been entered into between the plaintiff and defendant corporation. The appeal is by the plaintiff from a judgment in favor of defendant, and denying plaintiff the relief asked for.

The alleged contracts in question purport to have been entered into with the plaintiff by one W. L. Benchley, doing business under the name of Benchley Fruit Company, in behalf of, and as the alleged authorized agent of defendant company. The whole controversy rests upon the authority of Benchley to obligate the defendant by these contracts. The agency, if it existed, was created by the following agreement:

"Coachella Valley Onion Growers Association—Benchley Fruit Company.

"This agreement, made and entered into this 3rd day of March, 1923, by and between the Coachella Valley Onion Growers Association, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Coachella, County of Riverside, State of California, said association hereinafter called the party of the first part, and The Benchley Fruit Company, with its principal office in the City of Fullerton, California, said company hereinafter called the party of the second part.

"Witnesseth:

"Whereas, the Board of Directors of the Coachella Valley Onion Growers Association on March 2nd, 1923, adopted the following resolution, to-wit:

" 'Be It Resolved: by the Board of Directors of the Coachella Valley Onion Growers Association, that the association accept the proposition of the Benchley Fruit Company, to-wit: That the Benchley Fruit Company agrees to market and sell as agent for the Coachella Valley Onion Growers Association fifty (50) car loads of No. 1 Yellow Bermuda onions at One and 50/100 ($1.50) Dollars per crate net f. o. b. loading point, Coachella Valley: That Seventy-five (75c) cents per crate is to be deposited with a bank, or banks, in escrow upon the signing of a contract between the Coachella Valley Onion Growers Association and the Benchley Fruit Company and a guarantee of a bank or banks on the balance in the sum of Seventy-five (75c) cents per crate at the time of delivery of said onions f. o. b. loading points in the Coachella Valley: Shipment of said onions to be made at the rate of ten (10) cars per week during the onion season.'

"And whereas, the party of the second part has agreed to carry out the terms of the said resolution,

"Now therefore, the party of the first part having adopted the said resolution at a meeting of the Board of Directors of the Coachella Valley Onion Growers Association held on March 2, 1923, authorizing the entering into a contract with the party of the second part, and authorizing the party of the second part to market the 1923 onion crop of the party of the first part, which said resolution is hereby made a part of this contract, the following supplementary clauses are agreed upon by both parties:

"During the life of this contract the party of the first part agrees to market through the agency of the party of the second part all of the onions produced and controlled by it. If any sales are made otherwise than through the agency of the party of the second part, said second party shall nevertheless be entitled to receive the same charge per crate that would be due if marketed through their agency.

"The party of the first part reserves the right to decide when or in what amounts to ship, and with the exception of cars sold at auction, to decide prior to sale the price that it is willing to accept.

"It is understood that in the shipping, marketing and the distribution of the crop, the party of the second part acts as agent only, and shall not be liable for any transportation charges nor for any loss resulting from the shipping, marketing or distribution of the crop.

"The party of the second part agrees to use its best efforts to sell and dispose of the crop or crops covered by this contract, but it is expressly understood that in so doing it acts as agent only of the party of the first part, and assumes no responsibility or financial liability therefor further than it agrees to turn over to the party of the first part the cash proceeds of all sales as soon as received, retaining their brokerage for their services as hereinafter provided.

"It is further agreed that the party of the first part shall pay all expenses and costs incidental to the harvesting, packing, inspecting, loading and marketing of the crop. Party of the second part shall do all the clerical work connected with the collection of the proceeds, at their own expense. All collection charges and exchange, if any, shall be paid by the party of the first part.

"Party of the second part agrees to place a competent employee at the loading station during the shipping season, at their own expense, to assist in the billing and routing of the cars, and to aid the association in developing membership.

"It is understood and agreed that the party of the second part will refund to the party of the first part Seven ($7.00) Dollars per car out of their Five (5c) cents per crate as hereinafter specified on the Fifty (50) cars sold as in the above resolution provided, said refund to be made at the time remittance is made for the said onions.

"It is understood and agreed that the party of the second part as agents, will purchase for the party of the first part the necessary crates for the packing of said onions, and said party of the second part agrees to guarantee the payment thereof; the party of the second part to retain from the net proceeds of the sale of the first onions delivered, the purchase price of said crates and to render an accounting of the same to the party of the first part, provided however, the party of the second part agrees to allow the party of the first part the necessary harvesting money.

"The party of the second part is hereby authorized to retain from the net proceeds of all sales made by it the sum of five (5) cents per crate, said sum to be their full compensation for the services rendered. The balance of the proceeds to be remitted at once to the party of the first part; provided however, that any indebtedness of the party of the first part to the party of the second part may be deducted from any returns received by it.

"The party of the first part shall have the right at any time to inspect the books and accounts of the party of the second part, in so far as said accounts may relate to the business covered by this contract.

"It is agreed that in so far as possible, the marketing of this crop shall be done through co-operative agencies, such as the Federated Fruit and Vegetable Growers. Coachella Valley Onion Growers Association, Party of the first part, By Ben L. Clary, its president, By Chas. B. Jones, its secretary. Benchley Fruit Company, Party of the second part, By W. L. Benchley, its president."

[1] The foregoing agreement undoubtedly created a sales agency, whereby W. L. Benchley, as the Benchley Fruit Company, was empowered to enter into contracts with the plaintiffs, or other brokers in that line of business, for the disposal of the defendant company's 1923 onion crop. But this agency agreement, while it created the relation of principal and agent, also put its express limitations upon the agent's powers.

As to the first 50 carloads of onions, a sales price of $1.50 per crate net, f. o. b. at loading point, Coachella Valley, is required, with 75 cents per crate of the purchase money to be deposited upon the execution of the agency contract, and a bank guaranty to be given on the remaining 75 cents per crate at the date of delivery of the onions; any subsequent sales are to be made subject to the right of the onion company to decide when and in what amounts to ship, and, with the exception of sales made at auction, to decide prior to the sale the price the onion company was willing to accept.

Under this sales agreement, Benchley proceeded to execute, with the plaintiff corporation, the two contracts in question, which are the basis of this action.

One is of date March 12, 1923, shown in the record as Plaintiff's Exhibit B, wherein it is recited that the Benchley Fruit Company, acting as agent for the Coachella Valley Onion Growers' Association, as party of the first part, contracts to sell to the plaintiff, John A. Eck Company, as party of the second part, 50 carloads of onions, at a guaranteed price of 75 cents per crate, f. o. b. Coachella, Cal., the party of the second part guaranteeing to the party of the first part an average of 75 cents per crate, and that any overage that shall be received on marketing the onions shall be the money of the party of the first part, after deducting 7 per cent. commission on the gross sale of each car. This contract also provides that the shipping dates on the onions shall be from the first shipments from Coachella district, right through the shipping season, at not to exceed a maximum of 5 cars, or less than a minimum of 3 cars per day, weather conditions, crop maturity, and railroad facilities permitting, and that the party of the second part will have free and unrestricted right to sell all these onions through their Chicago office "as they roll," and that they are expected to get the prevailing market price for Coachella Valley onions at the time the sale is made, they, however, to use their own judgment and discretion in making these sales, and are free and are authorized to handle to the best of their judgment and ability.

The second contract, which is of date March 14, 1923, contains the same recitals as to parties as the first, and is for the sale to the plaintiff corporation of an additional 50 carloads of Coachella onions at a guaranteed price averaging 75 cents per crate, and all additional amounts received from the marketing of the onions in excess of 75 cents per crate, after deducting the agreed commission of 7 per cent. to be paid to the party of the first part; the shipping conditions are practically the same in both contracts, commencing with the first shipments from the Coachella district, and continuing it not to exceed a maximum of 5 cars daily, with a minimum of 3 cars per day.

Neither of these contracts is executed in the name of the Coachella Valley Onion Growers' Association, but they are signed, respectively, "Benchley Fruit Company, per W. L. Benchley; John A. Eck Company, per H. A. Eck, Sec'y."

It may be reasonably questioned, under the circumstances of the execution of these two contracts, if they were intended to create an original and primary contractual liability between the Coachella Valley Onion Growers' Association and the John A. Eck Company.

[2] However that may be, it clearly appears that the Benchley Company intended by these contracts to bind its principal, the Coachella Valley Onion Growers' Association, and it is also obvious that each of the agreements contained material provisions, not only in excess of, but in direct violation of, limitations placed on the agent's powers under the sales agency contract. The sales agency agreement expressly stipulates a sales price of $1.50 per crate on the first consignment of 50 carloads of onions, and as to all further sales reserves to the onion company the right to determine in advance the sales price it is willing to accept, and when and in what amounts shipments shall be made.

It further appears from the record that the plaintiff corporation, before or at the time the sales contracts were entered into, had before it the sales agency agreement under which the Benchley Company was purporting to act.

The sales contracts contain a number of

provisions with reference to escrows of amounts to be advanced on the purchase price of the onions and other conditions which, while not directly provided for in the agency agreement with the Benchley Company, may be said to come within the incidental and implied authority of an agent, but there can be no question that the deviation from the stipulated price at which the product was to be sold, and the time and quantity in which the onions were to be shipped, unless subsequently ratified by the principal, justified the repudiation of these contracts when brought to the attention of the defendant corporation.

The trial court finds, in effect, that the contracts in question sued on here were not enforceable against defendant.

[3] The only remaining question is as to whether the defendant company, by its conduct subsequent to the execution of these contracts, ratified the unauthorized acts of its agents, or is estopped from disputing the agent's authority.

It is contended by appellant that there was unreasonable and unnecessary delay on the part of the respondent in repudiating the sales contracts made by the Benchley Company. The contracts were executed, respectively, on the 12th and 14th of March, 1923. The respondents repudiated these contracts and refused to perform under them on the 23d day of April, 1923. There is no evidence that respondent had any actual knowledge of the terms and conditions of these contracts prior to that date. There is testimony in the record that on or about March 20, in a telephone conversation beween one Webster, connected with the Benchley Company, and a Mr. Kyle, assistant secretary of the defendant company, Kyle was informed that Mr. Benchley had made a very advantageous contract with the plaintiff company. It is not claimed that this was more than a casual conversation, or that any details of the contract were given. Benjamin L. Cleary, president of the defendant corporation, testified that at no time prior to April 23, 1923, had his company received any notice or information concerning the terms of the contracts from either Benchley or the plaintiff. He admits that about the middle of April these contracts were referred to at a meeting of the board of directors, but that the wording was not indicated, and he does not think the name of Eck was mentioned. Charles B. Jones, secretary of the defendant company testified: "We were not informed of contracts until receipt of telegram from plaintiff April 23d, and that no contract with plaintiff was mentioned on April 16th in the conversation between Benchley and the board of directors."

We are satisfied that, up to the time of the repudiation of these contracts with the plaintiff corporation, the defendants were in the possession of no actual knowledge of the terms of the contracts that had been entered into by its agent which indicated unnecessary delay or other elements of estoppel to repudiate liability thereunder.

[4] Was respondent in the possession of such imputed knowledge arising from the fact that the Benchley Company was its agent for effecting a sale of this onion crop as to constitute notice of the contents of the agreements entered into in excess and in violation of the terms of such agency? The general rule is well settled that the knowledge of the agent, in the course of his agency, is the knowledge of the principal, but we are satisfied that this rule will not apply to the provisions of a contract entered into by the agent beyond the scope of his employment.

This limitation is laid down in 1 Cal. Juris. p. 849, § 126, as follows: "Knowledge of the agent is not knowledge of the principal as to matters not within the scope of the agent's authority. Thus, where the agency is special, rather than general, the principal is not bound by the knowledge of the agent as to acts outside the scope of his authority. The doctrine manifestly cannot be maintained that the principal, if he has knowledge of the exercise by the agent of certain powers, is bound by the act of the agent, and that he must be held to have such knowledge from the fact that the agent knows of it himself. Such doctrine would place it within the power of an agent to bind the principal to any course of conduct, however foreign or obnoxious to the authority actually conferred." Westerfeld v. New York Life Insurance Co., 129 Cal. 68 79, 58 P. 92, 61 P. 667; Raleigh v. Lee, 26 Cal. App. 229, 146 P. 696.

The authorities cited by appellant are in support of the doctrine of imputed notice, but no farther than its application to matters within the knowledge of the agent transpiring in the course of his agency. Shamlian v. Wells, 197 Cal. 716, 242 P. 483.

When an actual agency exists and the principal has knowledge that the agent has transcended his authority, the liability of the principal to be held to a ratification of the unauthorized act by acquiescence is much greater than it would be in a case where an utter stranger had assumed to act as agent without authority. But this rule would only apply in case of actual knowledge or notice of the agent's unauthorized act.

Moreover, in this case the evidence discloses that the plaintiff corporation was informed as to the limitations on the power of the Benchley Company to contract, and, with this knowledge in their possession, ordinary prudence and diligence would call for prompt action on their part to obtain some confirmation of the agent's unauthorized acts before relying upon their acceptance by the principal.

[5] The finding of the court that the contracts sued on were not the contracts of the

defendant is supported by the evidence. The other findings complained of by the appellant follow necessarily the nonexistence of an enforceable contractual relation.

The judgment is affirmed.

I concur: BARNARD, J.

MARKS, J., deeming himself disqualified in the foregoing case, does not join in the consideration of the decision.

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102 Cal. App. 92

SHAFER et al. v. GREGORY et al.

(Civ. 6770.)

District Court of Appeal, First District, Division 1, California. Nov. 19, 1929.

1. Mortgages ⚷275—Plaintiffs could not claim trust deed under which defendants claimed was presumptively fraudulent, where plaintiffs assumed incumbrance as sole consideration for property.

Plaintiffs were not in position to raise question that deed of trust under which defendants claimed title was presumptively fraudulent, where they assumed obligation existing against property as sole consideration of acquiring it.

2. Mortgages ⚷275—That deeds were renewed after plaintiffs acquired title did not enable them to question validity of lien, where their assumption thereof was sole consideration for property.

Fact that liens were renewed after plaintiffs acquired their title did not enable them to question validity of lien under which defendants claimed, where plaintiffs assumed obligations existing against property as sole consideration of acquiring it.

3. Mortgages ⚷372(1)—Title passing under trustee's sale related back to time original deeds of trust were given as security.

Title which passed to grantee under trustee's sale related back to time original deeds of trust were given to her as security.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by W. S. Shafer, as receiver of certain properties held in trust by the National Radio Company, and others, against Jessie S. Gregory and others, in which defendants filed a cross-complaint. From a judgment for defendants, plaintiffs appeal. Affirmed.

R. M. F. Soto and J. Clark Benson, both of San Francisco, James H. Boyer, of Oakland (W. E. Cashman, of San Francisco, of counsel), for appellants.

George M. Naus and Grant & Zimdars, all of San Francisco, for respondent Jessie S. Gregory.

TYLER, P. J. Plaintiffs prosecute this appeal from a judgment quieting the title of respondent Gregory to certain real property.

The action was prosecuted by plaintiffs to remove an alleged cloud on their title to the real property involved, created by a trustee's deed to said Gregory, and to carry into effect a certain judgment in their favor, in an action wherein one Herman Eggers and others were plaintiffs and the National Radio Company, a corporation, was defendant.

[1-3] By their answer defendants denied the title of plaintiffs and the right of possession of plaintiff Shafer as receiver. By a cross-complaint defendant Gregory asserted title in herself. To establish their title to the real property involved plaintiff introduced in evidence the judgment roll in Eggers v. National Radio Company. It is conceded that whatever title plaintiff had to the property in question was based upon such judgment. Respondent Gregory was not a party to the Eggers judgment, nor was she in privity thereto. Her claim of title in and to the property was based upon a certain deed of trust securing notes which existed against the property long prior to the time of its acquisition by plaintiffs, and which deed of trust was foreclosed by sale, at which respondent Gregory became the purchaser. Plaintiffs claimed that the deed of trust under which respondent claims title was presumptively fraudulent, and the burden rested upon her to establish its bona fides. The trial court found, and rightfully so, that plaintiffs were in no position to raise this question, for the reason that they assumed the obligations existing against the property as the sole consideration of acquiring the same. Then, again, the judgment upon which appellants relied was not a final one, and it has since been reversed. Eggers v. National Radio Company (Cal. Sup.) 281 P. 58. Plaintiffs here concede that whatever title they had was based upon such judgment, and that in consequence of its reversal their alleged title has failed. Irrespective and apart from this concession, however, plaintiffs took title to the property in question subject to the incumbrances against the same, and which incumbrances they agreed to pay. This, as we have said, was the sole consideration paid by them. This being so, they were in no position to question the validity of the same. To hold otherwise would be to permit them to acquire the land without paying for it. Nor does the fact that the liens were renewed after plaintiffs acquired their title alter or change the situation. Respondent's claim is a purchase-money claim. The title which passed to her under the trustee's sale related back to the time the original deeds of trust were given to her as security.

We do not deem a further discussion of the case to be necessary. As above pointed out, the sole consideration paid by plaintiffs for the property was the assumption by them of the liens against it, and their agreement to pay the incumbrances. Irrespective therefore of whatever rights they may have acquired under the Eggers judgment, and which they here concede to be none, the conclusion of the trial court, from the facts, that plaintiffs or either of them is not the owner of or possessed of any interest in and to the real property involved, but that cross-complainant is the owner, finds full support in the evidence.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

101 Cal. App. 744

PEOPLE v. WRIGHT. (Cr. 1094.)

District Court of Appeal, Third District, California. Nov. 12, 1929.

1. Criminal law 🔑829(1)—Refusal of instructions covered by instructions given was not error.

Refusal of instructions covered by instructions given was not error.

2. Criminal law 🔑781(6)—Refusal of instruction that verbal admissions must be viewed with caution held not error.

In prosecution for rape, refusal of requested instruction that verbal admissions are to be viewed with caution *held* not error.

3. Criminal law 🔑1137(5)—Defendant cross-examining mother-in-law, developing fact defendant beat her, and cross-examination of defendant's wife showed without objection he had knocked mother-in-law out of house, he could not complain of proof he was imprisoned therefor.

In rape prosecution, where defendant, on cross-examination of defendant's mother-in-law, developed fact that defendant had beaten her up, and on cross-examination of defendant's wife it was shown without objection that he had knocked mother-in-law out of house, admitting proof on cross-examination of defendant's wife that he was imprisoned as punishment therefor *held* not prejudicial, since it was fact that he beat up woman which probably weighed against him with jury, and, having proved that fact himself, he could not complain of its effect on jury.

4. Rape 🔑43(2)—In prosecution for rape committed in February, evidence that prosecutrix wore blood-stained bloomers in following April held properly excluded.

In prosecution for rape committed February 24, 1929, in which prosecution introduced evidence of blood-stained bloomers which prosecutrix testified she was wearing at time of offense, defendant's proof that, on or about April 15th following, blood was observed on bloomers which prosecutrix was wearing at that time, and that she then disappeared in the house and returned shortly with bloomers free from blood, *held* properly excluded.

5. Criminal law 🔑1159(4)—Where evidence would support verdict for either party, determination of truth was exclusively within province of jury and trial court.

In rape prosecution, where there was ample evidence in record to support verdict for either defendant or the state, determination of where truth lay was exclusively within province of jury and trial court.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Floyd Wright was convicted of rape, and he appeals. Affirmed.

Superseding opinion in 281 P. 411.

Blaine McGowan, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of rape committed upon a girl of the age of nearly 9 years. He has appealed from the judgment.

The evidence, both direct and indirect, is in substantial and irreconcilable conflict. The testimony of a physician, who examined the girl a few days after the alleged act, is sufficient to show that some person committed the crime. The testimony of the girl, standing alone, is sufficient to show that the defendant committed a forcible rape upon her. It is deemed unnecessary to set out the testimony on account of the character thereof.

[1, 2] Appellant complains of the refusal of the court to give seven instructions requested by him. A careful examination of these proposed instructions and a comparison thereof with instructions given show that, with one exception, all rules of law stated in the proposed instructions were fully set forth in those given. In the excepted case, the instruction requested stated that "verbal admissions are to be viewed with caution." The refusal to so instruct the jury was not error. Hirshfeld v. Dana, 193 Cal. 142, 160, 223 P. 451.

Mrs. James, the defendant's mother-in-law, who is the mother of the prosecutrix, was a witness for the prosecution. She was cross-examined by counsel for the defendant as follows:

"Q. You and your son-in-law don't get along very well together, do you, Mrs. James? A. No sir. Q. Did you ever say that you hated him? A. Yes sir. Q. Did you ever say that you would fix him? A. No. Q. Didn't you ever say, 'I will fix you?' A. No sir. Q. Did you ever say anything like that? A. No sir. Q. Now think. A. Well, I will tell you why I never care for my son-in-law ever since he beat me up. Q. He beat you up? A. Yes sir. Q. That was the time that you spit at him? A. Yes. Q. And that was the time that you said he was no man? A. Yes sir. Q. That was the time you had him arrested wasn't it? A. Yes sir."

The defendant's wife was a witness for him. On direct examination, she testified as follows:

"Q. Have you ever heard your mother say to him (defendant), 'I hate you?' A. Yes. Q. How many times has she said that? A. She has said that most every time I go and visit her. They always get into a quarrel and things like that. * * * Q. Did she ever say to him, 'I will fix you?' A. Yes, she said that once after this other trouble. Q. She said that when? A. She said that after this other trouble."

On cross-examination, she testified as follows relating to the same matters:

"Q. And you say that at one time she said to him, 'I hate you?' A. Yes. Q. And 'I will fix you?' A. Yes. Q. Now you testified that that occurred about the time of the other trouble. Now what other trouble do you mean, Mrs. Wright? A. Well, that is the time they said he knocked her out of the house. * * * Q. Well, didn't he throw her out of the house? A. Not that I saw. I was in bed at the time. Q. You don't know that he plead guilty to that in the justice's court, do you, Mrs. Wright?

"Mr. McGowan: I object to that as improper cross-examination. * * *

"The Court: Objection overruled; go ahead.

"A. No, I did not know he did it. Q. Do you know that he served a term in the county jail for it?

"Mr. McGowan: I object to that as incompetent, irrelevant and immaterial and assign the question on the part of the district attorney as misconduct * * *

"The Court: * * * The objection is overruled.

"A. Yes, I do."

[3] It is conceded that the court erred in overruling the objections mentioned. The question then is whether such rulings were prejudicial. Counsel for the defendant, in the cross-examination of Mrs. James, developed the fact that the defendant had beaten her up, and in the cross-examination of the defendant's wife it was shown, without objection, that he had "knocked her (Mrs. James) out of the house." After the defendant had thus proved the commission of the offense, it is highly improbable that his rights were prejudiced by the further proof that he was imprisoned as punishment therefor. It is the fact that he beat up a woman which probably weighed against him with the jury rather than his imprisonment. Having proved that fact himself, he is not in a position to complain of its effect on the jury.

[4] The offense was committed February 24, 1929. The prosecution introduced in evidence blood-stained bloomers which the prosecutrix testified she was wearing at the time of the offense. The defendant attempted to prove that on or about the 15th of the following April blood was observed on bloomers she was wearing at that time, and that she then "disappeared in the house and returned shortly thereafter with bloomers on free from blood." The court sustained objections to such proof. The evidence offered would have had no tendency to prove or disprove any issue in the case.

[5] There is ample evidence in the record to support a verdict for either party. Under such circumstances the determination of where the truth lies is exclusively within the province of the jury and the trial court. The erroneous ruling of the trial court is not deemed a sufficient ground for reversal.

The judgment is affirmed.

We concur: JAMISON, J., pro tem.; THOMPSON, J.

101 Cal. App. 683

BOTHUM v. KREIS et al. (Civ. 7104.)★

District Court of Appeal, First District, Division 2, California. Nov. 6, 1929.

Hearing Denied by Supreme Court Jan. 2, 1930.

Mechanics' liens ⚷136(2)—Description in lien claim giving wrong street number, omitting number of tract block, and referring to wrong record, was sufficient for identification (Code Civ. Proc. §§ 1187, 1203).

Description in claim of lien giving wrong street number, and omitting to give number of tract block, and referring to book of maps instead of to book of miscellaneous records, was nevertheless sufficient for identification within Code of Civ. Proc. § 1187, as enabling a party familiar with locality to identify premises intended to be described with reasonable certainty to exclusion of others, in accordance with test embodied in section 1203.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action to foreclose mechanic's lien by L. J. Bothum against Charles W. Kreis, Isadore Reese, Ida Reese, and others. Judgment for plaintiff, and the last two named defendants appeal. Affirmed.

D. Howard Painter and Glen Behymer, both of Los Angeles, for appellants.

Nathan M. Dicker and Sidney Sampson, both of Los Angeles, for respondent.

KOFORD, P. J. Plaintiff obtained a judgment and decree of foreclosure of a materialman's mechanic lien against the property of the appellants.

The sole contention on appeal is that the plaintiff's claim of lien is invalid because of its many faults of description of the appel-

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★Hearing denied by Supreme Court.

lants' property against which the lien is claimed.

The appellants' said property is correctly described as follows: Lot 5, block 12, Brooklyn Heights Ganahl tract, as per map thereof recorded in Book 22, p. 17, of miscellaneous records of Los Angeles county, Cal., said premises being known as 2436 Folsom street, Los Angeles, Cal.

The description in the claim of lien gave the street number wrong, omitted to give the number of the tract block, omitted the word Ganahl in the name of the tract, and referred to Book 22 of maps instead of to Book 22 of miscellaneous records. It read as follows: "2546 Folsom street, Los Angeles, California, and which premises claimant is informed and believes to be described as lot five, Brooklyn Heights Tract, as per map thereof recorded in book 22, page 17 of maps, records of Los Angeles County, California."

The other statements required by law to be incorporated in the claim of lien are not said to be in any way lacking.

Appellants claim the lien does not contain a description of the property "sufficient for identification," as is required by the terms of the Code of Civil Procedure, § 1187. Appellants cite several decisions upon the sufficiency of the description, but these decisions were rendered before the adoption of Code of Civil Procedure, § 1203a in 1907 (St. 1907, p. 858). The law of that section was moved into section 1203 in 1911 (St. 1911, p. 1319) and has since remained there. The intent of Code of Civil Procedure, § 1203, is expressed in Ogram v. Welchoff, 40 Cal. App. 301, 180 P. 631, 632, as follows: "Some of the earlier constructions of these sections, although purporting to follow the rule of construction laid down in section 4, Code of Civil Procedure, were still somewhat technical, and the Legislature showed its disapproval of the method followed by adding to the law on the subject section 1203, which directs that certain kinds of mistakes in claims of lien which theretofore had been held sufficient to invalidate them should not be given that effect, thus emphasizing the legislative intent that the greatest liberality consistent with the attainment of the object of the sections should be exercised in their construction." This section, so far as it applies to this case, reads as follows: "No mistake or errors in the statement * * * nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds. * * *" The remainder of the section either does not relate to defects in description or relates to facts which do not enter into this case; but it shows that the legislative intent was that the greatest liberality should be extended towards the other named defects in claims of lien. It reads: "Unless the court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the court shall find that an innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner."

With such liberality as the closing part of the section indicates shall be exercised in favor of the lien as against an innocent third party purchaser, there can be no doubt of the intention to exercise the greatest liberality in favor of the lien as against the owner who is not even mentioned among the two exceptions named in the section following the words "unless the court finds."

The good faith of the attempt to describe the property is not gainsaid, and it cannot be said that the property description in the claim of lien is so deficient as to describe no property at all. That is certain which can be made certain. We cannot say as a matter of law that the defects which admittedly exist in the description are such as not to enable "a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others." Such was said to be the test even before the law now embodied in Code of Civil Procedure, § 1203, was enacted. Willamette S. M. Co. v. Kremer, 94 Cal. 205, 209, 29 P. 633. That section must mean that such a party shall ignore mistakes and errors and make a sincere attempt to ascertain what property is intended to be described. We are unable to say from the record that the word "Ganahl" is an indispensable word in naming the tract map; that there are other blocks in the tract besides block 12, and, if so, that any of them contain a lot 5; that a reference to the recordation of the map was necessary, and, if so, whether the reference to book of maps could lead any one searching in the recorder's office to any other record than that which contained the record of the tract map intended; nor that the erroneous street number designated any actual street number or building on Folsom street. The record of the proceedings in the trial court is very brief, having been made almost entirely by stipulation with respect to this particular claim of lien. It indicates that the parties submitted the case to the court to decide as a question of law whether the claim of lien contained a sufficient description of the appellants' property. We cannot say that the court erred in not holding the claim to be invalid.

The judgment and decree appealed from are therefore affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

101 Cal. App. 728

ANDERSON v. BERGER et al. (Civ. 6977.)

District Court of Appeal, First District, Division 2, California. Nov. 9, 1929.

1. Fraud 🔑22(1)—One actually relying on representations is not precluded from suing on ground of fraud merely because independent investigation would have shown representations were untrue.

In case one actually relies upon misrepresentations, he is not precluded from maintaining action on ground of fraud merely because, if he had made an independent investigation, he would have ascertained that the representations made were untrue.

2. Vendor and purchaser 🔑85—Owner's acceptance of withdrawal of offer of purchase operated as rescission so as to entitle proposed purchaser to recover deposit with brokers.

Consent of owner of confectionary store to withdrawal of offer of purchase made to selling agents operated as a rescission by mutual consent of contract of purchase and sale so as to entitle proposed purchaser to recover back his deposit, since in no event would brokers be entitled to keep deposit as and for their own property.

3. Money received 🔑6(6)—Action was maintainable against brokers for recovery of deposit by proposed purchaser after rescission of contract by mutual consent.

Action for money had and received was maintainable by proposed purchaser after mutual rescission of contract against brokers with whom he made deposit, and who were holding the money in legal effect as agent of depositor by reason of lack of authority to make a binding contract of sale on behalf of owner.

4. Money received 🔑1—Action for money had and received lies against one in possession of funds payable to plaintiff in equity and good conscience.

An action for money had and received lies against any person who is in possession of funds which in equity and good conscience he should pay to plaintiff.

5. Money received 🔑1—Common count for money received lies for any circumstances requiring money be paid in equity and good conscience, regardless of rights as for fraud.

Common count for money had and received would lie for any set of facts and circumstances existing between parties which required that money held by defendants should be paid to plaintiff in equity and good conscience, regardless of right to judgment for particular fraud alleged in different cause of action.

Appeal from Superior Court, City and County of San Francisco; J. C. Moncur, Judge.

Action by E. H. Anderson against B. Berger and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Dinkelspiel & Dinkelspiel, of San Francisco, for appellants.

Reisner & Deming, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff obtained judgment for $1,040, which was the amount of a deposit he made with the defendants when signing and leaving with them a proposal to purchase a confectionery store belonging to T. N. Smiley. The complaint was in three counts. The court made findings in favor of plaintiff on the first and third counts. The first was a common count for money had and received, and the third was based upon rescission for alleged fraudulent misrepresentations. The defendants are real estate brokers, with whom Smiley, the owner of the store, listed it for sale. In doing so he made written representations concerning the character and quality of the store. The brokers' alleged fraud consisted in communicating these representations to plaintiff, thereby inducing him to make the deposit and proposal of purchase. The proposal was signed by plaintiff alone. It read, in substance and effect, I hereby deposit with defendants the sum of $1,040 as part payment of the purchase price of Smiley's confectionery listed by the owner thereof with the defendants as agents for the sale thereof, and I hereby agree to buy said property upon the following terms and conditions. The proposal also said, "As the said agent is negotiating the sale of said personal property only, this offer to purchase * * * shall not be binding on the undersigned, unless the owner thereof will also assign to me the existing lease on said premises," etc. The court found that, on the day the said proposal was executed, plaintiff deposited the said sum with the defendants, "which sum said copartnership agreed to hold for plaintiff until the contract of sale of said confectionery should be executed between said plaintiff and the said Smiley; also until a certain lease on the said premises should be assigned to the plaintiff." After making the deposit, plaintiff became dissatisfied and visited Smiley, the owner, in company with one of the defendants. In the conversation between plaintiff and the owner, plaintiff expressed his dissatisfaction and charged misrepresentation upon the part of the agents. The owner replied to the effect that the plaintiff might do as he pleased, and, if he was dissatisfied, he should feel at liberty to take back from the agents the deposit made and be freed from the proposal. Thereafter plaintiff served notice of rescission upon the defendants and commenced this action against the brokers alone without making Smiley a party defendant. Appellants urge as one point on appeal that the action is against the wrong parties; that it should have been against Smiley instead of these defendants. We find in the record, however, a statement of the trial judge regarding the absence of Smiley as a party defendant. It is: "Smiley is not a necessary party to the action and as the defendants strenuously oppose a reopening of the case for the purpose of bringing in Smiley, I have reached the conclusion that plaintiff's motion for that purpose should be denied."

[1] On this appeal appellants attack practically every finding of fact supporting plaintiff's allegations of fraud. In every point, however, the record presents evidence in support of the findings, as well as the evidence pointed out by appellants which tends to prove contrary to the findings. We have examined the evidence in the record, and find that the findings of fraud made by the court are supported by substantial evidence. The appellants also claim that respondent did not avail himself of the means and opportunities to discover the untruthfulness of the representations made, and that such failure on the part of respondent bars his recovery. It is now settled that, if one actually relies upon misrepresentations, he is not precluded from maintaining an action on the grounds of fraud merely because, if he had made an independent investigation, he would have ascertained that the representations made were untrue. French v. Freeman, 191 Cal. 579, 217 P. 515.

[2] Respondent contends that, irrespective of the charge of fraud, the judgment is supported under the evidence and by the findings which find in favor of the plaintiff upon the common count for money had and received. The evidence relied upon is that which indicates the consent of Smiley, the owner, to the withdrawal of plaintiff from his proposal. This attitude upon the part of the owner would amount to a rescission by mutual consent if a contract of purchase and sale had been executed between plaintiff and Smiley. For like reasons in this case, there never having been an acceptance of plaintiff's proposal of purchase by the owner, the consent of Smiley to the withdrawal of the offer by plaintiff operated in the same way. In either case plaintiff would be entitled to recover back his deposit, since in no event would the brokers be entitled to keep the deposit as and for their own property. They held the deposit either as the agents of the plaintiff or of the owner.

[3, 4] Appellants claim that the action should be confined to one against Smiley, the owner, for the reason that Smiley was not an undisclosed principal. In receiving the deposit from plaintiff, the defendants were holding the money in legal effect as the agent of the depositor. This is so because of the wording of the written proposal and because defendants had no authority to make a binding contract of sale on behalf of Smiley. Lubeck's Investment Co. v. Voris, 68 Cal. App. 653, 229 P. 1025; Gold v. Phelan, 58 Cal. App. 471, 208 P. 1001; Reyntiens v. Treadwell Realty Co., 22 Cal. App. 314, 134 P. 333; Coover v. Cox (Cal. App.) 272 P. 343. The foregoing authorities seem to be directly in point for this case. The authorities cited by appellants to the general proposition that an action may be commenced against the principal on account of the acts of his agent do not go to the length of holding that the agent may not be sued in an action for money had and received where his principal never obtained title to the money nor even claimed it. An action for money had and received lies against any person who is in the possession of funds which in equity and good conscience he should pay to the plaintiff. The weight of authority is to the effect that an agent still holding possession of funds is the one against whom judgment should be given in an action for money had and received. Simmonds v. Long, 80 Kan. 155, 101 P. 1070, 23 L. R. A. (N. S.) 553; Alexander v. Coyne, 143 Ga. 696, 85 S. E. 831, L. R. A. 1916D, 1041; 41 C. J. 54. See, also, Gray v. Ellis, 164 Cal. 481, 129 P. 791. In Bogart v. Crosby & Van Haren, 80 Cal. 195, 22 P. 84, relied on by appellants, the title to the deposit had passed to the vendor for whom the agents were acting by the acceptance of the proposal made. The agents therefore had ceased to be, if ever they were in that case, agents of the vendee with respect to the deposit. Had Smiley been made a party defendant together with the brokers in this action for money had and received, it could scarcely be contended that judgment should go against Smiley and not against the brokers, as the evidence shows that the money is still in the hands of the brokers under conditions which do not entitle Smiley to receive it nor the brokers to retain it.

[5] There is no merit in the contention that plaintiff may have judgment on the common count in this action only in the event that he is also entitled to judgment for the particular fraud alleged in this third cause of action. The common count for money had and received will lie for any set of facts and circumstances existing between the parties to this action which require that the money held by defendants should be paid to the plaintiff in equity and good conscience. It is supported by evidence of a mutual rescission or by evidence of an unaccepted proposal, as well as by evidence of a rescission for fraud.

For the foregoing reasons, the judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

102 Cal. App. 37

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. METROPOLITAN CASUALTY INS. CO. OF NEW YORK. (Civ. 7118.)

District Court of Appeal, First District, Division 2, California. Nov. 20, 1929.

1. Attachment ⟹123—**Statutory provision that clerk must issue attachment upon receiving affidavit held equivalent to provision for filing affidavit with clerk (Code Civ. Proc. § 538).**

Provision in Code Civ. Proc. § 538, that clerk of court must issue writ of attachment upon receiving affidavit, *held* equivalent to provision for filing affidavit with clerk.

2. Attachment ⟹330—**Evidence in action upon undertaking given to release attachment held to support finding that affidavit for writ was filed (Code Civ. Proc. § 538).**

In action on undertaking given to release attachment issued under Code Civ. Proc. § 538, evidence *held* to support finding that affidavit for writ of attachment was filed with clerk of superior court.

3. Appeal and error ⟹1071(5)—**Finding that original affidavit for attachment through mistake and inadvertence without plaintiff's knowledge was returned to plaintiff's attorneys, held immaterial, where court found affidavit had been filed (Code Civ. Proc. § 538).**

Where court found that affidavit for attachment was filed with clerk of superior court, finding that clerk through mistake and inadvertence and without knowledge of plaintiff returned original affidavit required to be filed before issuance of attachment under Code Civ. Proc. § 538, to attorneys, *held* immaterial.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by the Zurich General Accident & Liability Insurance Company, Limited, against the Metropolitan Casualty Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Lawler & Degnan, of Los Angeles, for appellant.

Leonard E. Thomas, of Los Angeles, for respondent.

DOOLING, Justice pro tem. Plaintiff had judgment in the court below upon an undertaking given by defendant to release an attachment, and defendant appeals.

Appellant's sole point upon appeal is that the writ of attachment to release which the undertaking was given was a nullity because, it is claimed, the clerk who issued the writ did not receive an affidavit prior to the issuance of the writ of attachment as required by section 538 of the Code of Civil Procedure.

[1] Appellant contends, and we think correctly, that the provision of section 538 that "the clerk of the court must issue the writ of attachment upon *receiving* an affidavit" is equivalent to a provision for filing the affidavit with the clerk. This construction is in accordance with the long-settled practice and comports with common sense.

The original affidavit, according to the testimony, was never marked with the file stamp by the clerk or placed by him in the file of papers in the case. Instead a carbon copy of the affidavit, unexecuted, was found regularly stamped, among the papers in the clerk's office. An original affidavit was produced in court without the filing stamp of the clerk. As to this affidavit Mr. Mayo Thomas, called as a witness for respondent, testified that he was the attorney who procured the issuance of the writ of attachment, and that before the writ was issued he presented to the clerk for filing this original affidavit together with the other necessary papers, and that the clerk "looked it over and the other papers in the case and kept what papers he desired to file. He issued the writ and gave the writ with the other papers back to me."

[2] The court found that prior to the issuance of the writ of attachment "the said plaintiff delivered to and filed with the clerk of the Superior Court of the County of Los Angeles * * * and the aforesaid clerk * * * received from the said plaintiff an affidavit for attachment. * * *"

Under the authorities, we are satisfied that this finding is supported by the evidence of Mr. Thomas above summarized. In view of its clear applicability it is only necessary to cite Estate of Carroll, 190 Cal. 105, 210 P. 817. In that case pursuant to an order of the District Court of Appeal of the Third Appellate District a written release was mailed to the clerk of that court for filing. Through a misconception of the effect of the court's order the clerk mailed the document back to the attorney, with direction to file it in the superior court. In its opinion in Estate of Carroll, supra, the Supreme Court, after holding that the release should have been filed with the District Court of Appeal, said at page 111 of 190 Cal., 210 P. 819: "All of the circumstances attending the forwarding of the release to the clerk of the appellate court indicate that it was the intention of the counsel for plaintiffs to have the release filed with the records of the appellate court, and a paper is filed of record, in contemplation of law, when it is delivered to the proper official, with the intention that it shall become part of an official record, and the filing thus made is not impaired by the clerk's failure or refusal, without good cause, to receive and record the same as filed in the records of his office."

[3] Appellant complains of a finding that the clerk "through mistake and inadvertence, and without the knowledge of the plaintiff

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

herein, returned and handed back to the plaintiff the original affidavit." While there is no direct evidence to support this finding, we think that it was an inference that might properly be drawn from the evidence before the court. In any event, this finding is not necessary to support the judgment and hence, even if erroneous, would not justify a reversal.

Judgment affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

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101 Cal. App. 680

BURNS v. OSBORNE-FITZ-PATRICK FINANCE CO. et al. (Civ. 7108.)★

District Court of Appeal, First District, Division 2, California. Nov. 6, 1929.

Rehearing Denied Dec. 5, 1929. Hearing Denied by Supreme Court Jan. 2, 1930.

1. Evidence ⟹546—Qualification of witness to testify as expert held within discretion of trial court.

Deciding on question of qualification of witness to testify as expert is within discretion of trial court.

2. Evidence ⟹474(16)—In action for damages for fraud, property owner may ordinarily give his opinion as to value of his property.

In action for damages for fraud, property owner is ordinarily permitted to give his opinion of value of his own property.

3. Evidence ⟹570—Court or jury is not concluded by expert testimony, but may consider other evidence.

Judge or jury is not concluded by testimony of expert witness, but may consider other evidence pertinent to issue involved.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by W. Wilson Burns against the Osborne-Fitz-Patrick Finance Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rush & Beirne, of Los Angeles, for appellants.

George S. Hupp, Ben F. Gray, and James S. Jarrott, all of Los Angeles, for respondent.

KOFORD, P. J. Plaintiff recovered judgment for damages in this action for fraud and deceit practiced upon him by the defendants inducing him to buy twenty-five cemetery lots (called sections) for speculation at the price of $165 per lot. The measure of damages applied by the court was the difference in actual value of the property at the time this action was commenced and what it would have been worth at that time had the defendants' false representations been true and had the fraudulent promises been performed. No question is raised as to the measure of damage applied, and no question is, or was, made as to the sufficiency of the evidence to show that the property would have been worth at least $165 per lot at the time suit was commenced if the representations and promises had been true and performed. In fact, this was a stipulated fact at the trial. Appellants' sole point upon this appeal is that there was no substantial evidence to support the court's finding that the actual value of the lots at the time suit was commenced was but $10, making the total damage awarded plaintiff $155 for each of the twenty-five lots.

Upon this question the defendants produced several witnesses who fixed the actual value at $300 or $400 per lot as against the sole testimony of the plaintiff who fixed it at $10. It is claimed that plaintiff did not show himself sufficiently qualified as an expert on the question to justify the court in admitting in evidence his testimony on value and in finding accordingly.

This point on appeal is not well taken. The plaintiff bought the lots July, 1923; the suit was commenced in October, 1925; and the trial was in February, 1927. Plaintiff was, therefore, the owner of the land. The evidence also showed that he owned other land in the vicinity of the cemetery; that he was a licensed real estate broker, having engaged in the real estate business in Los Angeles for 20 years (though not dealing as such in this kind of property); that he had made numerous efforts to sell the lots himself without response; that he had discussed the values with other owners and with defendants' employees; that he had urged and authorized the defendants to sell the lots as they had promised to do; and that in December, 1923, the whole scheme of selling the cemetery lots to the public for speculation was subjected to very unfavorable publicity, after which it was practically impossible to sell any of the lots either for speculation or for burials.

[1, 2] Deciding upon the qualification of a witness to testify as an expert is a matter which lies in the sound discretion of the trial court. 10 Cal. Juris. 963 and 1022. In California a property owner is ordinarily, if not uniformly, permitted to give his opinion of the value of his own property. 10 Cal. Juris. 1023. With these principles in mind, it is plain that the court did not err in admitting the testimony of the plaintiff.

[3] It is well settled that the jury or a judge is not concluded by the testimony of experts. The province of such testimony is only to aid in coming to a conclusion, and it does not exclude consideration of other evidence which is pertinent to the issue involved. 10 Cal. Juris. 972. There were in the evidence many facts showing the manner of the flota-

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★Rehearing denied. Hearing denied by Supreme Court.

tion of this cemetery scheme by its promoters, the defendants, and the fact that the whole scheme collapsed under public criticism. This evidence, as well as all the evidence in the case, was necessary to be considered by the court in arriving at its decision, and the evidence is such as to justify the finding that the lots did not exceed the value of $10 each at that time. The court was not bound by the expert testimony of defendants' witnesses, if the other facts in the case reasonably convinced him that their opinions were colored and exaggerated.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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101 Cal. App. 712

DOWNS v. NATIONAL BANK OF BAKERSFIELD. (Civ. 7097.)

District Court of Appeal, First District, Division 2, California. Nov. 7, 1929.

1. Crops ⟹6—Deeds ⟹94—Executory contract preserving pasturage rights merging in deed, neither grantor nor his assignee could complain of crop mortgagee's subsequent sale of pasturage rights.

Growing crop being part of realty conveyed pursuant to executory sale contract containing covenants reserving pasturage rights, such contract was merged in deed, and neither vendor nor his assignee could complain of crop mortgagee's subsequent sale of such rights.

2. Appeal and error ⟹1071(6)—One claiming transfer of pasturage rights after transferor conveyed realty could not complain of failure to make direct finding on such issue; appellant may not complain of want of a finding which, if made, must have been against him.

Pasturage being interest in realty conveyed to vendee, one claiming transfer to him of pasturage right, alleged to have been retained by executory sale contract, could not complain of court's failure to make finding directly responsive to such issue in his action for such rights, in absence of evidence that all holders of legal title joined in grant of such interest, as such finding would have to be against plaintiff.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by H. S. Downs against the National Bank of Bakersfield, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

F. E. Borton and James Petrini, both of Bakersfield, for appellant.

Emmons & Aldrich, of Bakersfield, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover a judgment. The defendant answered, and a trial was had before the court sitting without a jury. The trial court made findings in favor of the defendant, and from a judgment entered thereon the plaintiff has appealed and has brought up a typewritten record.

[1] Heretofore, L. D. Hill and F. E. Hill, copartners, owned a tract of land in Kern county known as the Hill Ranch. Later J. T. Hill and J. L. Hill joined L. D. Hill and F. E. Hill, forming a larger partnership, for the purpose of managing and operating the ranch. During the season of 1923 and 1924 the Hills planted the land to wheat and barley. January 18, 1924, the Hills mortgaged their crops to the defendant and the mortgage was recorded on that date. On February 19, 1924, the owners of the ranch entered into an executory contract, by the terms of which they agreed to exchange their lands in Kern county for lands in the state of Kansas owned by William Wonn. That executory contract was not recorded. On April 15, 1924, the deed by which the Hills conveyed their lands to Wonn was recorded in Kern county. On June 9, 1924, one of the partners, L. D. Hill, signed and delivered a bill of sale purporting to convey the pasturage on the lands in Kern county. That document was delivered nearly two months after the Hills had parted with their title to the lands. On or about June 23d it had transpired that the year was dry. The crops in spots had not matured. Some of the crop was so short that it could not be mowed for hay nor headed for grain. The Hills left the ranch, and the defendant as mortgagee entered into the peaceable possession for the purpose of protecting itself by harvesting and marketing the crop. As to the portion of the crop that could neither be mowed nor headed, the defendant sold the pasturage rights, and its vendees proceeded to pasture sheep on said spots. In the present action the plaintiff contends that the Hills retained rights to the pasturage by reason of certain covenants contained in the executory agreement theretofore executed by themselves and William Wonn. The defendant contends that said instrument merged in the deed from the Hills to William Wonn. It was so held in Bryan v. Swain, 56 Cal. 616; Fraser v. Bentel, 161 Cal. 390, 392, 119 P. 509, Ann. Cas. 1913B, 1062. As between the vendor and the vendee, a transfer of the growing crop was a part of the realty. Wilson v. White, 161 Cal. 453, 119 P. 895. When the vendors sold the realty they sold all interest in the crop standing thereon. As to what this defendant thereafter did, the vendee might complain, but the vendor could not. Assuming, but not deciding, that the plaintiff under his bill of sale is the assignee of the vendor, he has no greater rights than his assignor. We have thus disposed of the

question which the appellant states is the simple issue involved in the case.

[2] The plaintiff alleged that Hill brothers transferred the pasture privilege to plaintiff. The defendant denied the allegation. The plaintiff complains that the trial court did not make a finding directly responsive to the issue. The finding as made directly followed the issues as modified by the evidence. Moreover, if it had been directly responsive to the issue as made, it must necessarily have been against the plaintiff. As stated above, the pasturage was an interest in the realty. That interest could have been conveyed by a grant joined in by all the holders of the legal title. 20 Cal. Jur. 725. But there is no evidence whatever that such a grant was executed. As we understand the brief of the plaintiff, we have answered every point contained therein.

We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

102 Cal. App. 117

BAILIN v. PHOENIX et al. (Civ. 7114.)

District Court of Appeal, First District, Division 2, California. Nov. 20, 1929.

1. Appeal and error 🔑757(1)—Appellant, bringing up record by typewritten transcript, must print enough properly to present questions raised.

It is duty of appellant, bringing up record under alternative method by typewritten transcript, to print enough of record properly to present questions raised by him.

2. Appeal and error 🔑931(1)—Appellate court must accept evidence most favorable to trial court's finding.

On appeal from judgment for defendants on court's finding that negligence of both parties proximately contributed to collision causing damages sued for, the Court of Appeal must accept the evidence most favorable to such finding.

3. Automobiles 🔑244(42)—Evidence held to support court's finding of contributory negligence either in continuing to approach truck on plaintiff automobilist's side of highway after seeing it in time to avoid collision, or in falling asleep and failing to see it.

In action for damages caused by collision between defendant's truck and automobile driven by plaintiff, evidence *held* sufficient to support court's finding of contributory negligence either on hypothesis that plaintiff, after seeing truck on his side of highway in time to avoid collision, continued to approach it in manner making collision inevitable, or that he was asleep and did not see truck.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Sam Bailin against Harry E. Phoenix and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Rowen Irwin and Rollin Laird, both of Bakersfield, for appellant.

Culver & Nourse, of Los Angeles, for respondents.

DOOLING, Justice pro tem. In this action for damages arising out of a collision between a truck and trailer driven by defendant's servant and an automobile driven by plaintiff, the trial court, sitting without a jury, found that the negligence of both parties proximately contributed to the collision. From the judgment for defendants entered upon these finding, plaintiff appeals.

Appellant makes only one point on appeal, the insufficiency of the evidence to support the finding that he was guilty of contributory negligence proximately contributing to the collision.

[1] As respondents point out, appellant has printed in his brief only the most meager excerpts from the testimony, although the record is brought up under the alternative method by typewritten transcript. Out of a transcript of testimony of over 100 pages appellant has printed testimony occupying less than 3 pages of his brief. Appellate courts should not be compelled to reiterate that it is the duty of appellants proceeding under this method to print enough of the typewritten record to properly present the questions raised by them to the court on appeal. However, since respondent has printed in his brief testimony amply supporting the finding of contributory negligence, we prefer to place our affirmance of the judgment on that ground.

[2, 3] According to appellant's own testimony, when he was 500 feet away from the truck and trailer, which was approaching him slowly up grade from the opposite direction, he saw it start to turn to his side of the road. It continued in the same direction and crossed the center of the highway when it was 200 feet away, and continued toward its left of the highway at all times until the collision occurred. Appellant applied his brakes lightly when the truck crossed the center of the highway about 200 feet from him, but proceeded toward it at about 25 miles per hour until he was only a few feet away. He then turned sharply to his left in an attempt to pass the truck, but failed to clear it, and the collision occurred. A doctor who saw and treated appellant after the collision testified that appellant stated, when the doctor asked him how the collision happened: "I went to sleep."

We must accept the evidence most favorable to the finding of the court. From this evidence the court may have believed that appellant, in spite of the fact that he saw the truck on his side of the highway in time to avoid a collision, continued to approach it in such a manner as to make the collision inevitable, or that appellant was asleep and did not see the truck at all. On either hypothesis, the evidence is sufficient to support the finding of contributory negligence.

Judgment affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

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102 Cal. App. 94

BRUNSWIG DRUG CO. v. SCHLYEN et al.
(Civ. 5710.)

District Court of Appeal, Second District, Division 2, California. Nov. 19, 1929.

Pleading 🔑345(1)—Plaintiff suing on note was entitled to judgment on pleadings, where answer failed to contain positive denial of any material allegation.

Where answer in action to recover on note admitted execution of notes by copartnership and denied nonpayment or execution of notes for value by reason of lack of information and belief based on certain other information without one positive denial of material allegation, plaintiff was entitled to judgment on pleadings.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Brunswig Drug Company against Joseph Schlyen and another, copartners doing business under the fictitious firm name and style of Palm Drug Company. Judgment for plaintiff against defendant first named, and such defendant appeals. Affirmed.

Ben M. Goldman, of Los Angeles, for appellant.

Mott, Vallee & Grant, of Los Angeles, for respondent.

CRAIG, J. By complaint in the usual form the respondent in this action alleged that Joseph Schlyen and Michael H. Brodsky were copartners doing business under the firm name of Palm Drug Company; that individually and in the name of the company they executed two promissory notes, payable to the plaintiff, for the amounts of which, less certain deductions, judgment was prayed. The defendant Schlyen having answered, a motion for judgment upon the pleadings was interposed by the plaintiff, which was granted, from which said judgment defendant appeals.

It is at first contended that appellant's answer joined issues upon material allegations of the complaint by way of denials and affirmative defense, upon the merits. A second ground assigned for reversal restates the first, by urging that the pleadings show that the defendant has created an issue entitling him to his day in court upon a good and legal defense.

As already observed, the plaintiff alleged the existence of the copartnership, the execution of the notes, which were set forth in full, the nonpayment of one, and the payment of $334.32 and interest to a date specified, upon another in the principal sum of $480.57, which bore interest at the rate of 8 per cent. per annum. There was a provision in each note, and the complaint alleged that attorney's fees should be paid upon certain contingencies. Each note was signed: "Palm Drug Co. Joseph Schlyen. Michael H. Brodsky." The notes were pleaded in separate causes of action.

In answering the first cause of action appellant alleged that Brodsky was in sole and exclusive charge of the business, made all purchases without appellant's knowledge, and had all dealings with the plaintiff regarding the consideration for the note in suit; that since the execution of the note, and prior to the commencement of the action, the partnership was dissolved. Appellant then alleged that his copartner had not accounted to him with respect to the consideration for the notes, that he was informed and believed that a portion of the goods, wares, and merchandise for which it was given were not delivered; that since there had been no accounting, and having no information or belief sufficient to enable him to answer, he places his denial upon that ground, and alleges upon information and belief that there was no consideration, or if there was a consideration, that it failed. Appellant avers that he is informed and believes that because of the foregoing he is entitled to certain credits, and having no information or belief, denies nonpayment upon that ground, or any amount due, and having no information or belief upon the subject, denies that the notes were executed or delivered for value. By a second paragraph, it is alleged as to the second note that, "because of the reason set forth in paragraph I of the amended answer," the defendant has no information or belief upon the subject, "places his denial on said grounds; that the said promissory note * * * was made or executed or delivered to plaintiff for value received, and alleges in this connection upon information and belief that there was no consideration," or if there was a consideration that it failed; that because of the reason set forth in the last-mentioned paragraph, he alleges upon information and belief that he has no information or belief, and therefore denies that any amount remains due upon the second note.

The defendant Schlyen admits the existence of the copartnership at the time of the execution of the notes, and the execution of them by it and by himself as a copartner, and affirmatively alleges that they were given for goods, wares, and merchandise. Giving full effect to his answer, if supported by evidence, his copartner has had full charge of the business, and has failed to account in this instance; the defendant has no knowledge or information upon the subject, but believes that a portion of the goods were not delivered, hence he denies that the consideration was furnished. In a single allegation he states that he is informed and believes because of certain other information and belief that he has no information or belief, and upon that ground denies nonpayment or execution of the notes for value. The answer does not contain one positive denial of a material allegation, but is indeed unique and evasive. Even under the liberal rules of pleading in this state, it has been repeatedly held that in such a case the plaintiff is entitled to judgment upon the pleadings. Hemme v. Hays, 55 Cal. 337; Loveland v. Garner, 74 Cal. 301, 15 P. 845; Zany v. Rawhide G. M. Co., 15 Cal. App. 373, 114 P. 1026; Reigel v. Wollenshlager, 49 Cal. App. 300, 193 P. 160.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

102 Cal. App. 119

MARSHALL v. SWAIM. (Civ. 5647.)

District Court of Appeal, Second District, Division 2, California. Nov. 20, 1929.

1. Exchange of property 🔑7—Under exchange contract providing grantee of house should have rental beginning following day, grantor had no title to rentals thereafter.

Under exchange contract, providing that grantee of house exchanged for other property should have right to rental commencing on day following agreement, with right of reimbursement should they have been paid otherwise, grantor had no title to rentals or any right to receive them thereafter.

2. Exchange of property 🔑8(1)—One entitled to rentals after exchange could maintain action for money had and received though there was agreement relating to rentals.

One entitled to rentals from house as grantee after exchange could maintain action for money had and received though exchange agreement provided that rentals to become due thereafter should belong to grantee, since law would have supplied provision had it been omitted and therefore contract was not special.

3. Exchange of property 🔑8(1)—One entitled to rentals after exchange could sue grantor's wife receiving rentals for money had and received aside from contractual relation.

One entitled to rentals from house after exchange could maintain action against grantor's wife cashing draft sent to grantor for rentals after exchange, entirely aside from contractual relation.

4. Exchange of property 🔑7—Right to recover rentals after exchange was not affected by question whether defendant could recover against another.

In action by grantee entitled to rentals, after exchange of property, against grantor's wife, who cashed draft for rentals after exchange, plaintiff's right to recover against defendant was not affected by question whether defendant had right to recover against her husband.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action for money had and received by Marcus M. Marshall against Lena K. Swaim. From a judgment for plaintiff, defendant appeals. Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

O'Melveny, Millikin & Tuller, Paul Fussell, and Albert Parker, all of Los Angeles, for respondent.

IRA F. THOMPSON, J. The defendant was the wife of Dr. Clement Swaim, who owned a residence in Mexico City which he had been endeavoring to sell for two or three years prior to July 9, 1925. On the date mentioned, the negotiations had reached the point where he and his wife, the defendant, signed a special power of attorney authorizing one Charles F. Pettijohn to sign and carry into effect a contract for the exchange of the dwelling for an orange grove in California. The exchange was actually consummated in Mexico on August 7, 1925. The Mexico City property was leased, and on August 12 the teñant purchased a draft in the sum of $1,500, to cover the rental due for the six months' period commencing on August 15, 1925, and forwarded it to the residence of Dr. Swaim. It arrived at its destination on August 17, 1925, and the defendant indorsed the draft and used the proceeds for various purposes. The agreement for exchange of properties contains the following paragraph: "Third: Both deponents declare that the price of residence number 47 of Marsella Street is that of thirty thousand dollars and that the lands and shares together also are valued at thirty thousand dollars and consequently through the permutation (exchange) of the lands and shares for the house, the respective owners are fully compensated, and there being no claim for any reason whatsoever, they mutually acknowledge payment observing (the fact) that the rent for said residence covering rental of Mr. Conway until today belongs to Mr. Swaim and that commencing tomorrow to Mr. Marshall *with right of reimbursement* should they have been paid otherwise." The plaintiff commenced this action; the one count being for money had and received and the other being based upon an assignment from Dr. Clement Swaim to the plaintiff of his claim against the defendant. The trial court rendered its judgment in favor of the plaintiff in the sum of $1,500, and this appeal is from that judgment.

It is the appellant's contention that, by the terms of the agreement, the material portion of which we have already quoted, the respondent's right of action was one for reimbursement from Dr. Clement Swaim; he being the owner in fact of the residence as his separate property. Let us observe, however, at the outset, that the language of the agreement is such as to refer to the reimbursement to Marshall of rentals which might have been paid to him prior to the execution of the agreement, a very logical and wise precaution under the circumstance of its execution by an attorney in fact separated by a considerable distance from his principal. The words employed are "with right of reimbursement should they have been paid otherwise." Or, to put the promise in other words, it reads: "Swaim covenants that he will return to Marshall any rentals which have heretofore been paid and covering any period after the execution of the agreement." The promise did not relate to rentals which might thereafter be paid. Future unpaid rentals were comprehended by the clause "the rent for said residence covering rental of Mr. Conway until today belongs to Mr. Swaim and that commencing tomorrow to Mr. Marshall."

[1, 2] It becomes apparent, therefore, that by contract the parties had agreed upon the title to the rentals. In Jackson v. Creek, 47 Ind. App. 541, 94 N. E. 416, 418, it is said that "the rents belong to the person who holds the title, in the absence of a contract providing otherwise." To the same effect is Garber v. Gianella, 98 Cal. 527, 33 P. 458, and Diepenbrock v. Luiz, 159 Cal. 716, 115 P. 743, L. R. A. 1915C, 234, Ann. Cas. 1912C, 1084, the latter of the two cited cases going to the extent of holding that the grantee is entitled to collect an installment of rent earned at the time of the transfer, but not payable until thereafter.

It is obvious, therefore, that Dr. Swaim had no title to the rentals or any right to receive them. Had he received the draft and cashed it, there can be no doubt but that an action for money had and received would have been maintainable against him. London, etc., Fire Ins. Co. v. Liebes, 105 Cal. 203, 38 P. 691; Fontaine v. Lacassie, 36 Cal. App. 175, 171 P. 812. It is no objection to the maintenance of the action that the parties by the agreement provided that the rentals to become due thereafter should belong to the grantee. As we have observed, the law would have supplied the provision had it been omitted. The contract was therefore not special, and there is no reason why the plaintiff could not avail himself of the action of money had and received. Jackson v. Creek, supra.

[3] However, the right to this form of action is not dependent upon an express contract. It arises " 'whenever one man has in his hands the money of another, which he ought to pay over, he is liable to the action of money had and received, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has a legal or equitable ground for retaining it, the law creates the privity and the promise.' " Chung Kee v. Davidson, 102 Cal. 188, 196, 36 P. 519, 521. Entirely aside, then, from the contractual relation, the action was the proper one to pursue as against the appellant. Nor does it become the less effective by reason of the fact that she is the wife of Dr. Swaim, against whom, as we have seen, a similar action might have been brought had he received and used the proceeds of the draft. It is of no moment that Dr. Swaim had on previous occasions authorized the appellant to indorse and cash similar drafts. In this instance he not only had no right to give such authority, but also it is not suggested that he did in fact issue such instructions.

[4] It becomes unimportant than for us to probe the question of whether the court failed to find upon affirmative allegations by the defendant to the effect that she had a right to set-off against her husband, Dr. Swaim. The right of action resting in the plaintiff to recover his money could not in this instance be affected by the right of the appellant to recover against Dr. Swaim, if she had such right.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; BURNELL, Justice pro tem.

101 Cal. App. 704

HAMBERGER-POLHEMUS CO. v. LEWIN.
(Civ. 6674.)

District Court of Appeal, First District, Division 1, California. Nov. 7. 1929.

1. Sales 🔑200(3)—Title to coffee, sold under contract making sale absolute subject to quality requirements to be determined by third party, passed when third party determined quality, complied with contract.

Under contract for sale of coffee providing sale was to be absolute and coffee taken by buyer if average grading was within ½ cent. per pound of sample or description and providing for final decision of quality by third party, title to coffee passed to buyer when quality thereof was ascertained by the third party to be in accordance with the terms of the contract.

2. Sales 🔑108—Vendor's resale of goods after vendee's repudiation does not work rescission.

Resale of goods sold by vendor after repudiation of contract by vendee does not work rescission.

3. Sales 🔑384(7)—Amount which coffee brought on resale in open market was evidence of market value, in action by seller for damages for buyer's repudiation.

In action by seller for damages on buyer's repudiation of contract for purchase of coffee which seller thereafter resold in open market, amount which coffee brought on resale was evidence of its market value at that time.

4. Appeal and error 🔑931(1)—Facts supporting judgment inferable from facts found will be deemed inferred by trial court, especially where appeal is upon judgment roll.

Where facts supporting judgment may be inferred from the facts found by the trial court, such inference will be deemed to have been made, especially where appeal is upon judgment roll.

5. Sales 🔑384(7)—Seller's damages on resale of goods without auction, after buyer's repudiation, held difference between contract and market value (Civ. Code, §§ 3005, 3310, 3311, 3337, 3353).

Where seller of coffee, after buyer's repudiation, resold coffee in open market without complying with provisions of Civ. Code, § 3005, requiring sale of pledged property at auction, measure of seller's recovery against buyer under Civ. Code, §§ 3311, 3353, or under §§ 3310 or 3337, relative to conversion, was difference between contract price and market value of property.

6. Appeal and error 🔑1071(6)—Judgment for seller for difference between contract and net resale price after buyer's repudiation should be affirmed, notwithstanding absence of finding as to market value, where there was no claim coffee was resold under market value (Civ. Code, §§ 3005, 3310, 3311, 3337, 3353).

Judgment for seller of coffee against buyer repudiating contract for difference between contract price of coffee and price realized by seller on resale in the open market, less brokerage fee and demurrage, should not be reversed notwithstanding seller's failure to comply with Civ. Code, § 3005, providing for auction and notwithstanding absence of finding as to market value of coffee, where there was no claim that the coffee was resold for less than its market value; difference between contract price and market value determining plaintiff's recovery under Civ. Code, §§ 3311, 3353, and under §§ 3310, 3337, relative to conversion.

7. Appeal and error 🔑1071(6)—Omission of finding does not warrant reversal, where more complete finding would have been adverse to appellant.

Failure of trial court to make finding is no ground for reversal of judgment, where it may fairly be inferred from facts found by the record that had more complete findings been made they would have been adverse to the appellant.

Appeal from Superior Court, City and County of San Francisco; W. T. O'Donnell, Judge.

Action by the Hamberger-Polhemus Company against John Leon Lewin. Judgment for plaintiff, and defendant appeals. Affirmed.

Philip S. Ehrlich, of San Francisco (Albert A. Axelrod, of San Francisco, of counsel), for appellant.

Oliver Dibble, of San Francisco, for respondent.

PER CURIAM. An appeal by the defendant from a judgment entered in an action to recover the damage due to his refusal to accept and pay for certain coffee purchased by him. The appeal is presented on the judgment roll. As grounds therefor it is contended that the title to the coffee passed to the defendant; that after his refusal to accept and pay the agreed price therefor the plaintiff, without complying with the provisions of section 3005 of the Civil Code, resold the coffee in the open market and was consequently entitled to no relief in the action.

The complaint, to which was annexed a written contract executed by the parties, alleged that, pursuant to the terms thereof, the "plaintiff agreed to sell to defendant 500 bags of Columbian Coffee Aripe brand at the agreed price of 27¼¢ per pound, ex dock San Francisco, net weight actual tare." These allegations were admitted by the answer. The contract also contained the following provisions: "Quality: To be based upon Columbian Coffee—Aripe Brand—usual quality. * * * Payment: Cash less 2%. Full payment in exchange for delivery order on day after presentation of invoice with weight tags attached. Terms: Sale to be absolute and coffee is to be taken by buyer if average grading within one-half (½) cent per pound of the sample or description sold on at the graded allowance. * * * Decision of quality to be final and binding upon both buyer and seller, to be determined by C. E. Bickford & Co." The complaint further alleged that upon the arrival of the coffee in San Francisco the same was examined by C. E. Bickford & Co. and by them determined not to be more than one-half cent per pound below usual quality; that on October 14, 1926, the same was weighed by a public weighmaster and certified to be of the gross weight of 76,691 pounds; that on the same day an invoice of the coffee with the weight tag attached was delivered to the defendant; and on October 16, 1926, a delivery order therefor was tendered, the net weight of the coffee being 75,941 pounds. Demand for the agreed net price, namely, $19,907.94, and a refusal by the defendant to accept the coffee or pay therefor, was alleged, and that thereafter, on October 18, 1926, defendant was notified that the plaintiff intended to sell the coffee in the open market and hold him for any damage due to his refusal. It was further alleged that on October 19, 1926, the coffee was sold for the total sum of $18,789.13, from which plaintiff paid a brokerage fee for selling amounting to $187.89 and the sum of $9.75 for demurrage, and that plaintiff had suffered damage in an amount equal to the difference between the agreed net price and the net amount for which the coffee was sold.

The answer averred that the coffee tendered was between 1½ and 2 cents per pound below the usual quality of said aripe brand at the graded allowance, and also that the decision of C. E. Bickford & Co. as to its quality was due to a mistake on their part and constituted a fraud on the rights of the defendant. According to the findings, which recited that oral and documentary evidence was introduced at the trial by the respective parties, the plaintiff agreed to sell to defendant and defendant agreed to buy from plaintiff the coffee in question. The other findings were in accordance with the allegations of the complaint and against the defenses pleaded by the defendant. Judgment was entered thereon for $1,316.45 with interest.

[1, 2] According to the contract, the sale was to be absolute and the coffee taken by the buyer if the average grading proved to be within one-half cent per pound of the sample or description sold on at the graded allowance, and the determination of the fact by C. E. Bickford & Co. was to be final. Payment therefor in cash, less 2 per cent., was to be made in exchange for delivery order on the day after the presentation of the invoice with the weight tags attached. The language of the instrument clearly indicates an intention that title should pass when the quality of the coffee was ascertained by Bickford & Co. to be in accordance with the terms of the contract. Under this interpretation the defendant, relying on Bennett v. Potter, 16 Cal. App. 183, 116 P. 681, and Madison v. Weyl-Zuckerman & Co., 48 Cal. App. 308, 192 P. 110, claims that no recovery could be had. The rule is well settled that a resale by a vendor whose vendee has repudiated the contract does not work a rescission. Tomboy Gold, etc., Co. v. Marks, 185 Cal. 336, 197 P. 94; Phillips v. Stark, 186 Cal. 369, 199 P. 509, 511. In the latter case the court, referring to Bennett v. Potter, supra, said: "It was a case where a vendor, left with property on his hands the title to which had passed to the vendee, resold the property, but not in the manner required for the enforcement of a vendor's lien, and brought suit for the difference between the contract price and the amount obtained on the resale. * * * The trial court had allowed the plaintiff judgment for the difference between the contract price and the amount realized on the resale. This was reversed on appeal, but not on the ground that the plaintiff was not entitled to recover anything. It was reversed on the ground that, since the resale had not been made in the manner prescribed for the enforcement of a vendor's lien, the defendant was not bound by it that as a result the plaintiff had been guilty of a conversion of the property for which he was liable to the defendant, and that the amount received by the plaintiff on the resale could not be taken as the defendant's measure of damages for this conversion. It is not said in so many words, but the plain implication from the opinion is that the plaintiff was entitled to recover the contract price offset by the amount of damages done the defendant by the conversion worked by the resale."

Such, also, was the effect of the decision in Madison v. Weyl-Zuckerman Co., supra. Phillips v. Stark, supra, was a case wherein the vendees of personal property, the title to which had vested in them, abandoned the property and refused to pay the price. The vendor retook possession and resold the property, but without giving the notice required by the code for a sale in enforcement of a vendor's lien. Civil Code, §§ 3049, 3002. The court held that the vendor, notwithstanding the above, still had the right to recover in damages for the vendee's breach, and in discussing the measure of damages said: "The measure provided by section 3310, Civil Code, in cases where title has passed to the vendee, is the full purchase price. * * * The vendor may not have both the full purchase price and the property. It is quite immaterial in the present case upon what theory this is worked out, whether upon that suggested by us, that by repudiating the contract and thrusting the property back on the plaintiff the defendants put him in the situation of a vendor under an executory contract, in which case the measure of damages is the difference between the contract price and market value of the property (Civil Code, §§ 3311, 3353), or upon that suggested by Bennett v. Potter [supra], that the vendee is responsible for the full purchase price under section 3310, Civil Code, but the vendor is liable to the vendee in damages for a conversion. The result is the same in either case, since the measure of damages for a conversion is the market value of the property (Civil Code, § 3337)."

[3-6] So far as appears from the pleadings or otherwise, the defendant made no claim that the coffee was sold for less than its market value or that he was damaged as the result of the resale. While the complaint did not allege the market value of the property, but only the amount for which it sold on the resale, and the court found in accordance with this allegation, and not as to the ultimate fact of the market value, nevertheless the amount for which the coffee sold was evidence of its market value (Phillips v. Stark, supra; Meyer v. McAllister, 24 Cal. App. 16, 140 P. 42); and whenever from facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made. And this rule has a special application where the appeal is upon the judgment roll. Breeze v. Brooks, 97 Cal. 72, 31 P. 742, 22 L. R. A. 257; Anglo-California Trust Co. v. Oakland Railways, 193 Cal. 451, 225 P. 452.

[7] Moreover, it may fairly be inferred from the facts shown by the record that had more complete findings been made they would have been adverse to the defendant, and under such circumstances a failure to find is not a ground for a reversal of the judgment. Hulen v. Stuart, 191 Cal. 562, 217 P. 750. The findings were sufficient to support the judgment and the record discloses no error which would justify a reversal.

The judgment is affirmed.

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101 Cal. App. 719

MURPHY v. WHITE et ux. (Civ. 20.)

District Court of Appeal, Fourth District, California. Nov. 7, 1929.

1. Bills and notes 🔑94(1)—Contract to take automobile, credit value on buyer's notes, and take new note for balance, held not without consideration.

Contract to take automobile, credit agreed value thereof on buyer's notes, and take new note for balance due on old indebtedness, *held* not without consideration; new contract not merely modifying, but entirely superseding, original contract.

2. Novation 🔑12—Agreement to substitute new contract for old one may be shown by parties' acts.

An agreement to substitute a new contract for an old one may be shown by the acts of the parties.

3. Novation 🔑9—Nonperformance of substituted contract does not revive old contract.

Failure to perform the terms of a new contract substituted for an old one does not revive or give life to the latter.

4. Husband and wife 🔑85(6)—Spouses' note for balance due on husband's notes for price of automobile held supported by valuable consideration as to wife as well as husband (Civ. Code, §§ 3106, 3110).

Note executed by husband and wife for balance due on husband's notes for price of automobile under conditional sale contract *held* supported by valuable consideration as to wife as well as husband, in view of Civ. Code, §§ 3106, 3110, though she did not sign original notes or contract.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by E. B. Murphy against B. F. White and wife. Judgment for defendants, and plaintiff appeals. Reversed.

James A. Hall, of Hemet, for appellant.

E. John Eriksson, of San Bernardino, for respondents.

MARKS, J. This is an action brought by appellant against respondents as makers of a promissory note dated January 14, 1922, due three years after date, in the sum of $500. A trial was had by the court, without a jury, and judgment was rendered in favor of respondents.

The answer admits the execution of the note, pleads the statute of limitations, which plea was afterwards abandoned, and sets up the defense of failure of consideration based upon the allegations that the note was given by respondents to appellant to permit him to borrow money thereon, and for his accommodation, and upon his express promise that respondents would never be called upon to pay the note or any part thereof.

From the findings of fact and the bill of exceptions, it appears that appellant sold an automobile to B. F. White on the 28th day of July, 1920, for the sum of $1,790, payable as follows: $700 as a down payment in the form of an automobile traded in, and two promissory notes in the sum of $545 each, due on October 28, 1920, and January 28, 1921, respectively. In addition to the two notes, a conditional sales contract was executed whereby title to the automobile was reserved in appellant, and possession given to purchaser. L. H. White did not sign the notes or the contract. The contract provided that, in case the purchaser should make default in any payments to become due thereunder, the seller might terminate the contract and the rights of the purchaser thereunder, and to the automobile, and take possession of the same.

The findings of the trial court material to this appeal are as follows:

"It is true that the defendant B. F. White defaulted on this contract in the following particulars: That the defendant B. F. White did not pay or cause to be paid on his behalf the sum of $545.00 due on October 28, 1920, and the sum of $545.00 due on the 28th day of January, 1921.

"It is true that on the 14th day of January, 1922, the plaintiff made a demand upon the defendant B. F. White for the possession of the automobile, and did take possession of said automobile on the said 14th day of January, 1922. That on the 14th day of January, 1922, there remained due to plaintiff upon the contract the sum of $1,090.00 as principal and $25.00 interest or a total of the sum of $1,115.00. That the value of the automobile on the 14th day of January, 1922, the date upon which the plaintiff retook possession of the same, was $615.00. That there was a balance due upon said contract of the sum of $500.00 after deducting the value of the repossessed automobile for which amount the defendants B. F. White and L. H. White gave the note in question.

"It is true that said note was given for the balance due under the terms of the contract.

"It is true that the defendants have not paid the same or any part of said note.

"It is true that there was no consideration to the defendants B. F. White and L. H. White or to either of them for the giving of the note sued upon."

From the bill of exceptions, the evidence, which must support these findings, if they are supported, may be summarized as follows: That no part of the principal or interest on the two promissory notes for $545 was paid; that White offered to return the car several times during the year 1921, which offers were refused by appellant, who attempted to collect the money due; that on January 14, 1922, he demanded payment of White, who had no money for appellant; that the two parties thereupon entered into negotiations in an endeavor to settle the indebtedness. It was agreed that there was $1,115 principal and accrued interest due on the two notes; that the automobile was worth $615; that appellant would take the car and give White credit for $615 on the two notes; and that respondents would execute a new note in the sum of $500 for the balance due on the old indebtedness. Appellant took the car, and respondents executed and delivered to him the new note, which is the subject-matter of this action.

[1-3] Appellant urges in his briefs that the finding of the trial court to the effect that the note in question was given without consideration is not supported by the evidence. In meeting this argument, respondents rely upon the cases of Johnson v. Kaeser, 196 Cal. 686, 239 P. 324; Boas v. Knewing, 175 Cal. 226, 165 P. 690, L. R. A. 1917F, 462; and various textwriters in harmony with the same. The case of Johnson v. Kaeser turns on the point of a verbal extension of the time of paying installments under the terms of a conditional sales contract, and holds the action prematurely brought. In the case of Boas v. Knewing, the action was brought on promissory notes given the seller by the purchaser for the unpaid portion of the purchase price of an automobile sold under a conditional sales contract and repossessed by the seller. The court held that the seller could not have both the car and the purchase price under the circumstances of that case and the conditions of the sales contract. There are many other cases in the books announcing this well-recognized principle of law.

In the instant case we have a state of facts that bring it without the rule laid down in Boas v. Knewing, supra. Here we have a new contract between appellant and respondents that was not a modification of the original contract, but entirely superseded it. Beckwith v. Sheldon, 165 Cal. 319, 131 P. 1049. Before appellant repossessed this car he agreed with B. F. White upon the manner of the complete liquidation of the original indebtedness, which agreement was carried out in detail by the parties. While there was no direct testimony that there was any definite agreement to substitute the later contract for the former, this may be shown by the acts of the parties (Simmons v. Sweeney, 13 Cal. App. 283, 109 P. 265), and a failure to perform the terms of the new contract does not revive or give life to the old (Hieatt v. Gassen, 41 Cal. App. 620, 183 P. 227; Producers' Fruit Co. v. Goddard, 75 Cal. App. 737, 243 P. 686).

The case of Harpold v. Slocum, 46 Cal. App. 51, 188 P. 824, presents facts somewhat similar to the one at bar. The plaintiff and defendants owned real property in Los Angeles. The plaintiff had a $1,000 personal interest in it, and one-third of the remainder in common with the defendants. For convenience, the record title was placed in the name of one of the defendants, and a written agreement executed setting forth the respective interests of the parties, and providing for a division of the purchase money in case of sale. About a year after the property was acquired, plaintiff wanted his money, and agreed to accept the defendants' note in the sum of $1,750 in full payment of his interest in the property. The note was given, but plaintiff did not surrender his copy of the written agreement referred to, nor did he execute any conveyance of his interest in the property to defendants, or either of them. In an action to collect the promissory note, the court held that a novation was effected by plaintiff's accepting the promissory note, which canceled any interest he had in the property or in the proceeds from the sale thereof, and that it was not necessary for him to surrender the written agreement setting forth his interest in the property, as it was canceled by the new contract.

[4] Respondents further contend, that if this court should hold that the note in ques-

tion was supported by a valid consideration, as to the defendant B. F. White, still there would be no consideration as to the defendant L. H. White, she not being obligated by the original notes or conditional sales contract. Section 3106, Civil Code, provides that a pre-existing debt constitutes a consideration for a new contract. Section 3110, Civil Code, provides as follows: "Liability of accommodation party. 'An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.'" We therefore hold that the note was supported by a valuable consideration as to both respondents. Judgment reversed.

We concur: SLOANE, P. J.; BARNARD, J.

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101 Cal. App. 694

ORR v. FORDE. (Civ. 3901.)

District Court of Appeal, Third District, California. Nov. 6, 1929.

1. Stipulations 🔑14(1)—Stipulation during trial of case not reduced to writing should be limited so as not to extend beyond what parties intended.

A stipulation, particularly one loosely made during trial of a case and not reduced to writing, should be limited so as not to extend beyond what parties thereto clearly intended.

2. Appeal and error 🔑931(8)—It may be inferred that court considered two findings together as necessary in order to hold finding warranted by stipulation.

Where finding may be considered as warranted by stipulation of parties when construed in connection with and as dependent on next preceding finding, it may be inferred that court intended the two findings to be so considered together.

3. Contracts 🔑198(6)—Hole drilled below certain depth containing broken casing and containing sand and gravel was no part of completed well within drilling contract.

Hole below certain depth containing broken casing and filled with sand and gravel and cable and drill constituted no part of completed well within contract for drilling to certain minimum depth and for additional depth in consideration of additional compensation.

4. Contracts 🔑322(1)—Owner to defeat recovery for incompleted part of well had no duty of proving negligence on part of driller.

Under contract for drilling well authorizing driller to stop drilling any depth beyond 300 feet, owner, in order to defeat recovery for incompleted part of well, had no duty of proving negligence on part of driller.

5. Contracts 🔑322(2)—Evidence in action on contract for drilling well established that owner accepted only portion of well.

Evidence in action to recover under contract for drilling well *held* to establish that defendant accepted only portion of well excluding that part of hole below certain depth containing broken casing and filled with sand and gravel.

6. Contracts 🔑231(1)—Well-drilling contract held to provide for increase of 50 cents per foot for each additional 100 feet after reaching 300 foot depth.

Contract for drilling well providing for compensation at the rate of $3.25 per foot for the first 300 feet, and for additional depth an increased price of 50 cents per foot for each additional 100 feet, *held*, when viewed in light of practical experience, to provide compensation at the rate of $3.75 per foot for the next 100 feet after the first 300 feet rather than at the rate of 50 cents per foot with an increase of 50 cents for each succeeding 100 feet.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by T. B. Orr against W. J. Forde, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Reversed.

William P. Boland and Bernard G. Hiss, both of Los Angeles, for appellant.

Irwin & Laird, of Bakersfield, for respondent.

FINCH, P. J. The complaint contains two counts. In the first it is alleged that, pursuant to the terms of a contract between the parties, "plaintiff drilled a well to the depth of 940 feet, and that said well was drilled in a proper and skillful manner and was fully completed; * * * that said well * * * was received and accepted by said defendant"; that the defendant became indebted to the plaintiff in the sum of $400 "for the moving of the well-drilling rig onto said property and in the further sum of $367.50 "for the perforating and finishing up of said well." In the second count it is alleged that the defendant is indebted to the plaintiff in the sum of $2,364.72 for "work and labor done, * * * for material furnished, * * * and for money advanced."

The answer denies, among other things, that the well was drilled in a proper and skillful manner, or that the same was ever completed or accepted. The defendant also filed a cross-complaint for damages alleged to have been caused by the plaintiff's negligence in drilling the well.

The court gave the plaintiff judgment on the first count for the full contract price for a well 940 feet in depth, and also for the amount proved on the second count, and the defendant has appealed. The contract contains the following:

"The first party agrees to drill a well for second party on that certain land (describing it) at the place thereon to be designated by second party, and to sink such well thereon at least to a minimum depth of 300 feet, * * * such well to be started as 16 inch well and the same to be continued down of the same size as near as can be practically put down considering the exigencies that may arise, it being understood that in case the casing becomes stuck the size may be reduced so as to permit the putting in of casing the next regular size smaller; all upon the terms and conditions following:

"The sum of $3.25 per foot to be paid by second party for the first 300 feet and for further depths as hereafter stated; ½ of said $3.25 per foot to be paid upon the attaining of 300 feet, and the other ½ upon completion of said well.

"In consideration thereof second party agrees to pay first party * * * the sum of $400 for moving of rig into said property. Receipt of ½ is hereby acknowledged, and the other half thereof upon completion of said well; and the further sum of 50 cents per foot for each foot of the first 100 feet that said well may be drilled in excess of said minimum, and for additional depth, second party agrees to pay a price per foot in each succeeding one hundred feet increased by 50 cents per foot over the per foot price of that next preceding 100 feet (that is the per foot price in each additional 100 feet shall be 50 cents greater than the per foot price of the next preceding 100 feet; on the completion of each of said 100 feet one-half of the amount to be paid therefor shall be paid * * * and the balance thereof * * * on the completion of the well.

"After said minimum depth has been attained first party may refuse to put it down any deeper, and must cease to put it down any deeper if requested by second party. * * * First party agrees to perforate the casing at each and all water strata, and to bail and sand pump said well at the price of $35 per day * * * while engaged thereon, and second party agrees to pay first party therefor at said rate. * * * All work done hereunder by first party shall be done in good and workmanlike manner."

The court found:

"That pursuant to and under the terms and conditions of said contract, plaintiff drilled a well upon the lands of defendant, in accordance with said contract, to a depth of 940 feet, and in a proper and skillful manner, and that said well, after being so drilled, was accepted by defendant.

"That at the trial of said action, it was expressly stipulated by and between counsel for the respective parties, that there was due and owing from defendant to plaintiff the sum of $2,589.72, together with reasonable attorney's fees, subject to proof of the counterclaim set forth in defendant's cross-complaint.

"That plaintiff drilled said well in a careful, proper and workmanlike manner."

The court found that the allegations of the cross-complaint to the effect that the defendant was damaged by the negligence of the plaintiff in drilling the well are not true.

Appellant contends that the record does not support the finding as to the stipulation between counsel for the respective parties. Shortly after the commencement of the trial the plaintiff admitted that the defendant had made payments for which he had not been given credit. After a consultation between the attorneys for the parties, Mr. Laird, counsel for plaintiff, stated that there was a balance of $2,589.72 due from the defendant to the plaintiff. Thereupon the following occurred:

"Mr. Boland (counsel for defendant): It will be stipulated that that amount is the amount now between us; that that represents only what is due on the well, not for any material.

"Mr. Laird: That represents the total amount due on the entire transaction, $2,589.72.

"Mr. Boland: That * * * is to be understood is subject to all offsets we have pleaded, * * * and the further objection to certain items rendered by Mr. Orr which we claim should have been supplied by Mr. Orr under the contract, and not charged to us; and the general objection or offset for damages for failure to complete the well."

After the foregoing colloquy the plaintiff was examined at considerable length relative to various disputed items in his account, at the conclusion of which examination the plaintiff rested. The defendant then moved for a nonsuit, and the following took place:

"Mr. Boland: Plaintiff has made absolutely no proof of the drilling of a well at all.

"The Court: I think your stipulation covers that. * * * The stipulation was that $2,589.70 was still due for the work at that time, less certain credits for materials furnished * * * and subject to your claim for damages.

"Mr. Boland: That wasn't the intention of the stipulation by any means. My idea of the stipulation was to avoid any further evidence on the question of accounts. * * *

"The Court: I will deny the motion for a nonsuit. * * *

"Mr. Boland: We want the question of that stipulation cleared up. * * *

"Mr. Laird: What is the idea of the stipulation? I don't think it makes any difference. * * * It is conceded we made a prima facie case. * * *

"Mr. Boland: We don't admit you drilled a well. We don't stipulate that at all. * * * The contract provided he should drill a well.

We allege that he drilled a hole, if you want to call it that; he didn't complete a well. He was under his contract to drill a well in a good and workmanlike manner. * * * We don't stipulate that amount is due. * * *

"Mr. Laird: If there is anything due, it is $2,589.72 plus attorney's fees?

"Mr. Boland: Yes, provided the court finds that he drilled and completed a well to the depth of 950 feet.

"Mr. Laird: In other words, there is that much due subject to your counterclaim of $10,500?

"Mr. Boland: Yes. * * * We maintain that * * * the plaintiff has not shown that he has delivered a completed well under the contract.

"The Court: My ruling was on your motion for nonsuit and does not go to the merits of the case. * * * Under the allegations of your cross-complaint, * * * coupled with the stipulation you have just entered into, and the statements of the plaintiff on the stand, I think there has been sufficient testimony adduced to justify the court in denying a motion for nonsuit."

[1] From the foregoing it appears that counsel for the defendant consistently contended that the plaintiff had not finished a completed well. To give the stipulation the effect contended for by respondent would be to deprive the appellant of an important defense interposed by him. A stipulation made for the purpose of expediting the trial of an action "ought not to be used as a pitfall." Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 698, 46 L. Ed. 968. "The stipulation is to be interpreted with reference to its subject-matter, in the light of the surrounding circumstances, including the state of the pleadings, the allegations therein, and the attitude of the parties in respect of the issues." People v. Nolan, 33 Cal. App. 493, 496, 165 P. 715, 716. A stipulation, particularly one loosely made during the trial of a case in court and not reduced to writing, "should be limited so as not to extend beyond what the parties thereto clearly intended." 25 R. C. L. 1105.

[2] If the finding that the defendant stipulated that "there was due and owing from defendant to plaintiff the sum of $2,589.72," subject to proof of the cross-complaint, be construed in connection with and as dependent upon the next preceding finding that the well was drilled in accordance with the terms of the contract to a depth of 940 feet, then it may be conceded that the finding is warranted by the stipulation, and it may be inferred that the court intended the two findings to be so considered together, otherwise the first of such findings was unnecessary.

It appears from the evidence that the well was started with a diameter of 16 inches. Casing of that diameter was used for the first 312 feet, then 12-inch casing to a depth of about 400 feet, and then 8¼-inch casing to the final depth of 940 feet. It thus appears that when the work of drilling ceased the well contained 940 feet of 8¼-inch casing, 400 feet of 12-inch and 312 feet of 16-inch. Water was first struck at a depth of between 131 and 133 feet, and there was "water-bearing gravel nearly all the way from there to 400 feet." By mutual consent the plaintiff "kept on going to see what there was below," with the hope of finding artesian water. When the drill had reached a depth of about 700 feet there was a break of some character in the 8¼-inch casing some 300 feet above the lower end thereof. Plaintiff's driller informed the defendant that "the pipe (casing) wasn't in very good shape." "The pipe was good pipe, 8¼ standard pipe. There happened to be a faulty weld." The driller told the defendant "that 8¼ casing wouldn't go over 800 feet." The defendant said "to keep on going down, see what there was * * * as long as things went all right." Shortly before the drilling ceased the defendant, who was inexperienced in the use of drilling machinery, called the driller's attention to the cable and said he "thought it looked crystallized and worn out, very insecure for a depth of 940 feet lift, and asked him if it * * * wouldn't be wise, where there was so much involved, to buy a new rope." The driller replied that "it wouldn't break." The cable was spliced "a day or two" thereafter, and it finally broke about 40 feet below the splice. The driller testified that when the casing was down to a depth of 940 feet and the drill had reached a depth of 5 feet lower, "I was trying to loosen the pipe up to go ahead. We had been working several hours, when the cable broke," about 250 feet below the surface. Four or five weeks were spent in an endeavor to remove the remainder of the cable, nearly 700 feet in length, and the tools attached thereto. The driller further testified: "We tried several times with our different fishing tools. The gravel came in (presumably from a break in the casing) and bothered us. The gravel coming in made it very difficult. When we didn't get it with the mill, we cleared everything away and went down after an impression, and the casing parted. That is the last we done on that well." An expert witness for the defendant testified that the course pursued by the plaintiff's driller in attempting to remove the cable and the tools attached thereto from the well was not "good practice." After abandoning the idea of removing the cable and tools from the well, the plaintiff, pursuant to an understanding with the defendant, cut and removed the overlapping 8¼ and 12 inch casings and perforated the 12 and 16 inch casings remaining in the well and "cleaned the sand out of the well * * * down so that the 12-inch was clear."

[3] It clearly appears from the foregoing evidence that the plaintiff did not complete

the well below a depth of about 400 feet. The hole drilled below that depth, containing the broken casing and filled with sand and gravel and plaintiff's cable and drill, constituted no part of the completed well. Respondent attempts to justify the findings and judgment on the ground that there is no proof of negligence in the drilling of the well.

[4] Whatever the rule to be applied to the cross-complaint for damages may be, it was not necessary for the defendant to prove negligence in order to defeat recovery by the plaintiff for the uncompleted part of the well, but it was a sufficient defense that such part of the well was not completed. Chico Well Drilling Co. v. Givens (Cal. Sup.) 274 P. 966. Under the express terms of the contract, the plaintiff had the right to stop drilling at any depth below 300 feet. Wilson v. Fuller, 37 Cal. App. 355, 174 P. 671. Under the same terms, however, he was entitled to payment of the deferred installments of one-half the contract price only "on the completion of the well" to the depth for which he claimed compensation. Regardless of any question of negligence, plaintiff's inability to complete the well to a depth of 940 feet was due to his own operations and not to any fault of the defendant. "One who has acted by virtue of a written contract has no right of recovery, unless he can show that he had completed the contract on his part or that completion had been waived or excused." Herdal v. Sheehy, 173 Cal. 163, 165, 159 P. 422, 423; Ahlgren v. Walsh, 173 Cal. 27, 31, 158 P. 748, Ann. Cas. 1918E, 751; Carlson v. Sheehan, 157 Cal. 692, 696, 109 P. 29. See, also, Gray v. Bekins, 186 Cal. 389, 394, 199 P. 767; Law v. San Francisco Gas, etc., Co., 168 Cal. 112, 118, 142 P. 52, Ann. Cas. 1915D, 842; annotations 53 A. L. R. 103, L. R. A. 1916F, 10, and 13 C. J. 639. "Mere difficulty, or unusual or unexpected expense, would not excuse him." Snow Mountain W. & P. Co. v. Kraner, 191 Cal. 312, 325, 216 P. 589, 594; Mineral Park Land Co. v. Howard, 172 Cal. 289, 291, 156 P. 458, L. R. A. 1916F, 1; Metzler v. Thye, 163 Cal. 95, 98, 124 P. 721. "An unforeseen contingency or event, not considered by the parties at the time they entered into their agreement, can in no manner affect the same." San Pedro, etc., Co. v. Atchison, etc., Co., 183 Cal. 342, 347, 191 P. 536, 538.

[5] The court found that the defendant accepted the well. The evidence bearing upon this question was given by the defendant, who testified:

"Mr. Orr and Mr. Arnot told me they had dropped some stuff in the well and couldn't go any further. We talked it over. I asked what could be done. Mr. Orr said, 'You have got a well; we couldn't go any further; the tools stuck. There is nothing to do but sand-pump and develop the upper well.' * * * I accepted their information that they couldn't go any further.

"Q. You told them to * * * perforate the casing that remained in the well? A. Yes. * * * They told me that they had made a failure of the well. * * *

"Q. Didn't you have a pump actually installed? A. The mail carrier sent me up a windmill, and he used it for his own purposes. * * *

"Q. When you told them to perforate the casing, what casing did you mean? A. The casing connected with the water strata, 240 feet of water bearing strata."

The defendant sold and received payment for the overlapping casing which was removed from the well. All the casing used in drilling the well was purchased by the plaintiff, who charged the cost thereof to the defendant, and it appears that the defendant had paid the plaintiff the cost of the 16-inch and 12-inch casing before the action was commenced.

The evidence shows that the defendant accepted only "the upper well," extending to a depth of some 400 feet. The conversation between the parties can be given no other meaning. It has been held that such an acceptance as here shown is not a waiver by the owner of even an action for damages. Stephens v. Weyl-Zuckerman & Co., 33 Cal. App. 566, 569, 165 P. 975; Machinery & Electrical Co. v. Y. M. C. A., 22 Cal. App. 416, 419, 134 P. 724. Plaintiff not only failed to complete the well to a lower depth than about 400 feet, but he left his drill and drilling cable fast in the uncompleted part in such manner as to prevent the defendant from drilling to a lower level for the purpose of developing artesian water.

There seems to be no substantial conflict in the evidence as to the amount properly chargeable to the defendant for casing and other materials, but it does not appear what part of the payments made by the defendant should be credited on the cost of such materials. It seems necessary, therefore, to reverse the entire judgment.

[6] Appellant contends that the contract fixes the compensation for drilling beyond the minimum of 300 feet at 50 cents a foot for the first 100 feet and for each succeeding 100 feet 50 cents a foot above the compensation for the next preceding 100 feet. Viewing the contract in the light of practical experience, it is clear that the plaintiff was to receive $3.25 a foot for the first 300 feet, $3.75 a foot for the next 100 feet, and for each succeeding 100 feet 50 cents a foot above the compensation for the next preceding 100 feet.

The judgment is reversed.

We concur: THOMPSON, J.; PLUMMER, J.

101 Cal. App. 736

GREENWOOD v. GREENWOOD.★
(Civ. 3916.)

District Court of Appeal, Third District, California. Nov. 9, 1929.

Hearing Denied by Supreme Court Jan. 6, 1930.

1. Appeal and error 🔑882(5)—Defendant, on appeal from order refusing to vacate final divorce decree on cross-complaint, could not complain for first time that her own amendment to cross-complaint was not reduced to writing and filed.

Where, during course of trial in divorce action, court at instance of defendant, without objection from plaintiff, permitted cross-complaint to be amended so as to pray for divorce, and all subsequent testimony and proceedings were upon theory that amendment had been actually made, defendant, on appeal from order refusing to vacate final decree of divorce rendered on cross-complaint, could not for first time raise objection that prayer of cross-complaint was not formally amended, especially since defendant obtained permission to make amendment and it was her own neglect that such amendment was not reduced to writing and filed with clerk.

2. Divorce 🔑154—Court in contested divorce case may grant any particular relief authorized by facts proved or admitted.

Where divorce action is contested, court has jurisdiction to grant any particular relief authorized by facts and alleged and proved or admitted, and is not limited to relief demanded in prayer of cross-complaint, since in such cases jurisdiction to grant any particular relief does not depend on prayer of complaint or cross-complaint but upon issues made by pleadings.

3. Divorce 🔑165(1)—Trial court, after expiration of period for attacking interlocutory divorce decree, held without jurisdiction to set aside decree (Code Civ. Proc. § 473).

After expiration of period within which interlocutory decree of divorce may be attacked on appeal in proceedings in which it was entered, or six months after entry of interlocutory decree, under Code Civ. Proc. § 473, trial court is without jurisdiction to alter or set aside interlocutory decree.

4. Divorce 🔑156—Husband, after wife's interlocutory divorce decree became final and one year elapsed after entry, had absolute right to final decree without notice (Civ. Code, § 132).

Where wife obtaining interlocutory decree of divorce on cross-complaint permitted such decree to become final, and one year elapsed after its entry, husband had absolute right, under Civ. Code, § 132, to have final decree entered, and no notice of entry of same was required to be given wife.

5. Appeal and error 🔑876—Divorce 🔑184(1)—Contentions reviewable on appeal from interlocutory divorce decree cannot be reviewed upon appeal from final decree or order refusing to set it aside (Code Civ. Proc. §§ 473, 956).

Contentions on appeal from order refusing to vacate final decree of divorce, all relating to matter occurring prior to entry of interlocutory decree and subject to review on appeal from such decree had appeal been taken, cannot be made subject of review upon appeal from final decree or from order denying motion to set aside final decree, under Code Civ. Proc. § 473, in view of section 956, providing that provisions of section do not authorize review of any decision or order from which an appeal might have been taken.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for divorce by S. J. Greenwood against Victoria R. Greenwood, in which defendant filed a cross-complaint. From an order denying the motion to set aside the final decree of divorce on cross-complaint, defendant appeals. Affirmed.

Newby & Newby, of Los Angeles, for appellant.

Andreani & Haines, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendant, Victoria R. Greenwood, from an order denying her motion to set aside a final decree of divorce entered in her favor.

The record reveals the following facts: S. J. Greenwood, the respondent, and Victoria R. Greenwood, the appellant, were formerly husband and wife. On July 29, 1922, they settled their property rights and separated. On March 4, 1924, the respondent filed a complaint in divorce in the superior court of the county of Los Angeles, against appellant, charging her with desertion, and further alleging that there was no community property. Appellant answered, denying desertion on her part, and alleging that there was community property amounting to more than $200,000, and also filed a cross-complaint alleging desertion on the part of respondent. The prayer of the cross-complaint reads: "Wherefore, defendant and cross-complainant prays that she be awarded reasonable attorney's fees, court costs and support pendente lite, and that the court, in granting permanent support, shall make disposition of the community property the same as though the marriage were dissolved."

Thereafter, and on June 16, 1924, appellant filed a supplemental cross-complaint, charging respondent with adultery, and again alleging there was community property, and concluding with the identical prayer as in the original cross-complaint. In neither the cross-complaint nor the supplemental cross-complaint, as originally filed, did appellant pray for a divorce. The respondent filed answers denying the matters alleged in both cross-complaints, and the case came on regularly for trial on July 1, 1925, upon the issues raised by the foregoing pleadings.

During the progress of the trial, and before

★Hearing denied by Supreme Court.

the taking of testimony was concluded, the following proceedings occurred in open court and in the presence of appellant and respondent: "Mr. Greer (who was the attorney for defendant and cross-complainant in the trial court): We ask leave to amend the prayer of our first cross-complaint in this manner only, that where we pray for separate maintenance we pray for a decree dissolving the bonds of matrimony and an interlocutory decree of divorce. The rest of the prayer with reference to the division of the property we do not care to amend. The Court: That amendment may be made. Mr. Bisher (the attorney for plaintiff and respondent): Yes, I have no objection."

The trial was then resumed and proceeded to final conclusion upon the pleadings as amended and upon the issues joined therein, without objection from appellant, but no written amendment or interlineation was actually made to the complaint or filed with the clerk.

During the progress of the trial, the appellant attempted to show that the property settlement entered into between the parties was unjust and inequitable as to her, but the court made findings, which are supported by ample evidence, contrary to her contention. The court also found that the allegation of adultery was not true, and that appellant did not desert respondent, but, on the contrary, found that appellant's allegation of desertion on the part of respondent was true, and granted her an interlocutory decree of divorce upon that ground. The findings and decree were signed and entered on October 27, 1925. No appeal was taken, or attempted to be taken, from the interlocutory decree of divorce; neither was any motion made to set aside or modify the same.

On November 1, 1926, on motion of respondent, S. J. Greenwood, the final decree of divorce, following the terms of the interlocutory decree, was entered. Thereafter, and on April 26, 1927, appellant filed a notice of motion to vacate said final decree of divorce upon the following grounds: "Said motion will be made on the ground that said decree was entered without notice to the defendant and because of excusable neglect of defendant, and the fraud of plaintiff in causing said final decree to be entered before the defendant's case had been fully presented to the judge for decision, and will be made in pursuance of the terms of section 473 of the Code of Civil Procedure of the State of California, and will be based upon the annexed affidavits and judgment roll, files and records in the above entitled action."

This motion was made on April 29, 1927, and submitted upon affidavits made in support and in opposition to the motion. The trial court, after fully considering the matter, denied the motion on July 7, 1927, and this appeal is prosecuted from the order denying said motion.

Appellant first contends that the trial court had no power to grant her an interlocutory decree of divorce on her cross-complaint, for the reason that the prayer of the cross-complaint only asked for separate maintenance and a division of the community property, and not for divorce, and that no amendment to the prayer of the cross-complaint was ever made or filed with the clerk of the court.

[1] There is no merit in this contention. It is true that the change in the prayer of the cross-complaint was not actually reduced to writing and filed with the clerk, but it was ordered by the court *at the request of appellant's attorney and stipulated to by respondent's attorney*, and all subsequent testimony and proceedings were taken and had upon the theory that the amendment had been actually made. Under such circumstances, it is now too late for appellant to raise the objection in this court for the first time that the prayer of the cross-complaint was never formally amended as ordered by the court. Murphy v. Stelling, 8 Cal. App. 706, 97 P. 672; Shaw v. Union Escrow, etc., Co., 53 Cal. App. 71, 200 P. 25. Certainly, appellant cannot be heard to complain that no written amendment was actually made to the prayer of her cross-complaint, in view of the fact that she obtained permission from the court to make the amendment, and it was her own neglect that such amendment was not reduced to writing and filed with the clerk.

[2] Furthermore, the case at bar, being a contested case, the court had jurisdiction to grant any particular relief authorized by the facts and alleged and proved or admitted, and was not limited to the relief demanded in the prayer of the cross-complaint. Murphy v. Stelling, supra; D'Arcy v. D'Arcy, 89 Cal. App. 90, 264 P. 497; 14 Cal. Juris. 986; Goetting v. Goetting, 80 Cal. App. 369, 252 P. 656; Woods C. I. Ditch Co. v. Porter S. Ditch Co., 173 Cal. 153, 159 P. 427; Nathan v. Dierssen, 164 Cal. 611, 130 P. 12. In such cases, the jurisdiction of the court to grant any particular relief does not depend on the prayer of the complaint or cross-complaint, but upon the issues made by the pleadings.

[3] It is well settled that an interlocutory decree of divorce is only subject to attack in the proceedings in which it is entered upon appeal, or by proceedings under section 473 of the Code of Civil Procedure, within six months after the entry of such decree, and that, after the expiration of the period within which either of these forms of attack may be made, the trial court is without jurisdiction to alter or set aside its interlocutory decree. Gould v. Superior Court, 47 Cal. App. 200, 191 P. 56; Suttman v. Superior Court, 174 Cal. 243, 162 P. 1032; Bancroft v. Bancroft, 178 Cal. 368, 173 P. 582; Abbott v. Superior Court, 69 Cal. App. 660, 232 P. 154; Bacigalupi v. Bacigalupi, 72 Cal. App. 658, 238 P. 93; Gillespie v. Andrews, 78 Cal. App. 598, 248 P. 715; Claudius v. Melvin, 146 Cal. 257, 79 P. 897; Reed v. Reed, 9 Cal. App. 748, 100

P. 897; Newell v. Superior Court, 27 Cal. App. 343, 149 P. 998.

[4] Therefore, appellant having permitted the interlocutory decree of divorce to become final and one year having elapsed after its entry, the respondent had an absolute right to have the final decree entered, and no notice of the entry of the same was required to be given appellant. Section 132, Civ. Code; Claudius v. Melvin, supra; Suttman v. Superior Court, supra.

[5] Other contentions are made by appellant for a reversal of the order appealed from, but they all relate to matter which occurred prior to the entry of the interlocutory decree of divorce, and were therefore the subject of review on appeal from the interlocutory decree, had such appeal been taken, and hence cannot be made the subject of review upon an appeal from a final decree of divorce, or an appeal from an order denying a motion to set aside the final decree of divorce, made under section 473 of the Code of Civil Procedure. Bancroft v. Bancroft, 178 Cal. 366, 173 P. 585; section 956, Code Civ. Proc.; Suttman v. Superior Court, supra; Newell v. Superior Court, supra; Reed v. Reed, supra; Claudius v. Melvin, supra.

We have, however, considered all the points discussed upon this appeal, and find that none of them possesses sufficient merit to have warranted a reversal had an appeal been properly taken from the interlocutory decree.

We find no merit whatever in the appeal. The order is therefore affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

RICHARDSON v. LAMP et al. (Civ. 22.) ★

District Court of Appeal, Fourth District, California. Nov. 18, 1929.

Rehearing Denied Dec. 18, 1929. Hearing Granted by Supreme Court Jan. 16, 1930.

1. Evidence 🔑445(4)—Terms of note cannot be altered by any oral agreement to relieve makers from liability unless agreement has been fully executed.

Terms of note, absolute on its face, cannot be altered by any oral agreement of parties to relieve makers from liability, whether made prior to, contemporaneously with, or subsequent to, execution of note, unless agreement has been fully executed.

2. Bills and notes 🔑537(3)—Evidence in action on note, showing transactions between parties and services rendered by plaintiff, held sufficient for jury on question of consideration.

In action upon note, evidence showing transactions between parties and services rendered by plaintiff *held* sufficient to present question for jury as to consideration for which note was given.

3. Appeal and error 🔑1050(1)—Admitting testimony showing oral agreement to relieve defendants from liability on note held reversible error, where evidence on failure of consideration was questionable.

In action upon note, admitting testimony by defendants showing express oral agreement by plaintiff to relieve and exonerate defendants from liability *held* reversible error, especially where evidence on failure of consideration was of very questionable weight and jury was not instructed to disregard incompetent evidence.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Jerome L. Richardson against J. F. Lamp and others. Judgment for defendants, and plaintiff appeals. Reversed, and new trial granted.

W. Earl Redwine, Frank C. Scherrer, and Jerome L. Richardson, all of Riverside, for appellant.

James L. Davis and Sharpless Walker, both of Santa Ana, for respondents.

SLOANE, P. J. This action was brought to recover on a promissory note made and executed by the defendants named herein to the plaintiff, Jerome L. Richardson.

The appeal was taken by the plaintiff after a jury trial from a verdict and judgment in favor of the defendants. The note in question was in words and figures as follows:

"$1,500.00 Riverside, Calif. Jan. 16, 1924.

"On or before six months from date for value received, I promise to pay to Jerome L. Richardson, or order, in the City of Riverside, California, the sum of Fifteen Hundred Dollars ($1,500.00) with interest from date until paid at the rate of seven per cent per annum payable at maturity.

"Should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note and in case suit is instituted to collect this note or any portion thereof I promise to pay such additional sum as the Court may adjudge reasonable as attorneys fees in said suit.

"30¢ I. R. S. Cancelled.

"J. F. Lamp.
"C. O. Field.
"D. P. Goodrich.
"A. W. Leichtfuss.
"G. G. Beckmann.
"W. B. Lamp."

The complaint was in the usual form for action on a promissory note, and the answer of the defendants admits the execution of the note and its nonpayment, but pleads, by way of defense, that it was without consideration, and for a further and separate answer and

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★Hearing granted. 290 P. 14.

defense alleges: "That at the time and place when and where defendants executed the promissory note set out in paragraph I of plaintiff's complaint, to-wit, on January 16, 1924, at Riverside County, California, the plaintiff agreed with defendants, and with each of them, that if defendants would execute and deliver to him the said promissory note, he, the plaintiff, would collect the principal and interest thereof from Herman Fisher, B. R. Parrott, and M. C. Fleming, against whom defendants then had claims for money and for damages, and which said claim the said plaintiff agreed to enforce for defendants against the said Fisher, Parrott and Fleming; that defendants, and each of them, executed said promissory note as aforesaid pursuant to a mutual, contemporaneous, dependent, oral agreement then and there entered into between plaintiff and defendants wherein and whereby plaintiff then and there agreed that if defendants would execute and deliver to plaintiff the said promissory note, he, the said plaintiff, would collect the amount of the said promissory note, principal and interest, from the said Fisher, Parrott and Fleming, and would not hold the said defendants, or any of them liable for the payment of said promissory note or for any part thereof, and wherein and whereby defendants, and each of them, by reason of said agreement of said plaintiff, and not otherwise, agreed to execute said promissory note; that none of the said defendants would have signed said promissory note except for the said agreement of the said plaintiff that he would not hold defendants, or any of them, liable on said promissory note and would collect said promissory note only from the said Fisher, Parrott and Fleming, either by compromise and settlement of the said claim of defendants against the said Fisher, Parrott and Fleming, or by suit or suits in behalf of defendants on said claims against said Fisher, Parrott and Fleming, to be filed in the Superior Court of Los Angeles County, California, which said county was then the place of residence of said Fisher, Parrott, and Fleming; that for some months prior to the date of the execution by the defendants of said promissory note, the plaintiff, as the representative of one B. R. Parrott, attempted to sell to a corporation known as the Lone Wolf Oil Company, in which said corporation defendants were interested as officers or stockholders, a property at Signal Hill, California, known as Thompson Well No. 5; that in connection with and incident to the said attempt of plaintiff, as the representative of said Parrott, to sell to said corporation said Thompson Well No. 5, the said plaintiff made a number of trips from Riverside, California, to Orange, California, to Long Beach, California, and to Los Angeles, California; that said trips were not made for or in behalf of these defendants, or any of them, or for or in behalf of said corporation; that on the 16th day of January, 1924, and immediately prior to the execution of said promissory note, the said plaintiff stated to defendants that he considered $50.00 a trip a reasonable charge for said trips and that his total charge for such trips, together with incidental expenses, aggregated about $1,400.00 and that if the defendants would execute and deliver to him their note for that amount he would not hold defendants liable on said note and would not collect said promissory note unless it could be collected as additional damages which he alleged he could collect from the said Fisher, Parrott, and Fleming; that thereupon the defendant G. G. Beckmann stated that if the plaintiff would agree not to collect said promissory note from defendants and would agree to not collect said note at all unless it could be collected as damages from said Fisher, Parrott and Fleming out of a settlement which plaintiff then and there stated he was about to effect in behalf of defendants of their claim against said Fisher, Parrott and Fleming, or out of a suit which he stated he was about to prosecute against said Fisher, Parrott and Fleming on said claim, if a settlement and adjustment could not otherwise be procured, that then the defendants would agree to give to plaintiff a promissory note not merely for the said $1,400.00, but for $1,500.00; that thereupon the said plaintiff and all of said defendants agreed and assented to said proposal and the defendants then and there executed and delivered to plaintiff said promissory note and the said plaintiff received said promissory note under and pursuant to the said understanding and agreement, and not otherwise."

Want of consideration is pleaded as a second further and separate answer and defense to plaintiff's complaint, in which it is alleged that none of the defendants received any consideration or anything of value for the promissory notes set out in the first paragraph of plaintiff's said complaint, or for the execution or delivery thereof, and that no other person with the consent of defendants or of any of them, received any consideration or anything of value from said plaintiff for the said promissory note or for the execution and delivery thereof; that there was and is an entire absence and want of consideration for the said promissory note and for the execution and delivery thereof; and that, at the time defendants executed and delivered to plaintiff said promissory note, none of said defendants was indebted to plaintiff in any sum.

On the presentation of the issues raised by the pleadings to the jury, counsel for plaintiff objected to the separate answer and defense, setting up the alleged contemporaneous promise and agreement of plaintiff that he would not hold the makers of said note obligated to its payment, but would collect it from the third parties named, on the ground that it was incompetent, irrelevant, and immaterial, and contains matters evidentiary in nature, and furthermore does not constitute a defense.

The objection was presented and argued before the court, in the absence of the jury, on the ground that the alleged defense was an attempt to vary the terms of the written contract and that the execution of a contract in writing supersedes all the negotiations or stipulations concerning it, which preceded or accompanied the execution of the instrument, and that a contract in writing may be altered only by a contract in writing, or by an executed oral agreement. The court overruled the objection, and permitted the issue so raised by the answer to be presented to the jury, and evidence to be given in support thereof.

[1] This ruling was apparently made by the trial court on the theory that the facts alleged were such as might properly be considered as going to the defense of want of consideration for the note. It is apparent that the principal question involved in this appeal arises upon this special defense of a contemporaneous oral agreement to relieve defendants from liability on the note and the admission, over plaintiff's objection, of testimony in support thereof. The rule is too well settled to admit of controversy or require citation of authorities, that the terms of a written contract cannot be altered by any such oral agreement of the parties, whether made prior to, contemporaneously with, or subsequent to, the execution of the writing, unless the agreement has been fully executed. In this case the defendants entered into a specific agreement to pay to the plaintiff the sum of $1,500, for a consideration which is expressly stated, and which is presumed from the nature of the instrument. There is no contention that this agreement was reached through any fraud or mistake or undue influence. The defendants pleaded and presented the defense of a failure of consideration, which they had a right to do, and, if the verdict of the jury was arrived at from competent evidence showing a want of consideration for the promise of defendants alone, and was not influenced by testimony given of the contemporaneous oral promise not to enforce payment of the note against them, but to look to third parties for payment, the verdict can be properly sustained. On the other hand, if the parol evidence of this agreement to release the defendants from liability was such as to affect the minds and decision of the jury as an independent agreement, irrespective of the question of a valuable consideration for the promise to pay, the admission of such evidence was palpably reversible error.

[2] The question as to the consideration for which the note was given, was properly presented to the jury, and, while there is some evidence, though of an unsatisfactory nature, to indicate that the professional services rendered by the plaintiff, which form the alleged consideration for the note, were rendered pursuant to an understanding with plaintiff that they were not to be paid for by defendants, but were his own contributions to a mutual enterprise in which they were all engaged, such evidence is far from conclusive against the plaintiff. All of the defendants, makers of the note, testified in categorical denial, that they or either of them at any time employed plaintiff for the services rendered, or that he was to be paid for the services rendered, but, in the face of these declarations, it was conclusively shown, not only by the testimony of the plaintiff himself, but that of each of the defendants, that plaintiff, during a considerable period of time, rendered legal services to the defendants in the organization of a corporation of which defendants were officers and directors and prospective stockholders, and the negotiation of a contract for the purchase by this corporation of an oil well known as Thompson well No. 5, at Signal Hill. While it is claimed by defendants that plaintiff was acting for the owners of this well, with the expectation of receiving a generous commission in case the sale was perfected, and not with the expectation of compensation from defendants, it does appear conclusively from the evidence that he was acting and accepted by defendants as their legal advisor in these matters, and that he was employed by them to effect the organization of this corporation, known as the Lone Wolf Oil Company. They had advanced him $400 to meet the expenses of the incorporation, and had met with him repeatedly in consultation as to the carrying out of the enterprise.

[3] It appears without dispute that the principal sum contracted for under this promissory note was made up in conference with the defendants, as the reasonable charges for services rendered, including some twenty or thirty trips from Riverside to Orange, Santa Ana, and Los Angeles, in pursuance of this business, and that the amount arrived at, included in the note, was agreed to as the reasonable compensation for such services; the only controversy between the parties being as to who was to pay the bill. It was conceded by all parties in their testimony that the proposed oil well purchase fell through by reason of default on the part of the owners to make a good title to the property, and the agreement arrived at between plaintiff and defendants was that an action should be brought against the owners of the property, in the superior court of Los Angeles county, to recover damages for the failure to make good on their agreement of sale, and it is the theory testified to by the defendants, that the amount of compensation to plaintiff incorporated in this promissory note, and which they had obligated themselves to pay, was part of the damages to be recovered in this suit. If the defendants' own theory of the case is correct, they were attempting to recover the

principal sum of this note from the owners of the oil well property, on the theory that it was part of the obligations they had contracted, in attempting to carry out the purchase of the oil well. If, as a matter of fact, they had not incurred this obligation to the plaintiff for his services, this scheme to charge the amount of liability they had thus incurred to the people with whom they were dealing, as part of their damages, was clearly an attempted fraud on their part, and ought, in good conscience, to estop them from claiming want of consideration for the note in question. However that may be, we cannot escape the conclusion that the admission of testimony on the part of defendants showing an express oral agreement on the part of plaintiff to relieve and exonerate the defendants from liability on this note, materially influenced the jury in arriving at its verdict, and that the admission of the same was reversible error, especially in view of the very questionable weight of the testimony as to failure of consideration.

It is true that the case was submitted to the jury on this issue of want of consideration alone, and the instructions given, so far as they went, were appropriate to that issue; but the jury was not instructed to disregard any evidence of the parol agreement of the plaintiff, to relieve defendants from liability and look to the third parties named for his pay. And, even had such an instruction been given, it is doubtful if it would have removed from the minds of the jury the influence of such parol agreement, if they believed it had been actually entered into and relied upon by defendants.

The judgment is reversed, and a new trial granted.

I concur: BARNARD, J.

MARKS, J., deeming himself disqualified from taking part in the decision of this appeal, does not participate.

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102 Cal. App. 42

MacGREGOR v. KNOWLDEN et al. ★
(Civ. 7058.)

District Court of Appeal, First District, Division 2, California. Nov. 16, 1929.

Rehearing Denied Dec. 16, 1929. Hearing Denied by Supreme Court Jan. 13, 1930.

1. Deeds 🔑93—Intention of parties to deeds must be ascertained and carried out.

Primary rule of interpretation of deeds is to ascertain and carry out the intention of parties thereto.

2. Deeds 🔑115—False call will be disregarded, to make description harmonize with actual facts and conditions.

A false call in a deed will be disregarded, in order to make description harmonize with actual facts and conditions.

3. Deeds 🔑115—Deed referring to previous conveyances excluding right of way excepted only 40-foot strip in accordance with previous conveyance, regardless of reference to 60-foot strip.

Deed conveying property with the exception of right of way consisting of a 40-foot strip in accordance with reference to previous conveyance conveyed all the property with the exception of right of way strip, regardless of reference therein to right of way as a 60-foot strip, which must be disregarded as a false call.

4. Deeds 🔑114(4)—Amount of acreage as to right of way excepted in deed would not control outstanding intention to except that theretofore conveyed.

Amount of acreage stated in deed as excepted for right of way would not control outstanding intention of deed to except that which had been theretofore conveyed, and consequently not owned by grantor, particularly in view of words "more or less," indicating that exact amount of acreage should not be controlling factor, and should yield to other more definite parts of description.

5. Deeds 🔑140—Location of right of way fences was immaterial, in determining width of strip excepted in deed, without claim of railroad thereto.

Location of fences on railroad right of way was immaterial, in determining width of strip excepted in deed excluding right of way in accordance with conveyance theretofore made, in view of fact that there was no claim of railroad involved, and no question of estoppel nor of adverse possession.

6. Boundaries 🔑3(3)—True boundary line, used as monument, controls distance call.

A known boundary line may be a monument as well as a physical object on the ground, and, when such boundary line is used as a monument, the true boundary line is indicated rather than the conventional one, and as such controls distance call.

7. Boundaries 🔑3(3)—True right of way controlled over distance call in deed conveying land bounded by right of way.

Under deed conveying land to right of way boundary, the true boundary, including 10-foot strip inclosed by right of way fence, controlled distance call in deed, in absence of intention on part of grantor to reserve to himself any land between true right of way and land conveyed by deed.

8. Appeal and error 🔑901—Appellants have burden of showing error on appeal, regardless of burden of proof at trial.

Burden of showing error on appeal is on appellants, regardless of rule as to burden of proof at trial.

9. Evidence 🔑265(5)—Deeds, maps, and other evidence, constituting declarations against interest, were not conclusive in action to quiet title, but merely presented question of fact.

Deeds, maps, and other evidence, constituting declarations against interest by predecessors of plaintiffs in action to quiet title, were not

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★Rehearing denied. Hearing denied by Supreme Court.

conclusive, but merely presented question of fact for court.

10. Quieting title ⚷43—Plaintiff in action to quiet title was not prevented from introducing deeds other than those mentioned in amended complaint.

Amended complaint in action to quiet title, alleging conveyances and concluding by allegation that both plaintiff and defendant claimed title from a common source, did not prevent plaintiff, in proof of title, from introducing other deeds in evidence than those mentioned in amended complaint.

11. Quieting title ⚷51—Defendants were not entitled to judgment quieting title merely because of plaintiff's failure to prove title to property.

Defendants in action to quiet title were not entitled to judgment quieting title to property by reason of failure of plaintiff to prove title to certain portion of property involved, where evidence showed title to be outstanding in third person.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by C. M. MacGregor against Bertha McKenzie Knowlden and another, wherein defendants filed a cross-complaint. From the judgment, defendants appeal. Affirmed.

Robert E. Knowlden, of Oakland (John C. Stirrat, of Oakland, of counsel), for appellants.

Robert B. Gaylord, of San Francisco, for respondent.

KOFORD, P. J. This is an action to quiet title to certain long strips of land 10 feet wide adjoining the two sides of the 40-foot right of way of the Atchison, Topeka & Santa Fé Railway Company, hereinafter called the Santa Fé. The strips of land are in Albany, Alameda county, and are bisected by Main street where it crosses the railroad track, thus making the strips of land into four separate parcels; each parcel being the subject of a separate cause of action in the complaint. The plaintiff obtained judgment quieting his title to the three parcels of land described in the first three of the four causes of action of his complaint. Defendants, who are also cross-complainants, obtained judgment quieting their title to the fourth parcel. Defendants appeal from the judgment in favor of the plaintiff upon the first three causes.

Appellants claim title to the land described in the complaint under a quitclaim deed executed to them in September, 1925, by George Sterling. The deed conveyed to them whatever interest the said grantor may have had in the said strips of land at that time. The said George Sterling is the common predecessor of the parties to this action. Respondent claims title under a chain of conveyances, the first being two conveyances by the said Sterling in 1906.

Going back of Sterling in the chain of title, to explain tne origin of the right of way, we find that in February, 1884, the Pacific Improvement Company, owner of two-thirds, and Maria Hall, owner of one-third, by separate instruments, conveyed to the California & Nevada Railroad Company the railroad right of way hereinabove referred to. These deeds, in granting the right of way, described it by metes and bounds. It was 40 feet in width (not 60 feet). The deeds stated that the strip contained 5.73 acres of land. Afterwards, on the 12th of October, 1906, Pacific Improvement Company conveyed to George Sterling, and on the 27th day of November, 1906, H. W. Carpentier conveyed to George Sterling a large tract of land surrounding the said right of way. The descriptions in these two deeds were identical. They contained a number of exceptions. One of these exceptions was the railroad right of way. It read: "Saving and excepting therefrom the following tracts or parcels of land heretofore conveyed, viz.: * * * 5.73 acres for right of way to the California & Nevada Railroad Company February 23, 1884."

Very shortly thereafter the said Sterling made the two conveyances which start the chain of title to the respondent. These deeds were, first, Sterling to North Berkeley Land Company, dated October 13, 1906, which relates only to the third cause of action herein; and, second, Sterling to Spring, dated December 7, 1906, which relates to the first and second causes of action herein. The deed from Sterling to Spring conveyed that part of Sterling's property which lay north of Main street. It included and conveyed the strips of land described in the first and second causes of action unless the said deed, in excepting from its description the railroad strip, had the legal effect of excepting a 60-foot strip instead of a 40-foot strip of land. The exception in this deed reads as follows: "Excepting therefrom a strip of land 60 feet in width heretofore conveyed by the Pacific Improvement Company to the Atchison, Topeka & Santa Fé Railroad Company, containing 4.32 acres, more or less, and being within the boundaries of the above described tract." It appears, therefore, that Sterling received title to the land surrounding and including that described in the first and second causes of action by deeds which clearly excepted the identical 40-foot right of way which had theretofore been conveyed, whereas in the conveyance by which he parted with his title he excepted a right of way which he referred to as a 60-foot strip of land theretofore conveyed. From this discrepancy arises the litigation with respect to the first and second causes of action.

It was stipulated at the trial that the California & Nevada Railroad Company, to which company the right of way was conveyed in

1884, was a predecessor of the Santa Fé, that the latter company succeeded to the rights of the former prior to 1905, that it used and occupied the right of way ever since the last-named date, and that the railroad tracks were then and now within the 40-foot strip. It was also stipulated that there was no record of any conveyance which transferred the 10-foot strips in controversy to the Santa Fé. Testimony was stipulated to the effect that the Santa Fé Railway Company claimed no more than a 40-foot right of way, and that it claimed the same only under the deeds of 1884 hereinabove described.

Respondent claims that the exception in this deed operated to except only the 40 feet theretofore conveyed, or it excepted nothing at all on account of its ambiguity. If it excepted nothing at all, or if it excepted only 40 feet, the title to the 10-foot strips in either case passed by Sterling's deeds to respondent's predecessors, and was not retained by Sterling after the execution of said deeds until 1925, when he executed a quitclaim deed to the appellants.

[1-3] The primary rule of interpretation of deeds is to ascertain and carry out the intention of the parties. It does not seem reasonable that Sterling intended to except a 60-foot strip of land when he executed to respondent's predecessors the deed above mentioned. The language of the exception refers to a strip of land theretofore conveyed by the Pacific Improvement Company to the Santa Fé Railway Company. This description is not satisfied by a 60-foot strip, because no 60-foot strip had ever been so conveyed. Of course, it would be quite possible for Sterling to have reserved to himself for some purpose a 10-foot strip on either side of the Santa Fé 40-foot right of way. The deed does not show this intention, however, for he reserves nothing to himself, and excepts only that which had been theretofore conveyed away to the Santa Fé Railway by his (Sterling's) predecessors. The strip of land intended to be excepted by Sterling must necessarily have been the right of way conveyed in 1884, for that was the only right of way in existence and the only strip theretofore conveyed. This was the rule applied in Grennan v. McGregor, 78 Cal. 258, 262, 20 P. 559. On the other hand, if the only right of way in existence was of such a nature that it could not possibly have been in the minds of the parties using the language found in the deed, then it was no exception whatsoever, and in that case the said deed of Sterling would have operated to convey all the title that he had within the exterior boundaries of the property described. Lange v. Waters, 156 Cal. 142, 146, 103 P. 889, 19 Ann. Cas. 1207.

Under this construction the title to the land in the 60-foot strip outside the 40-foot strip would have passed by the deed. If the exception is an exception at all, it is so because of the application of the rule that a false call will be disregarded, in order to make the description harmonize with actual facts and conditions. Irving v. Cunningham, 66 Cal. 15, 16, 4 P. 766; Los Angeles, etc., Land Co. v. Marr, 178 Cal. 243, 173 P. 83. The exception referred to a previous conveyance. That conveyance once found is the most definite description. It speaks for itself. When once found, the incorrect particulars of the description of that conveyance will give way. The particulars are given to describe and identify a previous conveyance, and, when that conveyance is ascertained from the fact that it is the only one in existence, the false particulars are discarded as useless. Under this rule the expression 60 feet must be disregarded as a false call, with the result that only a 40-foot strip is excluded by this exception from the major description. This we hold to be the correct interpretation of this exception in the Sterling-Spring deed.

[4] The amount of acreage of the railroad strip excepted is stated in the Sterling to Spring deed to be "4.32 acres more or less." Appellants state that this acreage corresponds with a 60-foot strip, instead of a 40-foot strip. The amount of acreage would not control the outstanding intention of the deed to except that which had been theretofore conveyed, and consequently not owned by the grantor. The acreage, following mathematically from the statement of 60 feet, is a false call in the same way that the 60 feet is a false call. The words "more or less" also indicate that the exact amount of acreage should not be the controlling factor, and should yield to other more definite parts of the description.

[5] Appellants assert that at the time of the Sterling-Spring deed there were fences standing upon the ground which inclosed a 60-foot strip of land, through the middle of which ran the railroad 40-foot strip. The evidence does not disclose who built these fences, but appellants assume they were built by the railroad company, which would exclude any of the predecessors in interest of the parties hereto. Neither does the evidence show when the fences were built, but Mr. Prather testified that they were there in the year 1906—exact date not stated. The existence of fences as stated might be of considerable importance in a controversy between adjoining landowners, as if the railroad claimed the strip as fenced.

In this controversy there is no question of estoppel, nor of adverse possession. Presumably the fences remained, and were there when appellants obtained their deed, as well as when respondent's predecessors obtained and made their deeds. If the fences were there a few days prior to the time Sterling deeded to Spring, then they were also there when the property was deeded to Sterling. The parties hereto are litigating the title as it may be established by the conveyances in evidence. The existence of fences is not to be denied its evidentiary value, but that value in this case is small. The fences were not mentioned in the conveyances, but the original conveyance of the right of way was mentioned. Here Sterling conveyed all his land within the exterior boundaries given on both sides of the railroad track, and purported to except only a strip theretofore conveyed to the railroad, and exhibited no intention to reserve anything for himself, his heirs, or assigns. No reason exists to believe that he intended to convey only to the fence, and reserve for himself and assigns whatever he owned beyond the fence and adjoining the 40-foot right of way.

We now take up the third cause of action of the complaint. Sterling obtained title to this land at the same time and by the same two deeds by which he acquired title to the land described in the first and second causes of action. He conveyed this land by his deed to North Berkeley Land Company October 13, 1906. If the eastern boundary line of the land conveyed by this deed was a 40-foot right of way of the Santa Fé, then the 10-foot strip of land described in the third cause of action of the complaint herein passed by that deed from Sterling and by other succeeding conveyances to the respondent herein. But if the said eastern boundary line of the land conveyed by said deed was a 60-foot right of way of the Santa Fé, then Sterling retained for himself, and did not convey at that time, the said 10-foot strip, in which case he retained it until 1925, and conveyed it by the quitclaim deed which he executed to the appellants herein. The deed, so far as material on this point, describes the property conveyed as follows:

"Bounded on the west by San Pablo avenue, on the south by Cordonices creek, on the east by the right of way of the Atchison, Topeka & Santa Fé R. R. and on the north by the county road, and more particularly described as follows:

"Beginning at a point formed by the intersection of the center line of Cordonices creek and the easterly line of San Pablo avenue, thence north 14 degrees 11′ west 2,519.65 feet to a point on the south line of the county road, forming the northwest corner hereof, thence north 86 degrees 3′ east 1,554.91 feet to a point on the west line of the right of way of the Atchison, Topeka & Santa Fé R. R. which point forms the northeast corner hereof, thence along the west line of said right of way south 14 degrees 11′ east," etc.

[6, 7] As already shown herein, the evidence establishes that the only right of way in existence was that which was more accurately described in the deeds by which the right of way was originally created. Appellants claim that the evidence conclusively establishes that the distance call for the north boundary is 10 feet less than the actual distance from the northwest corner of the tract conveyed to the Santa Fé 40-foot right of way. Conceding this claim, nevertheless the right of way was a monument and as such it controlled the distance call of 1,554.91 feet. A known boundary line may be a monument as well as a physical object upon the ground (Bartlett Land Co. v Saunders, 103 U. S. 316, 26 L. Ed. 546), and when such boundary line is used as a monument, the true boundary line is indicated rather than the conventional line (Umberger v. Chaboya, 49 Cal. 525, 538). In fact, the property is first described as bounded by four monuments and the distances and calls are given afterwards as particulars of the general description. For this reason also the true right of way, and not the length of the north boundary of the tract, should control. It is like conveying a tract by name. Haley v. Amestoy, 44 Cal. 132. As in the case of the deed from Sterling to Spring, we see in this deed no intention of the grantor to reserve to himself any land between the true right of way and the land conveyed by this deed. For these reasons, the deed should be interpreted as conveying, and not reserving, the 10-foot strip described in the third cause of action.

The remaining points to be considered relate to one or more of the first three causes of action indiscriminately.

[8] Some of the deeds in the respondent's chain of title contain exceptions of certain parcels of land. Appellants assert that the burden of proof was upon the respondent to identify and lay out said exceptions upon the ground in such a way as to prove that none of them excepted any part of the parcels of land in litigation here. Whatever may be the rule about the burden of proof at the trial on this point, the burden of showing error upon this appeal is upon the appellants. To assume this latter burden, appellants should either assert or show that the descriptions in the deeds show upon their face that the exceptions complained of do cut into the respondent's title, or at least show that it cannot be ascertained from the face of the deeds whether the exceptions do or do not cut into it. They have done neither.

Nevertheless, by plotting out the descriptions and exceptions concerning which no parol testimony was given, we find that, from the face of the instruments in which they appear, each exception is a considerable distance away from any of the three strips of land involved on this appeal. Regarding the exception of a 400-foot strip in the Sterling-Spring deed, parol testimony was given for the purpose of locating it with respect to the strips here in litigation. Appellants' only point in respect to this exception is that respondent "only vaguely located" it. Respondent, however, has pointed out testimony of civil engineer E. C. Prather to the effect that this exception neither lies within nor overlaps any of the strips of land described in the complaint. No sufficient reason is urged by appellants to justify this court in rejecting this testimony which evidently the trial court believed and followed.

This disposes of all the exceptions enumerated by the appellants.

[9] Scattered through appellants' briefs are many references to deeds, maps and other parts of the evidence which it is stated constitute declarations against interest by the respondent's predecessors. Appellants have not definitely stated what point they make of this matter. It is stated that these things were admissible evidence; but this evidence was not excluded. It was admitted by the court. This evidence was not conclusive, but presented a question of fact for the court. Respondent has also pointed out declarations and admissions against appellants' interest to the effect that the Santa Fé right of way was and is only 40 feet wide and which declarations were admissible against the appellants. On this subject the comments of the parties hereto lead nowhere. Neither party hereto has any advantage upon this score except as the court may have weighed this evidence. At most these things tend to prove that the discrepancies and errors in conveyancing were not discovered by any interested party until shortly before this litigation was commenced.

[10] In the amended complaint respondent alleged title generally, then alleged the conveyances to and from Sterling and concluded the paragraph by alleging that both respondent and appellants claimed title from a common source of title. This, of course, did not prevent respondent in his proof of title from introducing other deeds in evidence than those mentioned in the amended complaint. The allegations only purported to indicate how the source of title of both parties was the same. It was proper for respondent to introduce in evidence all of the conveyances in his chain of title and any additional conveyances necessary to explain references in those in his direct chain.

[11] It developed in the evidence that the respondent's deed from Spring Estate Company did not convey that part of parcel No. 1 which lies north of Brighton avenue. The court, therefore, quieted respondent's title to only the remainder of the parcel described in count No. 1, namely, that part lying south of said Brighton avenue. The part to the north was awarded to neither party. The appellants herein contend that, because respondent failed to prove title to this portion of parcel No. 1, the judgment should have decreed that the same belonged to the appellants, even though the evidence showed no better title in appellants than in respondent. This contention is based upon the rule that in a quiet title action the plaintiff must recover upon the strength of his own title and, not upon the weakness of the defendants' title. From this rule it, of course, follows that respondent was not entitled to judgment to this part of parcel No. 1.

If this were the only property involved in the action, appellants would be entitled to judgment for costs; but the appellants, simply upon the failure of proof of respondent's title were not entitled to affirmative relief in the form of a decree declaring them to be the owners, when the evidence showed the title to be outstanding in the Spring Estate Company, and not in the appellants. The finding and judgment with respect to this part of parcel No. 1 was correct under the evidence. It determined the title as between the parties in accordance with the facts in evidence.

This disposes of all the points urged by appellants as grounds for reversal.

The judgment appealed from is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

298 Cal. 498

In re HEULER'S ESTATE.

HEULER v. RINEHART.

(L. A. 10527.)

Supreme Court of California. Nov. 15, 1929.

Executors and administrators 🔑17(7)—Administrator nominated by widow, and not shown disqualified, held entitled to administer estate in preference to any person, where nomination remained unrevoked (Code Civ. Proc. §§ 1350a, 1365).

Where nomination of widow for appointment as administrator remained unrevoked, and court admitted document to probate as last will and testament, administrator nominated, in absence of any ground for his disqualification, *held* entitled under Code Civ. Proc. §§ 1350a and 1365, to administer estate in preference and priority to any child of decedent or any other person, and court had no discretion to determine to whom letters should issue, and could not add to statutory disqualifications.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of George T. Heuler, deceased. On the petition of George E. Heuler, letters of administration issued to Jay D. Rinehart were revoked, and the administrator appeals. Reversed, with directions.

Superseding opinion, 278 P. 1032.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

Horace S. Wilson and Constan Jensen, both of Los Angeles, for respondent.

PRESTON, J. The order revoking letters of administration issued to appellant, Jay D. Rinehart, is hereby reversed, with directions to the court below to so amend the order of appointment of said appellant as to provide for the issuance to him of letters of administration with the will annexed, upon compliance with the terms of said order of appointment.

Appellant was appointed administrator upon the nomination of the widow of said decedent. He had previously filed in this proceeding an alleged will bearing date of March 17, 1926, which failed of probate because of defective execution, and there had also been called to the attention of the court an instrument designated a "marriage contract," purporting to be testamentary in character. The court, however, after consideration of these documents, granted appellant's petition for letters. Thereafter one of decedent's sons, George E. Heuler, in another proceeding, presented, with his petition for its probate, said so-called "marriage contract," the validity of which as the last will of the deceased is established by our recent decision affirming the judgment admitting it to probate. Heuler's Estate (Cal. Sup.) 278 P. 1031. Said son likewise filed his petition herein seeking revocation of the letters issued to appellant upon the ground that the deceased did not die intestate, but left a will, then being propounded for probate, which said widow and said administrator had failed and refused to present. After trial of the contest instituted by the widow against the probate of said document and upon overruling of the demurrer filed on behalf of said administrator, without giving him opportunity to file further pleadings, the court made said order here appealed from, revoking the letters of administration theretofore issued to him.

The nomination of the widow remaining unrevoked, in the absence of any ground for his disqualification, appellant is clearly entitled to administer the estate in preference and priority to any child of decedent or any other person. In this behalf, section 1350a of the Code of Civil Procedure provides: "If no executor is named in the will * * * letters of administration with the will annexed must be issued as designated and provided for in granting of letters in case of intestacy." Section 1365 of said Code provides: "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, * * * and they are, respectively, entitled thereto in the following order: 1. The surviving husband or wife, or some competent person whom he or she may request to have appointed; 2. The children; 3. * * *" Many cases announce this rule: Estate of Garber, 74 Cal. 338, 16 P. 233; Estate of McDonald, 118 Cal. 277, 50 P. 399; Estate of Crites, 155 Cal. 392, 101 P. 316; Estate of Winbigler, 166 Cal. 434, 137 P. 1; Estate of Wyman, 182 Cal. 645, 189 P. 267; Estate of Rees, 60 Cal. App. 92, 96, 97, 212 P. 234.

The record fails to offer any support whatsoever for the allegation in the petition for revocation that appellant and said widow failed and refused to present said will for probate. Indeed, the document was not in their possession. Furthermore, the fact that said widow contested the action of said son to test the validity of the instrument as a will is immaterial. Upon the hearing, appellant repeatedly stated that, if the instrument were admitted to probate, he, as nominee of the widow, was entitled to letters of administration with the will annexed. The court, having admitted the document to probate, had no discretion to determine to whom letters should issue. It could not add to the statutory disqualifications prescribed by sections 1350 and 1369 of the Code of Civil Procedure, and, being qualified thereunder, said widow or her nominee, as above stated, had the absolute right to letters. Estate of Brundage, 141 Cal. 538, 75 P. 175; Estate of Randall, 177 Cal. 363, 170 P. 835; Estate of Rees, supra.

Upon the above grounds we base our conclusion first herein announced.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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208 Cal. 502

FRESHOLTZ et al. v. BOARD OF TRUSTEES OF CULVER CITY et al. ★
(L. A. 11649.)

Supreme Court of California Nov. 20, 1929.

Rehearing Denied Dec. 19, 1929.

Municipal corporations ⟹63(1)—Determination by legislative body of city as to sufficiency of petition for consolidation of municipalities is conclusive, in absence of fraud (St. 1913, p. 577, § 2).

Determination by board of trustees or city council as to sufficiency of petition under St. 1913, p. 577, § 2, relating to consolidation of municipalities, is final and conclusive, and not subject to review by courts, in absence of any allegation that legislative body acted fraudulently in matter.

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Proceeding by Henry L. Fresholtz and others for writ of mandate to be directed to the Board of Trustees of the City of Culver City and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Superseding opinion in 276 P. 416.

John J. Dillon, of Culver City, and M. Tellefson, of Los Angeles, for appellants.

L. V. Meloy, of Los Angeles, for respondents.

LANGDON, J. Petitioners asked for a writ of mandate compelling the defendants to call a special election and submit to the electors of the city of Culver City the question

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★Rehearing denied.

of whether such municipal corporation should be consolidated with the city of Los Angeles.

The petition alleged that on May 14, 1928, the petitioners, who are qualified electors in the city of Culver City, filed a petition signed by not less than one-fourth in number of the qualified electors of the city of Culver City, as shown by the registration of electors of the county of Los Angeles with the legislative body of the city of Culver City, asking that said city and the city of Los Angeles, a city of greater population and contiguous with the city of Culver City, be consolidated.

The respondents filed a demurrer, which was overruled, and they then filed an answer in which it was alleged, among other things, that "these respondents admit that on or about the 14th day of May, 1928, a petition was filed with the said Council of the said City of Culver City, but allege that said petition contained less than one-fourth of the number of qualified electors for the said City of Culver City as shown by the registration of the qualified electors for the county of Los Angeles."

The trial court heard some evidence, but rejected certain other evidence regarding the written withdrawal of the names of a number of the signers of the original petition and also rejected evidence offered to the effect that a number of persons signing the said petition were not at the time of signing registered voters, but had registered as voters later in the day upon which the petition was signed.

The trial court held that the petition was sufficient to invoke the action of the city council and ordered that body to call the special election.

From this judgment defendants and respondents appeal, urging that the rulings of the trial court with reference to the rejection of evidence offered by them were erroneous, and particularly urging, as decisive of the appeal, the point that the determination by the board of trustees or city council as to the sufficiency of the petition filed with them is final and that it is beyond the power of the court to inquire into the validity of the action of said city council in determining the sufficiency of said petition, in the absence of any allegation that the said council acted fraudulently in the matter. This position is supported by the following authorities: People v. Town of Loyalton, 147 Cal. 774, 82 P. 620, 622; People v. Los Angeles, 133 Cal. 338, 65 P. 749; People v. Town of Ontario, 148 Cal. 625, 84 P. 205; People v. San Diego, 71 Cal. App. 421, 236 P. 377.

The statute governing proceedings for the consolidation of cities requires that: "Whenever a petition, signed by not less than one-fourth in number of the qualified electors of any municipal corporation, as shown by the registration of electors of the county in which such municipal corporation is situated, is filed with the legislative body thereof, asking that such municipal corporation and any other municipal corporation contiguous thereto, designated in such petition, and having a greater population, be consolidated, such legislative body must, without delay call a special election and submit to the electors of such municipal corporation the question whether such municipal corporations shall be consolidated." St. 1913, p. 577, § 2.

In the case of People v. Los Angeles, supra, quo warranto proceedings were instituted to test the legality of certain annexation proceedings. The provision of the statute governing annexation proceedings with reference to the filing of the petition therefor was substantially the same as the above-quoted provision of the statute relative to consolidation proceedings. In that case, this court said: "The jurisdiction of the city council to order an election depends upon the presentation to it of such petition, signed by the requisite number of electors. Whether it was so signed was a question of fact, submitted by the statute to the decision of the council; and the question arising upon this branch of the case is, whether the adjudication of that question of fact by the city council is conclusive." The court, in that decision, goes on to say: "All such adjudications are conclusive against collateral attack, and as the statute has not, in the case at bar, given any appeal or review by a higher tribunal, it follows that it can be vacated only in the manner and upon the grounds that would justify the vacation of a judgment rendered by a court of record, and a mere error in the adjudication of a question of fact, nor procured by fraud extrinsic or collateral to such question, is not a ground upon which it may be vacated."

In the case of People v. Town of Loyalton, supra, where proceedings for the incorporation of a town were attacked on the ground of the insufficiency of the petition, this court said: "Under what appears to be the settled law of this state, the decision of the board of supervisors upon both these questions of fact must be held to be conclusive here. There was no allegation to the effect that the decision was induced by any extrinsic or collateral fraud, and in the absence of any right of appeal or review by a higher tribunal such decision could be vacated only upon grounds which would justify the vacating of a judgment rendered by a court of record."

A similar question arose in People v. Town of Ontario, supra, and the ruling in the case of People v. Los Angeles, supra, was followed, as it must be followed in the instant case.

The judgment appealed from is reversed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

208 Cal. 518

BROWNING v. BROWNING. (L. A. 11627.)★

Supreme Court of California. Nov. 29, 1929.

Rehearing Denied Dec. 26, 1929.

1. Divorce 🔑178—Accepting money in accordance with divorce judgment, to which wife is entitled irrespective of her appeal, does not bar right of appeal.

Where wife would have been entitled to receive from husband monthly sums of money even if her appeal from divorce judgment should be unavailing, accepting sums in accordance with terms of judgment *held* not to bar right of appeal, since it is only where appellant receives and accepts advantages from judgment to which such appellant would not be entitled in event of reversal of judgment that acceptance thereof operates to defeat right of appeal.

2. Divorce 🔑312—Wife's retaining custody of child does not bar her right to appeal from judgment awarding husband custody for limited periods.

Where wife has custody of child at times prior to institution of divorce action and during pendency thereof, retaining custody after court has awarded husband custody for limited periods, does not bar wife's right to appeal from such award.

3. Divorce 🔑312—Supreme Court will not require wife to deliver custody of child to husband for periods specified in judgment from which wife has appealed.

Where wife has appealed from judgment awarding husband custody of child for limited periods, Supreme Court will not require wife to deliver child to husband during times specified in judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Divorce action by Theresa Browning against George L. Browning. From the portion of the judgment enforcing prior property settlement and awarding defendant custody of minor child during certain periods, plaintiff appeals. On defendant's motion to dismiss appeal and motion to enforce judgment regarding custody of child. Motions denied.

A. W. Sorenson, Margaret E. Faires, and Hubert T. Morrow, all of Los Angeles, for appellant.

W. I. Gilbert and O'Melveny, Tuller & Myers, all of Los Angeles, for respondent.

RICHARDS, J. The respondent herein moved the court for an order dismissing the appeal in this case upon the ground that the plaintiff and appellant had voluntarily accepted and received the benefits of the judgment and orders appealed from, and having done so cannot challenge any portion of the judgment and orders upon this appeal. The respondent also, in the event of the denial of said motion, presents certain other alternative motions, the grounds for which will be hereafter stated.

This action was instituted by the plaintiff to obtain a divorce from the defendant upon certain enumerated grounds of cruelty as set forth in her complaint. She alleged that there was as issue of said marriage one child of the age of six years, which was in her custody. As an incident to the action for divorce the plaintiff sets forth in her complaint the fact of the existence of a large amount of community property consisting of both real and personal property. She then proceeds to allege that on or about June 30, 1927, about three months before the commencement of her action for divorce, an agreement had been entered into between herself and the defendant for the settlement of the property interests of the parties, and which included an agreement regarding the custody of their minor child, and that in pursuance of said agreement the defendant executed to the plaintiff a promissory note for the sum of $50,000 and also gave to plaintiff the sum of $5,000 in cash, and which said document and money she agreed to accept and take as her sole and separate estate and in consideration thereof to release and surrender her community interest in the remaining properties of the parties. In a contemporaneous writing it was agreed that the custody of the minor child should be and remain with the wife during its minority, except that the husband might at stated times have the temporary custody of said child. The plaintiff alleges that the foregoing property settlement between the parties was procured by the defendant through fraud, undue influence, and menace, and through the withholding by the defendant of certain facts with relation to the amount and value of the community property and other certain alleged false representations with regard to the same. The plaintiff alleges that she has rescinded said agreement and offered to restore whatever she has received thereunder, and she prays that the marriage between the parties be dissolved, that the plaintiff be awarded the custody of the minor child, and that the court shall set aside and declare null and void the foregoing agreements, and that it determine the property rights of the parties in and to the community property, that the plaintiff be allowed alimony in the sum of $600 a month for the support of herself and the minor child, together with attorney's fees and costs of suit. The defendant filed his answer, admitting the marriage between the parties, but denying specifically the averments of plaintiff's complaint with respect to her alleged cause of divorce. The defendant also admits the making and existence of said marriage settlement, but denies that the same was procured through any fraud, over-reaching, or misrepresentations upon his part, or of any misunderstanding on the part of the plaintiff as

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★Rehearing denied.

to the scope and effect of the agreement. He prays in his answer that plaintiff take nothing by her complaint. He also, however, presents and files a cross-complaint alleging cruelty on the part of the plaintiff, and further alleging that the plaintiff is not a fit and proper person to have the custody of the minor child, but that the cross-complainant is such a fit and proper person. He therefore prays that the bonds of matrimony existing between the parties be dissolved, that he be awarded the care, custody, and control of the minor child, and that otherwise the property settlement between the parties be confirmed. The plaintiff responded with an answer to said cross-complaint, denying the averments thereof and praying that the relief asked for by the cross-complainant be refused. Thereafter the plaintiff filed a supplemental complaint setting forth averments of the alleged improper acts occurring between the defendant and another woman subsequent to the filing of her original complaint and constituting additional grounds of cruelty. To this supplemental complaint the defendant filed an answer denying the averments thereof. The cause came on for trial before the court sitting without a jury upon the issues as thus framed, and the cause having been submitted for decision the court made its findings of fact and conclusions of law wherein it found in the plaintiff's favor upon her alleged grounds of divorce and against the defendant upon his cross-complaint for divorce. Upon the incidental issues as to the existence of the property settlement agreement between the parties the trial court made its findings against the plaintiff and upheld the agreement. Upon the issue as to the custody and best interests of the minor child the trial court found that neither of the parties was an unfit person to have the custody of said child, but that the best interests of the child would be subserved by having the custody of the child remain with the mother, with the right of visitation and temporary custody from time to time preserved to the father. As conclusions of law from the foregoing findings of fact the trial court found that the plaintiff was entitled to an interlocutory decree of divorce upon the grounds stated in her complaint and directed the entry of an interlocutory decree in her favor. As to the custody of the minor child the court by a supplementary decree directed that the plaintiff should have the custody of the minor child until further order of the court, with the exception that the defendant at certain stated times and periods was to have the exclusive custody of said child. With respect to the support of the plaintiff and the minor child subsequent to the granting of said decree, the trial court upheld the provisions of the property settlement between the parties in these respects. Finally, the trial court directed that the defendant pay to the plaintiff, or her attorneys, counsel fees in said action in the sum of $2,000 payable at the rate of $250 per month until the whole amount thereof should be paid. By a later order the trial court modified in some respects its prior orders respecting the custody and care of the minor child. The foregoing interlocutory decree was made and entered on the 20th of June, 1928.

Thereafter and in due time the plaintiff moved the court for a new trial upon the issues in said action other than those relating to the right of the plaintiff to a judgment of divorce, and also in connection therewith applied for leave to file an amended complaint touching the issues affecting the validity of the property settlement between the parties and the custody of the minor child. The trial court granted the plaintiff's motion for a new trial upon the foregoing restricted issues and permitted the amended complaint to be filed, and the defendant having thereafter filed his answer denying the allegations thereof, the cause was again submitted to the court for decision, whereupon, on January 24, 1929, the trial court made and entered its further findings of fact and conclusions of law wherein and whereby it confirmed its prior judgment awarding the plaintiff a divorce and also reaffirming its former decision upholding the property settlement between the parties, and also in the main upholding its former judgment and orders with relation to the custody of the minor child. With respect to the matter of costs and counsel fees the trial court modified its former judgment and order so as to provide that the plaintiff should have and recover her costs expended in said action in the sum of $150, and should be allowed attorney's fees in the sum of $1,250, payable at the rate of $175 per month, and that the plaintiff should be further allowed the sum of $25 per month to be used exclusively for the support of the minor child. The court entered its judgment accordingly, on January 24, 1929.

The plaintiff took the present appeal from said latter judgment and from the whole thereof excepting the portion relating to the interlocutory decree of divorce made and entered in her favor in said action. The respondent on June 27, 1929, filed and served a notice of motion to dismiss the plaintiff's foregoing appeal upon the grounds stated in the motion as hereinabove set forth, and in support thereof presented his affidavit setting forth that since the entry of the judgment from a portion whereof the plaintiff has taken this appeal, she has received from the defendant from time to time the sums of money, the monthly payment of which was provided for in the property settlement agreement, the validity of which she assailed in her several complaints filed herein, praying for the cancellation thereof, and which property settlement and the judgment of the trial court upholding the same she is still assailing upon this appeal. The respondent's affidavit further sets forth that the plaintiff has received and accepted the sum of $150 directed by the judgment to be paid to her on account of costs, and that the respondent has further paid to the plaintiff, or to her attorneys, the sums specified in said judgment to be paid monthly on account of attorney's fees. In response to said motion the plaintiff has filed a counter affidavit setting forth that as to the interlocutory decree in said action in so far as she was thereby granted a divorce from the defendant no appeal has been taken therefrom, and that the time for taking said appeal or for making any attack upon said interlocutory decree has expired.

The plaintiff further deposes that during the pendency of said action in the trial court and prior to the trial and determination thereof, the defendant, upon an order to show cause, was directed to pay to the plaintiff for the support of herself and of said minor child the sum of $350 per month until further order of the court, and that whatever sums were received from the defendant either prior to or subsequent to the making and entry of the interlocutory judgment herein have been necessary for and have been used by the plaintiff for the support and maintenance of herself and of said minor child, and that during all of said time she has had no other means of support, and the plaintiff further avers that whether upon the present appeal the portion of the judgment appealed from shall be reversed, modified, or affirmed, she would have been entitled to all moneys received by her from the defendant as necessary for her support and for the maintenance of said minor child, and hence that the acceptance of whatever sums of money which she has been paid by the defendant and which have been by her devoted to the support of herself and her minor child cannot be held to constitute any sufficient reason for the dismissal of her present appeal. The plaintiff further in her affidavit sets forth that whatever sums of money she has received from the defendant for her costs in said action or for her attorney's fees therein have been such sums as defendant would have been required to pay upon the granting of the decree of divorce in her favor and whether or not the portion of the judgment herein appealed from should be affirmed, modified, or reversed upon this appeal. To the plaintiff's foregoing affidavit the respondent has presented a counter affidavit setting up with more of detail the monthly payments and the amount thereof which the respondent claims to have made in accordance with the property settlement and the judgment approving the same which are assailed by the plaintiff upon this appeal.

[1] With respect to the respondent's motion to dismiss this appeal upon the foregoing grounds, we are of the opinion that it is without merit and that the same should be denied. It is true, as the respondent sets forth and sufficiently shows upon his said motion, that the respondent has made to the plaintiff certain monthly payments in accordance with the terms of the property settlement between the parties, and also in accordance with the terms of the judgment of the trial court upholding the same and from the portion of which judgment so doing the plaintiff is prosecuting this appeal. But it is also true that the parties to this action were, prior to the entry of the interlocutory decree of the trial court dissolving their union, husband and wife. It is also admittedly true that that portion of the judgment of the trial court dissolving their union was in the plaintiff's favor, and that she was thereby granted a divorce from the defendant upon the ground of extreme cruelty, and that said judgment, no appeal having been taken therefrom, has become final. It follows that at all times both before and after the entry of the said interlocutory decree the plaintiff was entitled to receive as the monthly sums for her support and maintenance, and for the support and maintenance of the minor child so long as the same remained in her custody, an adequate amount of money corresponding to the financial condition of the parties to this action. The fact that the parties prior to the institution of the plaintiff's action for divorce saw fit to enter into a property agreement intended to define the amount and value of the community estate and to determine what portion thereof the wife would thereafter be entitled to receive and hold as her separate property and to devote to the support and maintenance of herself and her minor child could not be held, whether valid or invalid, to take away from the wife her primary right to be supported out of the community estate of the parties whether rightly or wrongfully defined by the terms of said property settlement.

This being so, it would seem to follow that the receipt by the wife of whatever sums of money she is shown to have received under the terms of said judgment cannot be held to defeat her right to maintain this her appeal from such portions of the judgment as she is dissatisfied with, since even if her appeal should be unavailing she would still have been entitled to receive from the defendant the monthly sums of money which she is shown to have received and to have devoted to the support of herself and her minor child.

It is only in cases where an appellant is shown to have received and accepted advantages from a judgment to which such appellant would not be entitled in the event of a reversal of the judgment that her acceptance thereof has been held to operate to defeat the appeal. This case in some of its aspects is similar to that of Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715, wherein the right of a wife to maintain an action to rescind a property settlement upon the ground of fraud was held not to have been defeated by the fact that she had received under said agreement certain sums of money which she had applied to her living expenses, and which under the law relating to husband and wife she would have been entitled to so receive and so apply notwithstanding said agreement. The cases of Storke v. Storke, 132 Cal. 349, 64 P. 578, and McCaleb v. McCaleb, 32 Cal. App. 648, 163 P. 1045, upon which the respondent relies in support of his motion, have no application to the facts of the case at bar, since in each of these cases the very question at issue upon the appeal was as to whether or not the appellant was entitled to a divorce at all, and hence, of course, entitled to the sums of money which had been paid her, but to which she would have no right in the event of a denial of a divorce. In so far as the respondent's motion is made to rest upon his payments to the appellant of the amounts respectively awarded for costs and counsel fees upon the successful issue of her action for divorce, it would seem clear that the payment of these sums of money to the appellant could have no bearing upon her right to appeal from that portion of the judgment which denied her equitable relief from the property settlement, since as to that portion of the judgment the allowance of counsel fees and costs has no relation. Having been granted a divorce, the plaintiff was entitled to an award of her counsel fees and costs and to the collection thereof, since the judgment in that regard has not been appealed from and has become a finality. It is obvious that in making the award of counsel fees and costs to the plaintiff the trial court was confining the same to that portion of its judgment which was in the plaintiff's favor and in respect to which such allowances might be lawfully made, and that the trial court was making no allowance, and could have made none, to the plaintiff or her counsel for the maintenance of that incidental portion of said action with respect to which it denied the plaintiff any relief. We therefore find no merit in the respondent's motion to dismiss said appeal upon the foregoing grounds, and it is hereby denied.

[2] Respondent has made what he has chosen to call an alternative motion for an order dismissing the appeal of the plaintiff herein in so far as said appeal relates in any manner to the custody of the minor child upon the ground that the plaintiff has accepted the benefits of the judgment and order of the trial court in so far as they purport to award the custody of the minor child to her during the major portion of the time, and that therefore her purported appeal from that portion of the judgment and order which awards to the defendant the custody of the minor child for a limited portion of time should be dismissed. We perceive no merit in the respondent's motion to dismiss the plaintiff's appeal upon the ground last above set forth. The plaintiff had the custody of the minor child at all times prior to the institution of said action, during the pendency thereof, during the trial and since the trial and during the time thus far occupied by the appeal. It is conceded that she is a proper person to have the custody of the child, and, in fact, the custody thereof was for the major period awarded to her by the judgment and order of the trial court. By said judgment and order the respondent was permitted to have the custody of the child for limited and precisely defined periods. It is that portion of the judgment and order which the plaintiff has seen fit to include in this appeal. The fact that she has in the meantime retained the child's custody could furnish no reason why this court should, upon the respondent's motion, dismiss plaintiff's main appeal. The effect of her taking the appeal from the foregoing part of said judgment and order was to stay all proceedings thereon and hence was to leave in the custody of the plaintiff the minor child, in whose custody the child had ever been. Whether the respondent would have any remedy in the trial court for the situation of which he complains we do not deem it necessary to decide, although upon this motion the respondent frankly concedes that the application for relief should properly have been made in the trial court. But the fact that the trial court disagreed with the respondent in this regard can furnish no reason for seeking relief in this court in the form of a motion to dismiss the plaintiff's appeal, and his motion upon that ground should also be and the same is denied.

[3] The respondent has presented another so-called alternative motion in the form of a direct application to this court for an order directing and requiring the plaintiff to turn over and deliver the custody of said minor child to the respondent during the times and periods specified in the judgment and order of the trial court and pending the determination of this appeal. It is perfectly apparent, however, that this court could make no such order in advance of the determination of this portion of the plaintiff's appeal upon the merits thereof, since the very relief which the respondent is seeking to have the court apply is the relief to which the respondent shall be entitled only upon the affirmance of the judgment as to that portion thereof affecting the custody of the minor child, the correctness of which is involved in the hearing and determination upon its merits of this branch of the appellant's said appeal. It follows that the respondent's motion for this form of alternative relief should also be and the same is denied.

We concur: **WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.**

102 Cal. App. 133

ELLERHORST et al. v. BLANKMAN et al.★ (Civ. 7009, 7123.)

District Court of Appeal, First District, Division 2, California. Nov. 21, 1929.

As Modified, on Denial of Rehearing, Dec. 20, 1929. Hearing Denied by Supreme Court Jan. 20, 1930.

1. Pleading ⚿225(2)—Where leave to amend pleading had been granted, and amendment was sham and ineffectual, court properly refused leave to further amend.

Where leave to amend complaint had been granted and amendment was sham and ineffectual, trial court did not abuse discretion in refusing leave to further amend.

2. Appeal and error ⚿901—Pleading ⚿339—As regards demurrer, failure to defend pleading would be treated as abandonment, since burden is always on appellant to show error.

In regard to general demurrer, failure of plaintiffs-appellants to defend could be treated as abandonment, since burden is always on appellant to show error.

3. Pleading ⚿238(1)—Motion for leave to amend on ground judge was biased held properly denied, where no proposed amendment was presented and attack was without merit (Code Civ. Proc. §§ 170, 473).

Motion for leave to amend complaint on theory that trial judge was biased at time of hearing on demurrer, a complaint which should be raised and heard under Code of Civil Procedure, § 170, *held* properly denied, where defendants did not present with motion a proposed amendment to complaint, as they are required to do under section 473, and their attack on judge was without merit.

Appeals from Superior Court, City and County of San Francisco; C. J. Goodell and Daniel C. Deasy, Judges.

Action for damages, for mismanagement of the affairs of a corporation, by Annie L. Ellerhorst and others against L. V. Blankman and others. From a judgment for defendant and from an order denying leave to amend, plaintiffs appeal. Judgment and order affirmed.

W. A. Andrews and F. W. Sawyer, both of San Francisco, for appellants.

Reuben G. Hunt, of San Francisco, for respondents.

NOURSE, J. Plaintiffs sued for damages on a complaint charging mismanagement of the affairs of a corporation in which they were stockholders. But two of the defendants—Curry and McKannay—were served with process. Their demurrer to the complaint was sustained. An amended complaint was filed. Their demurrer to this complaint was also sustained. A second amended complaint was then filed. Their demurrer was sustained without leave to amend, and judgment was entered for these defendants. Thereafter plaintiffs moved under section 473, Code of Civil Procedure, for leave to further amend. Their motion was denied. Two appeals were taken, and are presented here on the same record—one from the judgment and one from the order denying leave to amend.

[1] The opening brief of appellants consists of a reprint of their second amended complaint, the demurrer of the two defendants, an affidavit of counsel used on the motion for leave to amend, and some of the oral testimony taken on that hearing. The appellants do not, either by argument or citation of authority, make any effort to support their pleading. All they say is that it is sufficient against the demurrer, "and if not it could be amended." The pleading is a jumble of innuendoes and legal conclusions, with unverified allegations of conspiracy and fraud, but without any allegations of facts from which these conclusions are drawn. The demurrers to all the complaints were both general and special. The special demurrers pointed out the uncertainty of these charges of fraud which were not based upon any verified allegation of fact. The amendments were manifestly sham, and not made in good faith. Ample opportunity having been given appellants to amend in these particulars, there was no abuse of discretion in refusing leave to further amend.

[2] We are not unmindful of the authorities holding that ordinarily leave to amend should be granted when the demurrer is special and an amendment can readily be made. But, when leave has been granted and the amendment is sham and ineffectual, the trial court should not be required to grant further indulgence. Loeffler v. Wright, 13 Cal. App. 224, 232, 109 P. 269, citing Stewart v. Douglass, 148 Cal. 511, 83 P. 699, Dukes v. Kellogg, 127 Cal. 563, 60 P. 44 and other cases. So far as the general demurrer is concerned, the failure of appellant to defend the pleading may be treated as an abandonment, as the burden is always on the appellant to show error. Etienne v. Kendall, 202 Cal. 251, 257, 259 P. 752.

[3] The appeal from the order denying leave to amend requires little comment. The demurrer to the original complaint was heard by Judge L. H. Ward. The demurrers to the amended and second amended complaints were heard by Judge Daniel C. Deasy. The motion for leave to amend was heard by Judge C. J. Goodell. On this hearing the appellants sought to show that on a previous occasion one of their counsel had approached Judge Deasy and had asked him if he would voluntarily take from another department of the superior court a divorce case in which one

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★Rehearing denied. Hearing denied by Supreme Court.

of the defendants herein was a party. The judge declined on the ground that the husband and wife were both friends of his and of his family. From this it was argued that the judge was prejudiced against the appellants herein when he sustained the demurrer to their second amended complaint. The appellants did not present with their motion a proposed amendment to the complaint, as they are required to do under section 473, Code of Civil Procedure, and they made no effort to show that an amendment could be made which would meet the objections to the former pleading. The theory of their motion is that the trial judge was biased at the time of the hearing, a complaint which is to be raised and heard under section 170, Code of Civil Procedure. Counsel for appellants failed to show that the trial judge abused his discretion in refusing leave to amend, but they affirmatively demonstrated by their conduct that such leave was properly denied.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

BARONI (CONTINENTAL CASUALTY CO., Intervener) v. ROSENBERG et al. (Civ. 6803.)★

District Court of Appeal, First District, Division 2, California. Nov. 9, 1929.

Rehearing Denied Dec. 9, 1929. Hearing Granted by Supreme Court Jan. 8, 1930.

1. Appeal and error ⇨301—Insufficiency of evidence cannot be urged in support of order granting new trial unless specified as one of grounds therefor (Code Civ. Proc. § 657).

Under Code Civ. Proc. § 657, the insufficiency of evidence cannot be urged in support of order granting motion for new trial when not specified as one of the grounds therefor.

2. New trial ⇨31—Misconduct cannot be asserted in support of order granting new trial unless assigned during trial.

Misconduct of counsel cannot be asserted in support of order granting new trial unless assigned as such at time of trial.

3. Trial ⇨133(6)—Any prejudice by reason of counsel's discussion as to compensation payments was removed by court's voluntary instruction to disregard opinion.

Any prejudice by reason of misconduct of counsel in discussion relative to compensation payments provided under St. 1917, p. 836, § 9, subd. (b)2(5), as amended by St. 1925, p. 642, § 1, was removed by virtue of court's voluntary instruction to disregard opinions of both counsel.

4. Automobiles ⇨246(60)—Instruction that recovery for personal injuries required showing that plaintiff was not guilty of negligence did not erroneously place burden of proof.

Instruction that, in order to recover damages for personal injuries, it must appear from the whole evidence in the case that plaintiff was not guilty of negligence, was not erroneous as throwing on plaintiff the burden of proving that he was not guilty of contributory negligence, in that it merely stated rule that plaintiff cannot recover if evidence shows contributory negligence.

5. Automobiles ⇨246(2)—Instruction that automobile driver obeying law could not be found negligent was not erroneous as requiring favorable finding if driving on right side of highway (California Vehicle Act, § 122).

Instruction in action to recover damages for personal injuries relating to California Vehicle Act, § 122 (St. 1923, p. 557), to effect that defendant could not be found guilty of negligence in case he was obeying law at time of accident, was not erroneous as requiring finding for defendant driving on right side of highway, notwithstanding any carelessness in manner of driving.

6. Appeal and error ⇨977(3)—Order granting new trial without legal ground to sustain it must be reversed on appeal.

Where there is a failure to show any legal ground upon which order granting a new trial can be sustained, and there is no error to sustain such order, it must be reversed on appeal.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Oriente Baroni against B. Rosenberg and another, wherein the Continental Casualty Company joined as intervening plaintiff and lien claimant. Verdict for defendant, and, from an order granting a new trial, defendant Rosenberg appeals. Reversed, with directions.

Louis V. Crowley and Cooley, Crowley & Gallagher, all of San Francisco, for appellant.

Daniel A. Ryan, of San Francisco (George F. Snyder, of San Francisco, of counsel), for respondent.

NOURSE, J. Plaintiff sued the defendant Rosenberg for damages for personal injuries. The Continental Casualty Company, the carrier through which the plaintiff's employer was insured under the Workmen's Compensation Act (St. 1917, p. 831, as amended), joined as intervener plaintiff and lien claimant. The cause was tried before a jury and resulted in a verdict for defendant. Upon plaintiff's motion a new trial was ordered and the defendant has appealed on typewritten transcripts.

[1] The grounds urged on the motion for a new trial were that the verdict was against the weight of the evidence, and that the defendant was guilty of prejudicial miscon-

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★Hearing granted. 284 P. 1111.

duct. In the order granting the motion the insufficiency of the evidence was not specified as one of the grounds, and that point cannot, therefore, be urged in support of the order. Code Civ. Proc. § 657.

[2] The claim of misconduct arises from the colloquy of counsel for plaintiff and defendant during the examination of the plaintiff as a witness. Defendant's counsel asked the witness if he was receiving "workmen's compensation" at the time of the trial. Plaintiff's counsel said he would object to the question unless the jury was instructed that such compensation would have to be paid back out of any verdict obtained. The jury was so instructed and the witness answered in the affirmative, and then volunteered the information that he was receiving $20.83 a week. So far in the examination of this witness everything was done with the consent of plaintiff's counsel. He joined in the discussion with the court and defendant's counsel of the legal questions arising under the provisions of the Workmen's Compensation Act and of the liabilities of the plaintiff and the intervener toward each other under that act. So far no misconduct was assigned and none can be asserted at this late date. Mohn v. Tingley, 191 Cal. 470, 490, 217 P. 733.

[3] After the plaintiff had volunteered the information as to the amount of compensation (and this is all that is declared inadmissible in evidence by the act) the counsel continued their discussion, each expressing different views as to how long these payments would continue. Counsel for plaintiff disagreed with the opinion expressed by his adversary, assigned it as misconduct, but did not ask the court to instruct the jury to disregard it. The trial judge voluntarily instructed the jury to disregard the opinions of both counsel. The position of counsel for plaintiff is not easy to understand. In his complaint and in his proof he insisted that plaintiff's injuries were permanent and would result in permanent disability. The insurance carrier took the same position. The Compensation Act, § 9, subd. (b) 2, (5), St. 1917, p. 836, as amended by St. 1925, p. 642, § 1, provides that the employee shall receive the compensation payments during the remainder of life if the injuries result in 70 per cent. or more of total disability. During the controversy counsel for plaintiff stated that these payments would not be permanent, and when his adversary said they would continue to the plaintiff "as long as he lives" this was assigned as misconduct. There is nothing in the briefs to indicate upon what this claim of misconduct is based, but if it were misconduct it was certainly all invited by plaintiff and any prejudice was removed by the court's instruction. Murphy v. Zwieg (Cal. App.) 279 P. 1062, where cases are cited.

[4] In respondent's brief on this appeal he has, for the first time, raised the point that the new trial should have been granted because of errors in instructions given or refused. Criticism is made of the instruction given reading in part: "It must further appear to you from the whole evidence in the case that the plaintiff was not guilty of negligence, etc." It is argued that this instruction threw upon the plaintiff the burden of proving that he was not guilty of contributory negligence. This instruction did not relate to the matter of the burden of proof; it merely gave to the jury the settled rule of law that a plaintiff may not recover if on "the whole evidence in the case" the plaintiff was shown to have been guilty of contributory negligence.

[5] Further criticism is made of the instruction given relating to section 122 of the California Vehicle Act (St. 1923, p. 557). After reading a portion of the section the jury was told that, if they found that the defendant was obeying the law at the time of the accident, it could not find him guilty of negligence "by reason thereof." It is argued that this instruction required the jury to find for the defendant if he was driving on the right side of the highway nowithstanding any carelessness in his manner of driving. The instruction is not open to this criticism. It merely advised the jury that the defendant was not guilty of negligence merely by following the law. The question of negligence generally was fully covered in other instructions.

Complaint is also made of the refusal to give certain instructions requested by the jury. We find no error in the action of the trial judge. The instructions requested were either instructions on the very issues of fact which the jury was to determine or were fully covered by other instructions.

[6] The respondent has failed to show any legal ground upon which the order granting him a new trial can be sustained. The record discloses a case which was fully and fairly tried before the jury. The jury brought in its verdict in favor of the defendant, and the trial judge, by his order granting the new trial, approved the verdict so far as the evidence was concerned. With no error to sustain the order granting a new trial, that order must be reversed.

Order reversed, with directions to enter judgment for defendant on the verdict.

We concur: KOFORD, P. J.; STURTEVANT, J.

102 Cal. App. 100

CAMPBELL CHEVROLET CO. v. WALSH.
(Civ. 58.)

District Court of Appeal, Fourth District, California. Nov. 19, 1929.

1. Sales 🔑467—Risk of loss under conditional sales contract falls on vendor only where vendee is without fault and there is no agreement to contrary.

Risk of loss of property sold under conditional sales contract is on vendor only when loss or destruction occurs without fault of vendee and there is no agreement between the parties to the contrary.

2. Sales 🔑467—Buyer of automobile under conditional sales contract containing stipulation against illegal use must use reasonable care to prevent such use.

One buying automobile under conditional sales contract containing his agreement that automobile should not be illegally used was under duty to use at least reasonable care to prevent illegal use thereof.

3. Sales 🔑467—Buyer, who under conditional sales contract was not relieved by loss of car, could not avoid payment because of forfeiture for transporting liquor without buyer's knowledge.

Forfeiture of automobile to government for use in transporting liquor without knowledge or consent of buyer thereof *held* not to relieve buyer from liability for purchase price where buyer did not show himself free from negligence in permitting such use, and conditional sales contract provided that loss of automobile from any cause should not relieve buyer.

4. Sales 🔑477(1)—Conditional seller of automobile was not precluded from recovering price by failure to exercise contract right to retake car for unlawful use.

Provision in conditional sales contract covering automobile that seller could take immediate possession of car in case of use thereof in violation of law *held* not to prevent seller from recovering balance due on the contract without asserting its right to forfeiture, in view of provisions that waiver of breach of covenant by purchaser should not be held a waiver of any other or subsequent breach and of provision giving seller election to retake property or sue for price; contract being taken together and reconciled according to general intent thereof, under Civ. Code, §§ 1641, 1650, 1652.

5. Sales 🔑477(1)—Seller could waive provision in conditional sales contract for termination of contract for unlawful use of automobile.

Seller under conditional sales contract covering automobile which was forfeited for use in violation of law had right to waive provision of contract that such use of car should terminate the agreement, especially where contract specifically provided that waiver by seller of any breach on purchaser's part should not be deemed a waiver of any other or subsequent breach of covenant.

6. Sales 🔑477(4)—Seller of automobile, by instituting suit for balance due after forfeiture to government, waived provision for termination of contract for unlawful use.

Seller of automobile under conditional sales contract, providing that use of car in violation of law should terminate contract, waived provisions of such forfeiture clause by filing suit to recover balance due on contract after automobile had been forfeited for use in transporting liquor, and no other notice of election to waive the forfeiture provision was necessary.

7. Sales 🔑479(1)—Conditional seller's recovery of balance due on automobile forfeited to government was not objectionable as double recovery of property and price.

Seller of automobile under conditional sales contract could recover balance due, though car had been forfeited to government for use in unlawful transportation of liquor, since seller was not attempting to get both the property and the purchase price, and was not required to take proceedings against the government, and there was therefore no double recovery.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Campbell Chevrolet Company against Paul Walsh. Judgment for plaintiff, and defendant appeals. Affirmed.

Honnold & Hubbell, of Escondido, for appellant.

S. G. North (H. B. Daniel, of San Diego, of counsel), for respondent.

BARNARD, J. This is an action to recover the balance due on a contract for the sale of an automobile from plaintiff to defendant.

The complaint sets up a conditional sales contract, reserving title in the vendee, alleges the default of the defendant in making several monthly payments, and asks judgment for the remainder of the purchase price. The answer admits practically all of the allegations of the complaint, but denies that any sum is due, and as a separate defense sets up one paragraph of the agreement between the parties, which reads as follows:

"It is distinctly understood and agreed that during the term of this contract, the automobile herein agreed to be sold shall not be used for the transportation of intoxicating liquors, drugs or narcotics, and shall not be used in or about the violation of any United States, state or municipal statute law or ordinance. Any violation of this provision shall forthwith terminate this contract and any and all rights of the purchaser in or to said automobile and the possession thereof, and without notice or demand of any character, the owner shall take immediate possession of said automobile and all accessories, using all necessary force so to do, and any and all rights of the purchaser in or to said automobile or the possession thereof shall thereupon be immediately forfeited and the owner shall be and become the sole owner of the same and each and every part thereof and right and interest therein and shall be alone and solely entitled to the possession thereof, and all payments previously made by the purchaser shall be retained for depreciation in value and for the use of said automobile, and the purchaser hereby waives all rights to the moneys so paid and all rights against the owner for taking possession of said automobile."

It is then alleged that the automobile in question was seized by officers of the United States of America, while the same was, without the knowledge or consent of defendant, transporting intoxicating liquor in violation of a United States law, and that the said automobile is now held under a libel filed against it by federal authorities.

A general demurrer was filed to this answer, as was also a motion to strike the separate defense and for judgment on the pleadings. The motion for judgment on the pleadings was granted, and this is an appeal by the defendant from the judgment that followed. Appellant insists that by reason of the facts set forth in his separate defense, as above referred to, the contract for the purchase of the automobile has been terminated, is of no force and effect, and that he is exonerated from further liability thereon.

[1] It is first urged that this is true, because the rule, as followed in California, places the risk of loss upon the vendor, where property sold under conditional sale contract is lost or destroyed without the fault of the vendee in possession. See Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 437, 25 L. R. A. (N. S.) 609; Waltz v. Silveria, 25 Cal. App. 717, 145 P. 169. This rule is applied, not only in the cases just named, but generally, to instances where the subject-matter of the contract was destroyed or so damaged as to be unfit for use, as, for instance, by fire. Whether it would apply to such a *loss* as here existed, where the article involved is neither lost, destroyed or damaged, but taken under process of law, we seriously question. However that may be, two considerations prevent the rule from being of assistance to appellant here. The rule applies only when it appears the loss or destruction occurred without fault on the part of the vendee; and then only "in the absence of special agreement to the contrary." Potts Drug Co. v. Benedict, supra; Waltz v. Silveria, supra.

[2, 3] In the first sentence of the quoted paragraph, appellant agrees that the automobile intrusted to his care shall not be illegally used, in the sense referred to. Under his contract it was therefore incumbent upon him to at least use reasonable care to prevent such use. While he says its use for that purpose was without his knowledge or consent, no facts are set up to excuse his breach of contract in the respect mentioned, and none to show that he was free from negligence, gross or otherwise. In any event, the parties here have themselves agreed to the contrary of the rule relied on and have provided where the loss shall fall. The contract contained the following provision: "The *loss* or destruction or theft of, or damage to, said automobile, *from any cause*, are at purchaser's risk, and *shall not relieve the purchaser from his obligation to make all payments* herein specified." (Italics ours.) Appellant has in writing agreed that he should not be relieved from making payments because of any loss of the automobile, from any cause whatever.

[4, 5] It is next argued that, under its own terms, the contract has been terminated; that the only right of respondent under the provision of the contract, as above quoted, was to retake possession of the machine if he could; and that appellant is exonerated from further liability. This contention is based on the assumption that the one paragraph of the contract, set up in the special defense, governs the entire contract, and is controlling in this case. This argument is without merit. The law abhors a forfeiture, and it would be strange indeed if the law could be invoked to compel a party to accept a forfeiture, without his seeking it, especially when, so far as appears, he does not even know of the existence of facts which might entitle him to one, until after he has exercised his election to stand on the contract and sue for the purchase price.

In the case of Knarston v. Manhattan Ins. Co., 140 Cal. 57, 73 P. 740, 741, it is said: "It [an insurance policy] is more in analogy to a lease or vendor's contract with condition of forfeiture contained therein, with reference to which it has invariably been held that the right to declare a forfeiture, being a matter entirely for the benefit of a lessor or vendor, can be, even by parol, effectually waived by either. * * * The law will not compel a man to insist upon any benefit or advantage secured to him individually." Appellant claims the provision in question could not be waived because it provides that, in the event this provision is broken, the contract shall *terminate*; but the case last cited held that, although a policy of insurance provided that it should be *void* in a certain event, this provision could be waived. The respondent had the right, under the law, to waive the provision relied upon, even had the right to do so not been specifically given in the contract. Johnson v. Kaeser, 196 Cal. 686, 239 P. 324.

[6] But, again, the contract in question specifically covers that point. The last clause of the agreement reads as follows: "The waiver by the owner of any breach of any covenant or agreement herein contained on the part of the purchaser shall not be deemed or held to be a waiver of any subsequent or other breach of said covenant or agreement,

nor a waiver of any other covenant or agreement herein contained." As appears from the pleadings, the respondent waived the provisions of the clause relied on by appellant, by filing this suit. No other notice of his election to so do was necessary. Johnson v. Kaeser, supra.

The contract in question is quite lengthy, and effect cannot be given to one clause alone, without consideration of the remainder of the agreement.

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641.

"Particular clauses of a contract are subordinate to its general intent." Civ. Code, § 1650.

"Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." Civ. Code, § 1652.

The agreement, in addition to the provisions already quoted, also contained the following:

"If said purchaser defaults in any of the above payments, when due, or defaults in any provision of this contract, or if said automobile is attached or levied upon under any writ or process of any court, or if said purchaser is declared a bankrupt, said owner may, at his option, without previous demand or notice, first, retake possession of said automobile and all its new and old equipment and accessories, with or without process of law; and all payments theretofore paid hereunder shall thereupon be forfeited to said owner for the use, wear, tear and depreciation of said automobile, and this contract shall thereupon terminate and all rights of purchaser in this contract and said automobile shall thereupon cease, and are hereby waived; or, second, said owner may declare the whole of the sums then remaining unpaid to be immediately due and payable, and sue therefor. * * *"

Viewing the contract as a whole, it contains definite provisions that the clause relied upon by appellant might be waived by respondent; that any loss or destruction of the machine from any cause, should not relieve the purchaser from making the agreed payments; and that respondent, upon the violation of any provision in the agreement, might elect either to retake the property or sue for the balance of the purchase price. It is plain that the general intent and purpose of the whole agreement is, not that the paragraph relied on by appellant shall control and govern all other provisions of the contract, but that this provision shall itself be modified and governed by the other provisions referred to.

[7] It is argued that the vendor cannot have both the property and the purchase price. He neither has nor is seeking both, nor is there any obligation upon him to seek to get the property back from the government. Under his contract, appellant assumed the very risk from which he here attempts to escape, and he should have guarded against the use of the automobile in the illegal manner described.

The judgment is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

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102 Cal. App. 126

VALLEY LUMBER CO. v. DAVIS, Director General of Railroads. (Civ. 54.)

District Court of Appeal, Fourth District, California. Nov. 20, 1929.

1. Railroads ⟹5½(23)—Director General proceeded against as defendant in action arising from government operation of railroads must be named (Transportation Act 1920, § 206 (a); 49 USCA § 74(a).

Director General of Railroads designated by President must be named as defendant in action arising out of government operation of railroads, and not merely designated in his official capacity, under Transportation Act 1920 § 206(a), 41 Stat. 461, 49 USCA § 74(a).

2. Railroads ⟹5½(24)—Right to substitute newly named Director General in action arising from government's operation of railroads is dependent on proper commencement of action (Transportation Act 1920 § 206(h), 49 USCA § 74(h).

In action against Director General of Railroads based on cause of action arising out of operation during period of government control, right to substitute new Director General as defendant under Transportation Act 1920 § 206 (h), 42 Stat. 1443, 49 USCA § 74(h), is dependent upon action against former Director General having been properly commenced.

3. Limitation of actions ⟹125—Filing of amended complaint naming present Director General of railroads defendant constituted new action as regards limitation, where Director General named in original complaint had previously resigned (Transportation Act 1920 §§ 206(a), 206(h), 49 USCA §§ 74(a), 74(h).

Where Director General of Railroads named as defendant in suit arising out of operation of railroads during period of government control under Transportation Act 1920 § 206(a), 41 Stat. 461, 49 USCA § 74(a), had resigned at time of institution of suit, original complaint did not amount to commencement of action against the United States, and filing of amended complaint seeking to substitute present Director General as sole defendant under Transportation Act 1920 § 206(h), 42 Stat. 1443, 49 USCA § 74(h), was attempt to institute new action as regards statute of limitation imposed by the act itself.

Appeal from Superior Court, Imperial County; Marvin W. Conkling, Judge.

Action by the Valley Lumber Company against James C. Davis, Director General of Railroads. From a judgment of dismissal, plaintiff appeals. Affirmed.

J. Stewart Ross and R. B. Whitelaw, both of El Centro, for appellant.

Hickcox & Trude, of El Centro, for respondent.

SLOANE, P. J. This appeal, originally taken to the Supreme Court from a judgment of the superior court of Imperial county in favor of the defendant, has been transferred to this court for decision.

The action was brought by the plaintiff, Valley Lumber Company, to recover damages for the destruction of a Ford automobile valued at $600, through a collision with a train of the Southern Pacific Company, while said railroad company was being operated under the control of the government of the United States.

The federal control of this railroad was terminated by act of Congress on March 1, 1920, before the original complaint herein was filed. The Transportation Act approved February 28, 1920, was, however, then in effect, and authorized the maintenance of such an action under and within the time prescribed by section 206(a) of said act (41 Stat. 461, 49 USCA § 74(a), as follows: "Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

The original complaint thus filed, if it was sufficient to give jurisdiction of the cause of action against the United States through its duly constituted agent, was instituted within the period prescribed. This original complaint named as defendants the Southern Pacific Company and Walker D. Hines, as the regularly appointed and duly acting Director General of Railroads. At the time the accident happened Walker D. Hines was the Director General and Presidential Agent in charge of this railroad, but he had resigned May 18, 1920, and was not, at the time of instituting the suit, the Director General or Agent of the federal government in the control of this railroad.

A demurrer to this original complaint was sustained by the trial court on September 14, 1923, and on April 2, 1925, an amended complaint was filed making James C. Davis, the then Director General of Railroads and Presidential Agent, the sole defendant. This amended complaint was filed more than two years after the accident complained of, and more than two years after the passage of the Transportation Act and statute of limitations thereon on March 1, 1920. It is the contention of respondent that no cause of action was stated, and that jurisdiction was not obtained against the United States under the original complaint, for the reason that it was not brought against the official designated under the act as the agent of the government. Appellants take the position that such suit was authorized to be brought in the name of the office, and that it is immaterial that there was a failure to designate and make a party defendant to the suit the identical Director General and Agent then in control.

The amended complaint was demurred to (1) on the ground that the complaint did not state a cause of action against the defendant; (2) that the court acquired no jurisdiction of the defendant in the action; and for further grounds of demurrer that the cause of action was barred under the specific provisions of the federal statutes and the laws of the state of California. The demurrer was sustained, and the plaintiff failing and refusing to amend, a judgment of dismissal was granted by the trial court, and a judgment for costs made and entered in favor of the defendant James C. Davis, Director General of Railroads. The appeal is from this judgment.

The correctness of the judgment turns on the question of whether or not the filing of the original complaint against Walker D. Hines, who at the time had resigned as Director General of Railroads, and who no longer represented the federal government, established a cause of action against the United States. If it did not, it clearly appears that such action could not be vitalized by the amended complaint, naming the then qualified officer of the government as the defendant, after the period of the statute of limitations had elapsed. Had the suit been originally commenced against the then incumbent Director General of Railroads, it is not questioned that upon the appointment of a successor, the latter could have been substituted as party defendant and the action continued in force.

[1, 2] It is suggested that the manifest purpose of the action was to procure a judgment which should be enforceable against the funds of the railroad administration, and that the individual name of the agent to be sued was of no real consequence. This suggestion is

answered by the fact that the Transportation Act provides explicitly that after the termination of federal control, an action of this character, could be brought only against the agent designated by the President for that purpose. The authorities cited seem to indicate that in each instance the agent, and not his official title alone, must be named as defendant. While it is provided by the Transportation Act that "actions, suits, proceedings, and reparation claims * * * properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may * * * be prosecuted to final judgment, * * * substituting at any time before * * * final judgment * * * the agent designated by the President then in office" (42 Stat. 1443, 49 USCA § 74(h), yet it will be observed that this right of substitution is predicated upon the action having been properly commenced within the period of limitations prescribed, and the proper commencement of such action would seem to require that it should be instituted against the individual and then acting Director General or Agent of the government.

[3] In Davis v. Griffith, 103 Okl. 137, 229 P. 499, the Supreme Court of Oklahoma had before it a similar substitution of defendants. It was there held that an action based upon matters occurring during federal control of railroads against John Barton Payne, a former presidential agent, did not make the United States government a party defendant to such action, and an attempted substitution of James C. Davis, the then duly appointed and acting presidential agent, for John Barton Payne, resigned, did not confer jurisdiction over the United States government, and that such jurisdiction could be acquired only by proper service of process against the then incumbent of the office, and that the United States had a right to prescribe the exact manner in which it could be sued, and that a strict compliance with its terms was necessary, whether the same was considered reasonable or unreasonable.

The case of Natoli v. Davis, 75 Cal. App. 309, 242 P. 895, 896, in an opinion by Plummer, J., goes quite exhaustively into a review of decisions bearing upon the manner of acquiring jurisdiction in this class of actions. That action was begun on the 1st of November, 1921, naming as defendants Southern Pacific Company and John Barton Payne, as Agent, under section 206 of the act of Congress of the United States known as the Transportation Act. The action was brought to recover damages to fruit in transit, while the railroad company in question was under government control. In October, 1922, an amended complaint was filed, naming as defendant only James C. Davis as agent aforesaid. The defendant Davis brought and filed a demurrer to the amended complaint, alleging, among other things, that said amended complaint did not state a cause of action against said defendant, and also that the alleged cause of action set forth in the amended complaint was barred by the provisions of section 339 of the Code of Civil Procedure of the state of California, and by subdivision (a) of section 206 of the Transportation Act of the United States of 1920. The defendant also moved the court to dismiss the action, among other things, upon the ground that at the time the action was brought against the said John Barton Payne as Agent, under the original complaint he was no longer such agent, but had previously retired from office as such agent, and that the said James C. Davis had been appointed as agent for the government under said section 206 subsequently, and that no proceedings had been taken by the plaintiff for the substitution of said James C. Davis as a party defendant in the place and stead of John Barton Payne, within the period of limitation prescribed by the act. The case was considered on the question of the statute of limitations. The court says: "The record shows that more than two years had elapsed before the bringing in of the defendant, James C. Davis, as agent under the Transportation Act, and that at the time suit was instituted John Barton Payne was not the agent under said act and had not been for some period of time."

The court holds that the amendment naming James C. Davis as the sole defendant was not a substitution of said Davis as defendant in an action which had already been properly commenced against his predecessor, but that under the original complaint no action against the United States had been properly instituted, and that the effect of filing an amended complaint, naming the then incumbent as the sole defendant, was in effect to attempt to institute a new action which was barred by the statute of limitations.

By way of illustration, the court in the Natoli Case refers to Jeffers v. Cook, 58 Cal. 147, citing the section of the Code stating what constitutes causes of action, to wit, the filing of a complaint, and then going on to speak of the effect of filing a supplemental or amended complaint bringing in new defendants. In that case the action was to foreclose a mortgage, where all the parties to the action were not made defendants in the original complaint. The court there says: "By moving, in the original action, to make the subsequent grantees of the mortgagor parties to the action, the plaintiff followed the course of procedure approved in Goodenow v. Ewer, 16 Cal. 465 [76 Am. Dec. 540]," and other cases cited; and adds: "But her motion was not made, and her supplemental complaint was not filed until nearly six years after the cause of action stated in the original complaint had accrued; and, according to the rule for moving within reasonable time, enunciated in Goodenow v. Ewer, supra, it would seem to have been too late to resort to a remedy against new parties in aid of a cause of action which, as to them, was barred by the lapse of time within which, under the Code of Civil Procedure, an action could be brought against them upon the cause of action. But it is contended that the cause of action was not barred, because the original complaint in the action, having been filed against the mortgagor in statutory time, stopped the running of the statute of limitations."

The opinion continues: "That as a legal proposition is true as to the mortgagor, who was made the sole party defendant to the action at the time of filing the complaint. And it would, also, have been true as to those who were subsequently made parties defendants by the supplemental complaint, if they had been made parties before the statute had run in their favor. But they were not made parties until the statute had run. The filing of the original complaint, therefore, stopped the running of the statute of limitations only as to him who was the party defendant at the time it was filed; it did not stop the running of the statute in favor of those who were not made defendants in the action at that time; the statute continued to run in their favor. * * * We do not find that this rule has been departed from in any subsequent California cases."

The instant case was submitted by stipulation, on the briefs on file, being appellants' opening brief and respondent's brief. No reply brief was filed by appellant. Without going further into a review of the authorities cited by respondent, the effect of which seems to be undisputed, we are of the opinion that the demurrer to plaintiff's amended complaint was properly sustained, and the judgment of dismissal is affirmed.

We concur: BARNARD, J.; MARKS, J.

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101 Cal. App. 762

KELSEY v. RICHARDSON et al.★

RICHARDSON et al. v. KELSEY et al.
(Civ. 7054.)

District Court of Appeal, First District, Division 2, California. Nov. 13, 1929.

Rehearing Denied Dec. 12, 1929. Hearing Denied by Supreme Court Jan. 6, 1930.

1. Contracts ⇨164—Agreements executed during negotiations covering months to carry out parties' intentions were to be construed together in ascertaining terms of contract (Civ. Code, § 1642).

Where negotiations involving transfers of property covered period of months resulting in execution of various instruments to carry out intention of parties, all instruments must, under Civ. Code, § 1642, be taken together when ascertaining what contract between parties was.

2. Mortgages ⇨319(1)—Grantors under trust deed claiming right to offsets or credits against principal and interest payable thereunder have burden to make proper showing.

If grantors under trust deed are entitled to any offsets or credits against amounts required to be paid as principal and interest thereunder, burden rests upon them to make proper showing.

3. Mortgages ⇨366—Contention that there was failure of proof of notice of sale under trust deed, where affidavit relied on was merely cumulative, held without merit.

Where affidavit as proof for giving of notice of time and place of sale under trust deed was merely cumulative to other evidence consisting of trust deed and deed executed by trustee on foreclosure and sale and recitals therein proved facts recited in affidavit, contention that there was failure of proof because affidavit was incompetent *held* without merit.

4. Mortgages ⇨335—Notice of default under trust deed need not mention volume and page in which original is recorded (Civ. Code, § 2924).

Under Civ. Code, § 2924, written notice of default under trust deed is not required to give volume and page in which original notice was recorded.

5. Forcible entry and detainer ⇨5—Grantors under trust deed refusing to surrender premises after foreclosure, and employer and employee relationship having terminated, held guilty of forcible detainer.

Where grantors under trust deed were not entitled as owners to remain in possession after trust deed was foreclosed and relationship of employer and employee between grantors and purchaser at sale had terminated, grantors in refusing to surrender possession of premises *held* to have committed forcible detainer.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by H. G. Kelsey against Thomas E. Richardson and others, in which defendants filed a cross-complaint against plaintiff and others. From the judgment rendered, defendants appeal. Affirmed.

John L. McNab and Jerome H. Bayer, both of San Francisco, for appellants.

Tobin & Tobin and George A. Clough, all of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to obtain the possession of a lot and the apartment house located thereon, the same being situated in San Francisco and known as the Kenilworth Apartments. He set forth his rights in two counts. The defendants answered both counts and filed a cross-com

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★Rehearing denied. Hearing denied by Supreme Court.

plaint. The plaintiff answered the cross-complaint, but on the trial the plaintiff introduced evidence on only the first count and dismissed the second count. The trial court made findings in favor of the plaintiff, and from a judgment entered thereon the defendants have appealed.

In the first count the plaintiff pleaded unlawful detainer. The plaintiff claimed the right to the possession by reason of being the grantee named in a trustee's deed. That deed purported to be a trustee's deed issued in the foreclosure of a trust deed which had been executed to secure a promissory note theretofore made by the defendants and which was a renewal of another note. If the proceedings were regular which resulted in the execution by the trustees of the deed held by the plaintiff, the judgment must be affirmed. We will pass, therefore, to a consideration of the claims of alleged irregularities. The first claim made by the defendants is that they were not in default when the foreclosure proceedings were commenced to foreclose the renewal note. That note was dated February 8, 1926, and provided that $3,126.50 should be paid on the principal one day after date, and that interest should be paid monthly as it became due. It also provided that if default should be made in the payment of the interest, then the whole of said principal and interest should immediately become due and payable at the option of the holder of the note. Notice of default in the payment of interest was given the 10th day of May, 1926, It is not claimed that the interest in name had been paid, but it is contended that the defendants were entitled to certain credits which, if they had been received, would have placed them in the position of not being in default but of having anticipated their payments. This claim carries us back to the inception of the entire transaction.

Before proceeding it will assist the reader to state that the litigation arose out of an attempt to finance a property valued at $165,000 or more, and in that attempt the evidence shows that the Richardsons put into the venture $8,764.50, and that the Kelseys put into the venture $8,000—and perhaps more. All other sums consisted of borrowed money. These facts must be borne in mind when, as counsel make assertions, we may have some light as to where an equity rests or does not rest.

The Richardsons bought the property in suit from Kurkjian. At that time Urrutia held: (1) A second mortgage for $50,500; (2) a chattel mortgage on the furniture; (3) a leasehold interest in and to the property; and (4) a claim against a former lessee, Mrs. Gorman, for unpaid rents, and on this last-mentioned item an action was pending. But, at the same time, Urrutia was liable on an appeal bond executed in certain litigation in which his interests in the property were involved, and that appeal bond was a potential liability against Urrutia.

As early as June or July, 1925, negotiations were commenced, among three parties, looking toward the execution of two bilateral contracts which were executed September 1, 1925. The first was between the Kelseys and Urrutia. The Richardsons called on the Kelseys at the home of the latter at Merced Falls and induced the Kelseys to agree to purchase the Urrutia interests. The Kelseys agreed to do so and authorized the Richardsons to conduct the negotiations. By the terms of those oral agreements, upon acquiring the Urrutia interests the Richardsons and the Kelseys would become tenants in common holding equal interests. For the Kelseys the Richardsons conducted the negotiations to a successful issue and purchased the Urrutia interests for $12,500. By the terms of that purchase the Kelseys executed to Urrutia a guaranty to hold him harmless on the appeal bond. The Kelseys also executed to Urrutia a promissory note in the sum of $12,500 secured by a deed of trust. The written guaranty was delivered September 1, 1925, and the note and deed of trust were delivered September 2, 1925.

The second bilateral contract was between the Kelseys and the Richardsons. Prior to the date just mentioned an agreement was entered into by which the Kelseys agreed to sell to the Richardsons their one-half interest. There is no direct evidence in the record as to what items, or what interest in any items so purchased from Urrutia, were assigned to the tenants in common by the Kelseys, nor what obligation or part of any obligation to Urrutia was assumed by the Richardsons. However, contemporaneously with the negotiations to purchase the Urrutia interests, the parties discussed the sale by the Kelseys to the Richardsons. On September 2, 1925, the Richardsons executed: (1) A written guarantee, by the terms of which they agreed to hold the Kelseys harmless as to certain obligations, naming them, but not naming the Urrutia note; (2) a promissory note for $26,585; and (3) a trust deed to secure its payment. A written memorandum used by the parties discloses that they treated the Urrutia note as a partnership liability. So treating it, they estimated the equity of the Kelseys at $26,281.15. The plaintiff testified in substance that he sold according to the written memorandum, and that the Urrutia note became the debt of the Richardsons which they were in duty bound to pay. The Richardsons did not flatly deny that statement. At the time of the purchase of the Urrutia interests the incumbrances had been so funded that $18,000 additional moneys had been borrowed. On September 3, 1925, the Urrutia note was taken up by the Richardsons.

[1] Noting the foregoing dates, it appears that, although the deal had its inception in

June, the negotiations continued, and the deal as a whole was not consummated until September 1, 1925, when each party delivered or received, as the case might be, the document which he was bound to deliver or was entitled to receive; and in this manner a three party agreement was entered into and actually executed. We may therefore take all of these documents together in attempting to ascertain what was the contract between the parties. Civ. Code, § 1642. When so examined it is not difficult to ascertain the rights of the parties.

[2] As above stated, while Urrutia held a lease on the property a claim arose in his favor against Mrs. Gorman for rents. Later that claim ripened into a judgment. By the expressed language contained in the guaranty dated September 1, 1925, and which was a part of the transaction of the sale by the Kelseys to the Richardsons, that judgment was recognized as the property of the Richardsons. The contingent liability of Urrutia on the appeal bond ripened into a judgment. The judgment against Mrs. Gorman was so assigned as to extinguish the judgment against Urrutia. This act canceled the liability of Urrutia and it canceled the liability of the Kelseys on the guaranty they had executed to Urrutia. The Richardsons claim they were not parties to that guaranty and that they were the owners of the Gorman judgment and should have been credited with the proceeds. This contention is not sustained by any evidence. That there was no writing in evidence by which the Richardsons expressly became parties to the Urrutia guaranty is true. But it is also true that there is no writing by which they obtained title to the judgment. 'Moreover, there was no writing directly showing the Richardsons to have been the purchasers of the Urrutia interests—a mortgage on the real estate $50,500, a mortgage on the furniture for additional sums, and the leasehold interest. Their title to the assets bought from Urrutia and their liability on the Urrutia liabilities both rest on indirect evidence. Moreover, there is not a particle of evidence that the parties ever agreed to partial assignments of the benefits or burdens, or both, claimed to have been purchased from Urrutia. However, we think there was evidence sufficient to sustain the conclusion of the trial court that by virtue of the sale of their one-half interest the Kelseys passed to the Richardsons the Urrutia contract—both its benefits and burdens. If so, the Richardsons may not claim that they were not in default. Be this as it may, the plaintiff made a prima facie showing that the Richardsons were in default for not paying their interest February 8, 1926. If the latter were entitled to any offsets or credits, the burden rested on them to make the showing. This they wholly failed to do. These views are fortified by the acts of the parties. The documents executed by them were used in consonance with the views we have expressed. No claim at variance with these views was made by the Richardsons until the commencement of this litigation on or about December 19, 1927. On the trial there was evidence that the Richardsons acted under duress. The trial court found otherwise. The finding is supported by the evidence.

The defendants contend that the plaintiff holds the property in dispute for their benefit. In making this assertion they point to the testimony of the defendants, which was to the effect that the plaintiff and his attorney assured the defendants before the sale that the defendants would be fully protected. In their answer the defendants ask that the court ascertain the amount due the plaintiff and the defendants would pay the same. On the trial they made no offer and no attempt to sustain their pleading.

[3] It is claimed that there was a failure of proof for the giving of notice of the time and place of the sale under the trust deed. In this connection the defendants call to our attention that on the trial the plaintiff introduced in evidence, over the objection of the defendants, an affidavit as proof. The defendants contend that the affidavit was incompetent. Lacrabere v. Wise, 141 Cal. 554, 75 P. 185. Apparently conceding the force of the objection, the plaintiff replies that at most the affidavit was merely cumulative. Continuing, he quotes from the record, showing that he introduced the trust deed and also the deed executed by the trustee to him, and that the recitals therein prove the facts recited in the affidavit. Turner v. Marshall, 90 Cal. App. 345, 265 P. 860; Roberts v. Colyear, 179 Cal. 669, 672, 180 P. 937. We think the reply is sufficient.

[4] Objection is made to the order admitting the written notice of default. The defendants assert the notice was defective because it did not mention the volume and page in which the original was recorded. The statute did not so require. Civ. Code, § 2924.

[5] The trial court made a finding that the defendants had committed a forcible detainer. It is claimed there is no evidence to support it. As will be seen, the defendants were not entitled as owners to remain in possession after the trust deed had been foreclosed. True, they at one time were in possession as the employees of the plaintiff. However, that relation had also been terminated. The court did not err in making the finding.

It is also claimed that there was no consideration for the largest part of the renewal note. If the court believed the evidence offered by the plaintiff, the point is without merit. The plaintiff offered an abundance of evidence to show that the claim of the plaintiff amounted to the principal stated in the note, if not to a greater sum.

We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

102 Cal. App. 67

APPLIANCE CO. v. KELLEY et al. (Civ. 60.)

District Court of Appeal, Fourth District, California. Nov. 18, 1929.

1. Appeal and error 🔑1010(1)—Findings of trial court will not be disturbed on appeal, if supported by material evidence.

If material evidence supports findings of trial court, such findings will not be disturbed on appeal.

2. Evidence 🔑594—Undisputed testimony, in seller's action, that change in coils would make refrigerating plant work satisfactorily, must be accepted as true.

In seller's action for balance of purchase price of refrigerating plant, undisputed testimony that changes in coils and pipes, which buyers would not permit seller to make, would make plant work satisfactorily, must be accepted as true.

3. Sales 🔑365—In action for purchase price, finding that buyers acted in bad faith in refusing to let seller repair goods held immaterial.

In action for balance due under sale contract, where defense was failure of consideration, finding that buyers acted in bad faith in not permitting seller to repair goods *held* immaterial.

4. Sales 🔑124—Buyers, retaining possession of goods without offer to restore, could not be relieved of obligation to pay (Civ. Code, § 1691).

Buyers in possession of all or considerable part of consideration, having made no offer to restore goods, could not be relieved of obligation, since under Civ. Code, § 1691, on rescission of contract, parties should be restored to former positions.

Appeal from Superior Court, San Diego County; H. G. Ames, Judge.

Action by the Appliance Company against Tony Berardino and others. Judgment for plaintiff, and defendants Berardino appeal. Affirmed.

E. F. Du Fresne, of San Diego, for appellants.

Tompkins & Clark, of San Diego, for respondent.

MARKS, J. Plaintiff filed its action in the superior court against defendants to recover a balance due it under a contract to install an ice box and display case, and refrigerating machinery and equipment, in a store being erected by the defendant Joseph C. Kelley, as contractor, for the defendants and appellants, Tony Berardino and Rose Berardino, as owners. Appellants filed their cross-complaint against their codefendant, asking for damages, but it was stipulated by all parties at the trial that, under his deposit of $549 in court, no judgment would be taken against him. Respondent recovered judgment against appellants in the sum of $549.

Appellants' sole ground upon which they ask a reversal of the judgment is that the following findings of the trial court are not supported by the evidence:

"1—Plaintiff was and is at all times mentioned in the amended complaint a corporation duly organized and existing under and by virtue of the laws of the state of Delaware, with its principal place of business at the city of San Diego, state of California."

"6—By reason of the acts and conduct on the part of the defendants, Tony Berardino and Rose Berardino, and by reason of their refusal to allow plaintiff to install said unit and coils after said adjustment had been made that the defendants, Tony Berardino and Rose Berardino, acted in bad faith.

"7—The amount due, owing and unpaid from the defendants, Tony Berardino and Rose Berardino, to the plaintiff herein, is the sum of five hundred forty-nine dollars ($549.00)."

Appellants abandoned their contention that the finding of the corporate existence of appellant was not supported by the evidence, when it was pointed out to them that at the trial they had amended their pleadings and alleged such corporate existence.

[1] The law is well settled in this state that, if there is any material evidence in the record supporting the findings of the trial court, they will not be disturbed on appeal. In this case there is competent evidence of the following facts:

That in September, 1925, the written order for the refrigerating equipment was placed with respondent; that at that time it was contemplated that the refrigeration would be furnished for a delicatessen store, which did not require the maintaining of as low a temperature for successful refrigeration as a meat market; that in December, 1925, appellants decided to rent their store for a meat market, and the original contract with respondent was modified at that time, after part of the equipment had been designed by it; that installation of the equipment was completed on December 21, 1925, and the meat market opened for business on December 26, 1925; that the refrigeration of the display case was accomplished by a series of pipes in which a cooling liquid was circulated, the lower pipes furnishing the cold, and the upper pipes returning the liquid to the pumping machinery; that the tenant operating the meat market desired the pipes in the case lowered, which was done to satisfy him, and which reduced the level of the cold zone in the case; that the refrigeration in the case was not satisfactory, and respondent frequently sent its men to the market to make changes and repairs; that at times they found the water shut off from the building and the refrigerating plant shut down; that at other times they were not permitted by appellants or their tenant to work on the machine at all; that respondent always responded to a request to service the plant when a complaint was received; that in February, 1926, respondent, with the consent and at the request of appellants and their tenant, took the pipes and coils from the case to their factory, to change the grade of the pipes and thus increase the flow of the cooling liquid through the plant, thereby reducing the temperature in the case; that appellants refused to permit respondent to reinstall the pipes and coils, and refused to pay the balance of respondent's bill of $549, although they retained a large ice box built by respondent, the display case furnished by it, and all of the refrigerating plant, except perhaps that portion removed from the case for change at the factory; that, had the pipes and coils been reinstalled, the plant would have worked satisfactorily and kept the temperature of the case at a point sufficiently low to preserve meats; that the ice box, which was satisfactory to appellants, was of the value of $600, and the display case and refrigerating plant of the value of $549.

The undisputed evidence showed that the total contract price which appellants agreed to pay respondent for the refrigerating equipment, ice box, and display case was $1,149, of which sum $600 had been paid to respondent, leaving a balance of $549 unpaid. If respondent was entitled to recover any judgment at all, it was entitled to the last-named sum.

[2] We believe that this evidence is sufficient to support the findings of the court, which are not attacked by appellants, that the respondent installed the ice box and display case, and the mechanical refrigerating equipment to cool the display case, and was prevented from finally perfecting the refrigerating plant by appellants. Part of the failure of the refrigerating plant to cool the display case between December 26, 1925, and the time the coils and pipes were taken out by respondent must be charged to appellants' refusal to permit respondent's workmen to make changes and adjustments in the plant, and the fact that it was shut down and the water turned off at different times. Respondent was willing at all times to do its best to make the plant satisfactory, and its expert testimony, to the effect that the final changes in the coils and pipes would do so, was not disputed and must be accepted as true. Boomer v. Southern Cal. Edison Co., 91 Cal. App. 375, 267 P. 178.

[3] That portion of the findings of the trial court which impute bad faith to appellants is not material to the issue. Respondent brought its action for a balance due under a contract, and appellants defended upon the ground of total or partial failure of consideration, and whether they acted in bad faith is of no great importance, except, perhaps, in weighing their testimony. This finding can be entirely disregarded. Spencer v. Deems, 43 Cal. App. 601, 185 P. 671. There are other findings of the court that support the judgment and are supported by the evidence. They must control. Hill v. Clark, 7 Cal. App. 609, 95 P. 382.

[4] Appellants are asking to have the courts relieve them from the obligations of their contract while they are in possession of all or a considerable part of the consideration which they received from respondent, without any offer to restore the same. This we cannot do (sec. 1691, Civ. Code). Upon the rescission of a contract the parties should be restored to their former positions as nearly as possible as the same existed when it was made. Gaume v. Sheets, 181 Cal. 119, 183 P. 535. They must surrender or offer to surrender any consideration received in the transaction. List v. Moore, 20 Cal. App. 616, 129 P. 962.

This case was appealed under the alternative method. The opening brief of appellants does not contain a single line of testimony or a single reference to the transcript. Their reply brief does not set forth any of the evidence, but does contain a few references to the transcript by line and page. Attorneys must prepare their appeals according to law and the rules of court. Their failure to do so unnecessarily places too great a burden upon this court.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

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102 Cal. App. 53

HOLMES et al. v. ROBARTS. (Civ. 3915.)

District Court of Appeal, Third District, California. Nov. 18, 1929.

1. Appeal and error ⚷907(2)—In absence of record showing evidence, appellate court must assume evidence was insufficient to warrant judgment for plaintiffs, and that court properly rendered nonsuit.

In absence of record showing evidence offered and received at trial, District Court of Appeal must assume that evidence was wholly insufficient to warrant judgment for plaintiffs, and that conclusion of trial court rendering judgment of nonsuit was right and proper.

2. Appeal and error ⚷694(2)—In absence of record showing evidence, appellate court is limited in considering appeal from nonsuit to admissions in pleadings.

In absence of record showing evidence offered and received in trial, District Court of Appeal is limited in consideration of appeal from judgment of nonsuit to admissions made in pleadings.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Contracts ⚷254—Notice and subsequent conduct of parties may amount to rescission of contract by mutual consent.

Giving of notice and conduct of parties thereafter may amount to rescission of contract by mutual consent.

4. Sales ⚷92—Where buyers of grocery business, who leased building, deserted property and repudiated sale, retaking of possession by seller and lessor to protect property held not rescission (Civ. Code, § 1689).

Where parties who purchased grocery business together with store fixtures and equipment, and who leased building in which store was located, repudiated sale and abandoned property entirely, and lessor notified them to remove merchandise from his building, and they refused to do so, retaking possession of property by seller and lessor did not amount to acquiescence on part of lessor of repudiation of contract or any intent on his part to end sale, so that there was no rescission under Civ. Code, § 1689, requiring consent of all parties.

5. Sales ⚷92—Resale of groceries after buyers repudiated sale of grocery business and failed after notice to remove merchandise from building held not rescission (Civ. Code, § 1689).

Where purchasers of grocery business, together with fixtures and equipment, repudiated sale and lease of building in which business was located, and seller and lessor subsequently notified buyers to remove merchandise from building, but they failed to do so, resale of groceries at public auction by seller and lessor did not amount to rescission of contract, under Civ. Code, § 1689, requiring mutual consent.

6. Sales ⚷92—If resale of groceries was unjustified or for inadequate consideration after buyers repudiated purchase of grocery business, remedy was action for conversion.

If seller of grocery business after buyers repudiated contract and lease of building in which business was located had no right to sell groceries after original buyers failed to remove them from building, or if resale was for an inadequate consideration, that grocery store had been fully paid for and title had passed to original buyers, who gave notice of rescission before becoming in default on rent, was immaterial, where action was for rescission and not for conversion, which would be remedy of original buyers.

7. Sales ⚷92—Where buyers of grocery business owed rent and repudiated sale and abandoned property, retaking possession by seller and lessor was not rescission by consent or acquiescence (Civ. Code, § 1689).

Where buyers of grocery business, as lessees of building wherein business was located, were two months in arrears on rent and had repudiated sale and abandoned property when seller and lessor retook possession, no rescission by consent or acquiescence thereby resulted, under Civ. Code, § 1689, requiring mutual consent.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by C. M. Holmes and another against Vincent O. Robarts. Judgment of nonsuit, and plaintiffs appeal. Affirmed.

Albee & Watkinson, of Los Angeles, for appellants.

Warren L. Williams and S. S. Silverton, both of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by plaintiffs, C. M. Holmes and Susan M. Holmes, from a judgment of nonsuit entered against them in an action for rescission. The appeal is upon the judgment roll alone.

The pleadings set forth these facts: Plaintiffs allege in their original and supplemental complaint that on January 22, 1927, they purchased from defendant, Vincent O. Robarts, a grocery business, store fixtures, and equipment, etc., located in the city of Redondo Beach, Cal., paying therefor the full purchase price of $1,775, and, as part of the same transaction, plaintiffs leased from defendant the building in which said store was located, for a period of three years from January 22, 1927, at a monthly rental of $50, paid the first month's rent and took possession of said building and all of said personal property on said 22d day of January, 1927, and operated the grocery business in said building until on or about the 12th day of February, 1927, when plaintiffs served upon defendant a written notice of rescission, stating, in substance, that they had ascertained that certain representations made by defendant to induce them to enter into the contract of sale and purchase of the grocery business and lease of said building were false, fraudulent, and untrue, and demanded the return of the purchase price of the store and the rent paid. Subsequent to the service of said notice of rescission, and subsequent to the filing of the original complaint in this action, defendant entered into and took possession of the building and stock of groceries, equipment, etc. Thereafter, and on or about April 4, 1927, defendant sold said stock of groceries, fixtures, and equipment to one F. K. Faucher, whom plaintiffs allege was acting for and as the agent of said defendant. The supplemental complaint further alleges that, ever since said 4th day of April, 1927, defendant has been in the possession of said store building and of said grocery stock, fixtures, equipment, etc., and has been operating the same as his own. Defendant admitted in the answer that, after the premises were vacated for approximately one month, and about March 13, 1927, he took possession thereof, and alleged that plaintiffs voluntarily surrendered said premises; that on April 4, 1927, he sold said groceries, etc., at auction to a bidder, and not as agent or one acting for him; that the sale was not fictitious but bona fide; that said transaction was through a bank escrow, etc.; that no person was deterred from bidding;

and that he did not directly or indirectly purchase any of said stock of merchandise.

By further answer, defendant set forth that, since January 22, 1927, no rent was paid by appellants for said premises and that $100 became due for rent on the 22d day of March 1927; that on February 12, 1927, appellants served written notice of rescission upon him and delivered to a bank the keys for said premises with instructions to the bank to deliver same to defendant; that plaintiffs notified defendant that they had relinquished possession of said premises and said personal property, etc., and that said premises remained vacant until April 5, 1927, when respondent repossessed the property.

Defendant further alleged in his answer that, due to the perishable nature of the merchandise, etc., in said store, and the fact that the same was becoming overrun with rodents and was rotting and decaying, he notified plaintiffs to remove said stock of groceries and fixtures from his building by March 20, 1927, and, in the event they failed so to do, the same would be stored at plaintiffs' expenses, or he would sell the same to the highest bidder and account to plaintiffs for the proceeds; that respondent did later notify plaintiffs of the time of said sale, and did sell said merchandise to the highest bidder, F. R. Faucher, for $375; and that he herewith offers and tenders to plaintiffs the proceeds of said sale, less the sum of $100 due him for rent according to the terms of said lease.

The case proceeded to trial before the court sitting without a jury upon the issues thus raised, and, after plaintiffs had introduced all their evidence, the defendant made a motion for a nonsuit, which was granted.

[1, 2] In the absence of a record showing the evidence offered and received at the trial, we must assume that the evidence was wholly insufficient to warrant a judgment in plaintiffs' favor, and that the trial court's conclusion was right and proper in every essential particular. O'Connell v. Behan, 19 Cal. App. 119, 124 P. 1038; Heslin v. Lapham, 77 Cal. App. 139, 246 P. 150; Archer v. Harvey, 164 Cal. 274, 128 P. 410. We are therefore limited in the consideration of this appeal to the admissions made in the pleadings.

Appellants contend that the undisputed facts as to the conduct and acts of the respective parties, as alleged and admitted in their pleadings, constitute a rescission by mutual consent, and that they were entitled to a judgment of rescission. With this contention we are unable to agree.

Section 1689, Civil Code, provides: "A party to a contract may rescind the same in the following cases only: * * * (5) By consent of all the other parties."

[3] The law is well settled that the giving of notice and the conduct of the parties thereafter may amount to a rescission by mutual consent. D. Ghirardelli & Co. v. Students' E. & T. Co., 175 Cal. 427, 166 P. 16; Newell v. E. B. & A. L. Stone Co., 181 Cal. 386, 184 P. 659, 9 A. L. R. 993.

The question, therefore, to be determined is, Did either of the two acts of respondent, that of retaking possession of the store and building, or that of reselling the stock of groceries, fixtures, and equipment, amount to a consent or acquiescence to a rescission of the contract; or, in other words, was either act of respondent inconsistent in any manner with respondent still insisting upon the continuance in effect of the contract? We think not.

[4] If the respondent had taken possession under such circumstances as would show an acquiescence on his part in the position taken by appellants, viz. that the sale was repudiated and ended, then there would at once have been a rescission by mutual consent (Phillips v. Stark, 186 Cal. 372, 199 P. 509); but when appellants repudiated the sale and abandoned the property entirely, and after respondent had notified them to remove the merchandise from his building, and they had refused to do so, he then took possession of the building and merchandise, his act in retaking possession cannot be said to indicate any acquiescence on his part of the repudiation of the contract or any intent on his part to end the sale. Appellants deserted the property and notified respondent that the sale was repudiated, and thereby thrust upon respondent the necessity of retaking possession, and against his will, in order to protect his property. Under such circumstances there was no rescission.

[5] For practically the same reasons the second act of respondent, that of reselling the groceries, etc., at public auction, did not amount to a rescission. The appellants had repudiated the contract and had abandoned the premises, and had refused to remove their goods and merchandise from respondent's premises. Was respondent, in the face of appellants' absolute and unequivocal repudiation of the sale and abandonment of the entire property, both real and personal, required to stand idly by, indefinitely, and see his property go to rack and ruin, under peril of acquiescing in appellants' repudiation of the contract? Certainly not!

It has been held many times that a resale by the vendor, whose vendee has repudiated the contract, does not work a rescission. Phillips v. Stark, supra; Tomboy Gold & Copper Co. v. Marks, 185 Cal. 336, 197 P. 94; Rayfield v. Van Meter, 120 Cal. 419, 52 P. 666, 667.

In Rayfield v. Van Meter, supra, considering a similar situation, the court said, quoting from Ketchum v. Evertson, 13 Johns (N. Y.) 359, 7 Am. Dec. 384: "The plaintiffs renounced the contract, and peremptorily refused to fulfill it. It was vain, therefore, to keep the land for them. The plaintiffs cannot, by their own wrongful act, impose upon the defendant the necessity of retaining property which his exigencies may require him to sell. This would be most unreasonable and unjust, and it is not sanctioned by any principle of law."

Appellants lay great stress upon the fact that the grocery stock, etc., had been fully paid for and title had passed to them, and they gave notice of rescission before they became in default on rent, and therefore respondent had no right to take possession and sell out the stock of groceries, etc., and that by so doing he impliedly consented to a rescission.

[6] There is no merit in this contention. In the first place, this *is not an action for conversion, but one for rescission.* If respondent had no right to sell the merchandise, or if he sold it for an inadequate consideration, appellants have their remedy in conversion.

[7] Appellants were two months in arrears on the rent, and had repudiated the sale and abandoned the property at the time respondent took possession. Respondent, having been forced by the action of appellants to take possession to protect his property, no rescission by consent or acquiescence can be attached to such act of respondent.

It seems to us that further discussion is unnecessary. From what has been said, it follows that we are of the opinion that respondent did not acquiesce in appellants' repudiation of the sale and lease, and that the judgment of nonsuit was correct and should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; THOMPSON, J.

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102 Cal. App. 122

BLANCETT et al. v. BURR et al. (Civ. 5663.)

District Court of Appeal, Second District, Division 2, California. Nov. 20, 1929.

Appeal and error ⚷936(1)—Record not showing determination was not on merits nor under circumstances warranting any other judgment, award for costs and disbursements held proper.

Where record on appeal by plaintiff from judgment of dismissal did not disclose costs were allowed by way of indemnity, nor that cause was not actually determined on its merits, nor that dismissal was not effected under circumstances and conditions warranting entry of judgment from which appeal was taken, award for costs and disbursements *held* proper, since under circumstances appellate court must assume trial court founded its judgment on record and facts before it.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Earl R. Blancett and another against John Burr and others. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

See, also, 279 P. 668.

A. E. Moore, of Los Angeles, for appellants.

Chauncey Gardner, of Los Angeles, for respondents.

CRAIG, Acting P. J. It appearing that a formal dismissal of an action pending between the parties in the superior court of Los Angeles county had been served, filed, and entered, a formal judgment was rendered accordingly on the day set for trial, and the defendants were awarded costs and disbursements in the sum of $105. A motion to retax costs and to strike the cost bill from the files was denied, and the plaintiffs appealed from said judgment.

Appellants argue in their brief that the trial court erred in allowing costs by way of indemnity, and that the actual determination of the cause upon its merits is necessary to an allowance of attorney's fees. The record does not disclose the existence of either of these contingencies, nor does it appear that the dismissal was not effected under circumstances and conditions warranting the entry of the judgment from which the appeal was taken. The subsequent motion to retax costs and to strike the cost bill from the files having been reviewed upon motion of appellants, we assume that the trial court founded its judgment upon the record and the facts before it. We cannot say as a matter of law that it erred in this respect.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

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102 Cal. App. 10

YAKOOBIAN v. JOHNSON et al. (Civ. 6759.)

District Court of Appeal, First District, Division 1, California. Nov. 15, 1929.

1. Vendor and purchaser ⚷194—Purchaser let into possession is entitled to crops raised by him absent stipulations to contrary.

In absence of stipulation to contrary, purchaser let into possession is entitled to crops raised by him.

2. Mortgages ⚷32(2)—Instrument intended as security will be given that effect whatever its form.

Whatever the form of instrument, if instrument is intended merely as security, it will be given that effect.

3. Vendor and purchaser ⚷194—Parties held to have intended that vendor should retain lien on crops for purchase price, and not ownership thereof, crops were expressly reserved as security.

Where contract expressly provided that half of crops were reserved as security for payment of installments of price of land, parties *held* to have intended that vendor should retain lien on crops for purchase price and not ownership thereof.

4. Vendor and purchaser 🔑305—Vendor having elected to forfeit and terminate purchase contract could not thereafter recover unpaid installments of purchase price.

Where vendor elected to forfeit and terminate purchase contract, vendor could not thereafter recover unpaid purchase price which thereupon ceased to be enforceable obligation, nor could payment thereof be subsequently enforced against security.

5. Vendor and purchaser 🔑194—Purchaser remaining in possession, notwithstanding vendor's election to terminate purchaser's rights under contract, is adverse claimant as respects crops.

On election by vendor to terminate and forfeit purchaser's right under purchase contract, as respects crops, purchaser remaining in possession of land is an adverse claimant, and all privity between him and vendor thereupon ceases.

6. Vendor and purchaser 🔑299(1)—No receiver for purchaser could legally be appointed in vendor's action to terminate purchaser's rights.

In vendor's action to terminate and forfeit purchaser's rights under contract, no receiver for purchaser could legally be appointed.

7. Vendor and purchaser 🔑299(1)—Vendor's remedy on termination of purchase contract consists of recovery of value of use and occupation of land.

In vendor's action to terminate purchaser's rights, remedy of vendor consists in recovery from purchaser of value of use and occupation of land.

8. Chattel mortgages 🔑225(2)—Vendor having lien on undivided half of crop on termination of contract could not assert that rights of mortgagee of other undivided half were diminished by wrongful acts of purchaser.

Vendor sold land, retaining half of crops as security for payment of price. Purchaser executed mortgage on other undivided half of crop. On default of purchaser, vendor terminated contract and took possession. Mortgagee brought suit against vendor for the conversion of mortgaged crop. *Held*, vendor, having relinquished lien, could not assert that rights of mortgagee were diminished by wrongful acts of purchaser.

9. Chattel mortgages 🔑227—Where receiver paid proceeds of crop which were subject to mortgage executed by purchaser to vendor, mortgagee could recover from vendor.

Where, in vendor's action to terminate rights of purchaser, receiver was appointed, and receiver thereafter paid proceeds of crops which were subject to lien of mortgage executed by purchaser to vendor, vendor *held* liable to mortgagee, even though receiver was officer of court.

10. Chattel mortgages 🔑227—Where receiver applied proceeds of crop subject to mortgage to benefit of vendor, vendor held liable for amount of mortgage.

Where receiver appointed in vendor's suit to recover on purchase contract held crop subject to mortgage executed by purchaser, proceeds having been applied to vendor's benefit, vendor was obligated to pay mortgage.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Serop Yakoobian against H. G. Johnson and others. Judgment for plaintiff, and the named defendant appeals. Affirmed. Superseding opinion in 279 P. 165.

Sherwood Green, of Berkeley, for appellant.

Gallaher & Jertberg, K. Kuyumjian and W. E. Simpson, all of Fresno, for respondent.

PER CURIAM. Defendant H. G. Johnson has appealed from a judgment for $2,616.66 which was recovered against him by plaintiff, Yakoobian. The plaintiff alleged that appellant converted to his own use certain crops of grapes and figs on which the former held a mortgage in the sum of $2,500. By a second count in the form of an action for money had and received he sought to recover to the extent of the mortgage the sums received by appellant from the sale of the crops.

The following are the facts of the case: Some time before the year 1924 appellant agreed to sell the land on which the crops were grown to S. Papazian. By the contract one-half of the crops to be produced thereon were reserved *as security* for the payment of the installments of the purchase price. Thereafter, on January 4, 1924, Papazian mortgaged to the plaintiff one-half of the crops to be produced thereon during the years 1924 and 1925 to secure a note for $2,500 payable to the plaintiff on or before October 1, 1924. During the crop season of 1924 Papazian sold a portion of the crops, and received therefor amounts aggregating $1,713.67. Thereafter he defaulted in the performance of his contract with appellant, and on September 4, 1924, the latter instituted an action to terminate his rights under the contract and for the recovery of the possession of the land. A judgment terminating the vendee's rights was entered on March 7, 1925, following which appellant went into possession. Upon the filing of that action the court, on the application of appellant, appointed a receiver, who took possession of the crops. The receiver proceeded to market the same, and received therefor a total of $4,411.64. After deducting his expenses and fees, he paid to appellant the sum of $685 in cash, and expended for the latter's benefit the following amounts: $81.65 for insurance on the buildings situated on the property; $368.21 for taxes; and $2,280 in payment of the accrued interest on the mortgage upon the land executed by appellant; the total amount received directly and indirectly by the latter being the sum of $3,330.71. It is admitted that the crop was removed by the receiver without the consent of the plaintiff. In addition to the above facts the trial court found that the value of the crop taken by the receiver was about $5,000 and in accordance with the allegations of the complaint that appellant became indebted to the plaintiff for money had and received in the sum of $2,616.66, this being the amount of the mortgage and accrued interest.

[1, 2] Appellant contends that, in view of the facts, the plaintiff had no valid claim to the crop, and that the conclusion of the trial court cannot be supported. In the absence of a stipulation to the contrary, a vendee let into possession is entitled to the crops raised by him (Lewis v. Hall, 38 Cal. App. 329, 176 P. 171; First National Bank of Tulare v. Andreas [Cal. App.] 267 P. 937); and, whatever the form of an instrument, if it was intended merely as security, it will be given that effect (17 Cal. Jur. [Mortgages] §§ 45, 46).

[3] And where, as here, the contract expressly provided that half the crops were reserved *as security* for the payment of installments of the price of the land, manifestly it was not the intention of the parties that the vendor should retain the ownership thereof, but a lien thereon for the price. Palmer v. Howard, 72 Cal. 293, 13 P. 858, 1 Am. St. Rep. 60; Stockton Savings, etc., Society v. Purvis, 112 Cal. 236, 44 P. 561, 53 Am. St. Rep. 210; Ferguson v. Murphy, 117 Cal. 134, 48 P. 1018. Such was the interpretation given the provision by the trial court, and, where its conclusion appears consistent with the true intent of the parties, it is not within the province of the appellate court to substitute another interpretation, though equally tenable, for that of the court below. Slama Tire, etc., Co. v. Ritchie, 31 Cal. App. 555, 161 P. 25; Manley v. Pacific Mill, etc., Co., 79 Cal. App. 641, 648, 250 P. 710.

[4] Following the execution of the contract, the vendee went into possession of the land, and so far as appears from the evidence, remained therein until the entry in 1925 of the judgment terminating his rights. In what respects he was in default under the contract is not shown by the record, but the vendor, having elected to forfeit and terminate his rights thereunder, could not thereafter recover the unpaid installments of the purchase price, which thereupon ceased to be enforceable obligations. Glassell v. Coleman, 94 Cal. 260, 29 P. 508; Dishian v. Kishishian, 64 Cal. App. 440, 221 P. 669; Mahoney v. McCrea, 104 Iowa, 735, 74 N. W. 699; Waite v. Stanley, 88 Vt. 407, 92 A. 633, L. R. A. 1916C, 886; Roney v. H. S. Halvorsen Co., 29 N. D. 13, 149 N. W. 688; Wotring v. Shoemaker, 102 Pa. 496; Steiner v. Baker, 111 Ala. 374, 19 So. 976; Ward v. Warren, 44 Or. 102, 74 P. 482; Warren v. Ward, 91 Minn. 254, 97 N. W. 886; Illinois, etc., Co. v. Stearns, 60 Ill. App. 21. Nor could payment thereof be subsequently enforced against the security, namely, the crops. While these were subject to the lien reserved by the vendor, the lien was created by the contract, and the right to enforce it depended upon the continued existence of the obligations secured. Glassell v. Coleman, supra; Hovsepian v. Eskender, 69 Cal. App. 379, 231 P. 364; Frankel v. Rosenfield (Cal. App.) 273 P. 122; Steiner v. Baker, supra; Ward v. Warren, supra; Warren v. Ward, supra.

[5-7] The crops which were fructus industriales (Vulicevich v. Skinner, 77 Cal. 239, 19 P. 424; Hovsepian v. Eskender, supra) were not in existence when the contract was made, and upon the election by the vendor to terminate and forfeit the vendee's right under the contract the latter notwithstanding remained in possession of the land. He thereupon became an adverse claimant and all privity between him and the vendor ceased (Cal. Delta Farms, Inc., v. Chinese, etc., Farms, Inc. [Cal. Sup.] 269 P. 443; Hovsepian v. Eskender, supra); and in the action to terminate the rights no receiver could legally be appointed (Cal. Delta Farms, Inc., v. Chinese, etc., Farms, Inc., supra); the remedy of the vendor consisting in the recovery from the vendee of the value of the use and occupation of the land (Johnston v. Fish, 105 Cal. 420, 38 P. 979, 45 Am. St. Rep. 53; Rector v. Lewis, 46 Cal. App. 168, 188 P. 1018; notes, 39 A. L. R. 958; 57 A. L. R. 578).

[8] Appellant claims that the portion of the crops removed and sold by Papazian was necessarily a part of the undivided half thereof which was subject to plaintiff's lien, and that the latter's security was to that extent diminished. Whether Papazian's acts would have had the effect claimed had appellant's lien continued, we need not decide, but, as between the plaintiff and Papazian, the latter's wrongful act could not affect the plaintiff's rights, and, so long as any crops owned by Papazian remained upon the land, the same would still be subject to the lien of the mortgage. Having relinquished his lien, appellant was not in a position to assert that the rights of the plaintiff were diminished by the wrongful acts of the vendee.

[9, 10] It is also contended that the receiver was not the agent of the appellant, but an officer of the court, for whose acts he was not responsible. However this may be, appellant received the proceeds of the crops which were subject to the lien of plaintiff's mortgage, and to which the latter by reason thereof was equitably entitled. Under such circumstances the money may be recovered. Gray v. Huffaker, 176 Cal. 516, 169 P. 1038; Fontaine v. Lacassie, 36 Cal. App. 175, 171 P. 812. Furthermore, the receiver held the crops subject to the mortgage (Von Roun v. Superior Court, 58 Cal. 358; Bories v. Union Building & Loan Ass'n, 141 Cal. 74, 74 P. 552), and, the proceeds having been applied to the benefit of appellant, he was to the amount of the mortgage obligated to repay the same to the plaintiff (Crosby v. Fresno Fruit Growers' Co., 30 Cal. App. 308, 158 P. 1070.)

The judgment is affirmed.

102 Cal. App. 58

DRURY et al. v. LOS ANGELES RY. CORPORATION. (Civ. 3923.)★

District Court of Appeal, Third District, California. Nov. 18, 1929.

As Modified, on Denial of Rehearing, Dec. 18, 1929. Hearing Denied by Supreme Court Jan. 16, 1930.

1. Carriers 🔑280(3)—Street railway as common carrier of passengers must exercise utmost degree of care (Civ. Code, § 2100).

Under Civ. Code, § 2100, providing that carrier of persons for reward must use utmost care and diligence for their safe carriage, street railway, as common carrier of passengers is bound to exercise utmost degree of care.

2. Trial 🔑295(1)—Instructions relating to same subject must be read together on appeal in determining alleged error in one of them.

Instruction alleged to be erroneous must, on appeal, be read with other instructions pertaining to same subject, in determining alleged error.

3. Carriers 🔑287(1)—Street car stopping regularly at abrupt turn in track should exercise greater care to see that passengers are safely aboard.

Where street car regularly stops for passengers at a safety zone located at beginning of abrupt turn in course of track, greater care should be exercised to see that passengers are safely aboard, and that car is carefully started and operated around curve, since sudden change in direction is likely to increase danger to those remaining on platform or steps.

4. Carriers 🔑348(14)—Instructions in action by passenger who fell off platform of street car held not to exclude contributory negligence in attempting to board car while in motion.

In action for personal injuries sustained when falling from platform of street car while rounding curve, where sole charge of contributory negligence relied on was plaintiff's attempt to board car while in motion, instructions permitting recovery if defendant brought car to standstill and plaintiff was attempting to board car while car was standing still, and defendant negligently moved car forward and plaintiff was solely injured thereby, *held* not erroneous as omitting all reference to defense of contributory negligence upon which defendant relied.

5. Appeal and error 🔑1064(1)—Instruction that street car passenger suddenly put in position of peril is not negligent if in bewilderment he runs directly to danger, though technically erroneous, held not reversible error.

In action for personal injuries sustained when falling from platform of street car while rounding curve, instruction that, when person without fault is suddenly put in position of peril by negligent act of another, even if in bewilderment he runs directly in very danger which he fears, he is not in fault, though technically erroneous, *held* not reversible error, in view of other instructions relating to same subject given in greater detail, and which, when read together, showed jury could not be misled thereby.

6. Carriers 🔑347(15)—Whether danger confronting street car passenger falling off rear platform justified clinging to handlebar held for jury.

Whether danger of emergency confronting passenger on street car falling off rear platform while car was rounding curve justified passenger's conduct in clinging to handlebar *held* for jury.

7. Carriers 🔑338—If ordinarily prudent person would have clung to handlebar when falling off platform of street car under similar circumstances, passenger so doing was not contributorily negligent.

Though passenger of street car falling off rear platform while rounding curve could have saved herself from serious injury by not clinging to handlebar, if ordinarily prudent person would have so acted under similar circumstances, passenger will nevertheless be excused from penalty of what might otherwise amount to contributory negligence.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Edmond Drury and another against the Los Angeles Railway Corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellant.

E. B. Drake, of Los Angeles, for respondents.

THOMPSON, J. This is an appeal from a judgment for damages for personal injuries sustained by the plaintiff Ethel Drury as a result of falling from the platform of a street car while it was rounding a curve in the track. The evidence as to the material issues was conflicting. The defendant challenges certain instructions as erroneous.

The plaintiff Ethel Drury was a teacher of music in the public schools at Los Angeles. About 4:30 o'clock in the afternoon of October 6, 1925, she attempted to board an eastbound Crown Hill street car at the corner of Broadway and First streets for the purpose of returning to her home. At this corner the car made an abrupt left-hand turn from First street northerly onto Broadway. It had stopped on First street opposite a safety zone just before proceeding to round the curve on to Broadway. Several passengers, among whom was the plaintiff Ethel Drury, boarded the car at this point. She was the last person to step upon the car at this station. Regarding the circumstances which led to the accident, there is a serious dispute. According to the testimony of Mrs. Drury and several of her witnesses, the car was at a full stop at this safety zone when several passengers boarded it. All had reached the platform of the car except Mrs. Drury. She secured a place on the steps of the car before it started, grasping the handlebar with her left hand.

★Rehearing denied. Hearing denied by Supreme Court.

A portly lady was entering the car ahead of her. While she was in this position, the car suddenly started and swerved round the curve at quite a rapid rate of speed, estimated by Mrs. Drury to have been about 10 miles an hour. The sudden start and jerking of the car threw her from her balance, and she slipped from the step, still clinging to the handlebar. In this predicament she was dragged a distance of 12 or 15 feet. Her weight pulled her hand down along the bar until her feet were caught under the rear wheels and crushed. Screaming, she released her hold and fell unconscious to the pavement. After rounding the curve, the car stopped. An ambulance was called, and she was taken to the emergency hospital. It was ascertained that her feet and ankles were crushed and that she was seriously injured.

There is no controversy regarding the sufficiency of the evidence to support the judgment, nor is the amount of the verdict questioned. The defendant denied the allegations contained in the complaint of negligence on its part, and, upon the contrary, affirmatively charged the plaintiff with contributory negligence in attempting to board the car while it was in motion. The language of the answer in this regard is as follows: "The said plaintiff carelessly and negligently * * * undertook to board a moving street car of the defendant * * * and so carelessly and negligently conducted herself as aforesaid, that she fell to the pavement and * * * that the injuries * * * resulting therefrom * * * were directly, proximately and concurrently contributed to by the fault * * * of said plaintiff Ethel Drury as aforesaid." No act of alleged contributory negligence other than the attempt to board the car while it was in motion was charged or proved.

[1, 2] The appellant challenges as erroneous three instructions which were given to the jury at the request of the plaintiff. It is claimed two of these instructions violate the rule announced in Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 P. 700, Keena v. United Railroads of S. F., 57 Cal. App. 124, 207 P. 35, and other California authorities, to the effect that it is erroneous to recite facts of a case in a charge and direct the jury to render a verdict in favor of a particular party in the event they find these specific facts to be true, unless the instruction embraces all the circumstances or features involved in the case which are necessary to fix legal liability upon the opposite party. In the present case, it is asserted that these challenged instructions omitted all reference to the defense of contributory negligence upon which the defendant relied. This was true of the instruction which was condemned in the Keena Case, supra. In that case, however, the defendant railroad company relied upon the defense for the killing of an infant child in a street railway accident on the assertion that the parents of the child were guilty of contributory negligence in permitting it to play in the street where the cars were operated. The instruction in that case did utterly fail to consider the defense of contributory negligence. It merely informed the jury that "if * * * the gripman * * * saw said child upon or near the tracks and did not give any warning of his approach, and * * * that he was negligent in not doing so, and that such negligence proximately contributed to its death * * *" judgment should be rendered in favor of the plaintiff. Clearly this was erroneous. Obviously the gripman of the defendant railroad company may have been guilty of all the negligent acts which were recited in the instruction; these acts may have been the proximate cause of the death of the child, and still, if the negligence of its parents in permitting it to play in a place of danger contributed to the cause of its death, the company would not be liable to the parents in damages. Accepting all the facts related in the Keena instruction as true, the contributory negligence relied upon in that case might still exempt the company from liability. For that reason it was error to predicate a declaration of the right of the plaintiff to recover judgment solely upon the facts recited. Similar omissions of facts vital to issues involved led to a declaration that instructions which were given in the other cases cited by the appellant in this case were erroneous. This criticism does not apply to the first instruction which is challenged in the present case. This instruction is readily distinguishable from that which was involved in the Keena Case. In the present case the defendant relied upon the defense of contributory negligence, consisting solely of a charge that the plaintiff Ethel Drury recklessly tried to board the street car while it was in motion. This instruction specifically based its declaration of plaintiffs' right to a judgment upon facts which are in conflict with, and absolutely precludes the possibility of, the existence of the contributory negligence upon which the defendant relied. If the jury found the car was stationary when it was boarded by Mrs. Drury, then by necessary implication the jury must have found that defendant's charge of contributory negligence was not true. This left no uncertainty as to the law. The jury could not have misunderstood its application. The defendant was deprived of none of the force of its defense of contributory negligence. Indeed, the jury were specifically charged in another instruction, which was given at the request of the defendant, that, if they found from the facts that Mrs. Drury tried to board the car while it was moving, she *could not recover damages*. The first instruction complained of read in part: "* * * It was the duty of the defendant, * * * to have used the highest or utmost degree of care for her safety," and, therefore, "if you find that the plaintiff, Ethel Drury, had hold of the

handlebar and was on the step of said car * * * *when said car was standing still,*" and that while she was in this position the car was negligently started, and that she was thereby thrown from the step of the car and injured, a judgment should be rendered in her favor. This is a correct statement of the law under such circumstances. As a common carrier of passengers, the "utmost degree of care" is required of a street railway company by the provisions of section 2100 of the Civil Code. The finding that Mrs. Drury boarded the car while "it was standing still," and that she "had hold of the handlebar," necessarily excludes the possibility that she was injured while attempting to board it when it was in motion. Moreover, the jury was further charged in defendant's instruction No. V that "* * * the defendant * * * claims * * * that after the street car had started up from its usual stopping place and *while it was in motion* and in the act of turning the curve * * * the said plaintiff Ethel Drury voluntarily attempted to board the same. If such is the fact the plaintiffs cannot recover." There seems to be no possibility of the jury misunderstanding the correct application of the law declared by these two instructions. They must be read together.

[3, 4] The next instruction complained of read in part as follows: "If you find that the defendant * * * brought the 'Crown Hill' car to a standstill, and the plaintiff, Ethel Drury, was attempting to board the car * * * *while said car was standing still,* and the defendant (then) negligently moved said car forward and she was solely injured thereby, then your verdict should be for the plaintiffs."

The preceding discussion regarding the former challenged instruction applies likewise to this charge. It is based on the hypothesis that the car was stationary when it was boarded and that the defendant negligently started the car while the plaintiff Mrs. Drury was still in this dangerous position. This instruction is even more specific than the former one, for it authorized a verdict for plaintiff only if her injuries were sustained "solely" by the negligent conduct of the motorman which was specifically described. This instruction was not erroneous. It should be observed that, when a street car regularly stops for passengers at a safety zone which is located at the beginning of an abrupt turn in the course of the track, greater care should be exercised to see that the passengers are safely aboard and that the car is carefully started and operated around the curve, for the reason that the sudden change in the direction in which the car is traveling is likely to increase the danger to those who may remain on the steps or platform of the car.

[5] The last instruction complained of involves the law applicable to the conduct of one who is suddenly placed in imminent danger of serious injury. It evidently refers to the incident disclosed by the evidence, from which it appears that, when Mrs. Drury was thrown from the moving car as it proceeded around the curve, she still clung to the handrail and was dragged until her feet were caught and crushed beneath the wheels of the car, while with the exercise of better judgment she might have released her hold of the handlebar and fallen to a place of greater safety on the pavement. This instruction read in part: "When a person, without fault on his part, is suddenly put in a position of peril by the negligent act of another, even if in bewilderment he runs directly in the very danger which he fears he is not in fault. * * *" Standing alone, this is technically not a correct statement of the law. It was preceded by another instruction relative to the same subject which was given in greater detail, and its application was apparent. When these two instructions are read together, we are inclined to think the jury could not be misled thereby, particularly is this true in view of the fact that the jury were clearly informed that the plaintiff Ethel Drury could not recover if she was guilty of contributory negligence.

The preceding instruction with which this challenged one was read and in connection with which it must be construed was in the following language so far as it is necessary to quote it: "If you find that the plaintiff, Ethel Drury, got upon the step of the car * * * while said car was at a standstill, and the defendant then started said car forward and threw her off said car and thus confronted her with danger of losing her life or great bodily harm, then, in an attempt to save herself (by clinging to the handlebar) she was not required to use the same care that she would otherwise be required to use when not confronted with danger. * * * If you find * * * that she used the care that an ordinarily prudent person would under the same or similar circumstances * * * then she was not guilty of * * * contributory negligence. * * *" It is apparent that, since this instruction was immediately followed by the statement that "in a position of peril * * * if, in bewilderment he runs directly into the very danger which he fears, he is not in fault," this language may reasonably be assumed to apply to the incident of Mrs. Drury's clinging to the handlebar when she was thrown from the step of the car. For it was argued that this increased her danger and resulted in the injuries which she sustained. It is not unreasonable to assume that the jury understood the term "she is not in fault" to mean she would not be in fault for the exercise of poor judgment in clinging to the bar, if they should determine that a reasonable person in such an emergency would have done the same. In truth, we are unable to say it was not a most natural and human impulse for one to cling for safety to such a bar, when suddenly thrown from the step of a moving car. Moreover, we are unable to say what the result would have been if she had released her hold of the bar and dropped to the pavement. Her danger might have been thereby increased or it might have been diminished. At least the jury were correctly instructed that in such an emergency one is not held to the same degree of sound reasoning in an effort to extricate himself from a situation of extrême danger. Quoting approvingly from Thompson on Negligence in the case of Waniorek v. United Railroads, 17 Cal. App. at page 124, 118 P. 947, 949, this language, which is appropriate to the situation in the present case, is used: "Where a passenger upon a railway train is, in consequence of the negligent and unskillful operation of its train by the company, placed in a situation so perilous as to render it seemingly prudent for him to leap from the train * * * and he so leaps and is injured, he is entitled to recover damages, although he would not have been hurt, if he had remained on the train."

[6, 7] This doctrine is supported by many authorities, and may not be questioned. It therefore becomes a question for the jury to determine whether the danger of the emergency which confronted Mrs. Drury justified her conduct in clinging to the bar, and, if it did, even though she might have saved herself from serious injury by acting differently, still, if an ordinarily prudent person would have so acted under similar circumstances, she will nevertheless be excused from the penalty of what might otherwise amount to contributory negligence. Bilton v. So. Pac. Co., 148 Cal. 443, 83 P. 440. Of course, the court was not authorized to usurp the province of the jury and instruct them definitely that "she was not in fault." But, construing this instruction with the language of the preceding one in the light of the evidence indicating that the incident of clinging to the handlebar was the only circumstance to which these instructions could have been addressed, we think it is reasonable to hold that the jury must have understood this to mean that "she was not in fault" (under such circumstances) for the use of poor judgment in clinging to the handlebar. At least there is not a miscarriage of justice in this case. Even though this last instruction was in fact technically erroneous, we are of the opinion that the case should not be reversed on that account alone.

Upon examination of the instructions as a whole, we find that the jury were fully, fairly, and correctly instructed as to the law with relation to the essential issues of the case, including the doctrine of the burden of proof, the negligence of the defendant, the proximate cause of injury, and the exemption from liability on the part of the defendant in the event that contributory negligence of the plaintiff was shown. There appears to be no reversible error.

The judgment is affirmed.

We concur: FINCH, P. J.; JAMISON, J., pro tem.

101 Cal. App. 781

FORBES et al. v. CITY OF LOS ANGELES et al. (GISH et al., Interveners).★

(Civ. 3704.)

District Court of Appeal, Third District, California. Nov. 14, 1929.

Rehearing Denied Dec. 14, 1929. Hearing Denied by Supreme Court Jan. 13, 1930.

1. Frauds, statute of 🔑144—Stockholder in water company whose property city sought to acquire held not estopped when sued for specific performance to assert agent was not authorized in writing, where means of ascertaining authority were open.

Where representatives of city seeking to acquire canal, water rights, and other property of mutual water company made no effort to ascertain extent and nature of authority which stockholder had given agent in premises, though means of doing so were convenient and ready, stockholder, when sued for specific performance of agreement executed by agent, *held* not estopped to assert contract was not binding, because agent was not authorized in writing.

2. Estoppel 🔑116—Burden is on one relying on equitable estoppel to show injury, if truth be proved.

One relying on equitable estoppel has burden of showing that he will be injured, if truth be proved.

3. Frauds, statute of 🔑144—Stockholder in water company whose property city sought to acquire held not estopped, when sued for specific performance, to assert invalidity of agreement, where resulting injury was not shown.

Where city seeking to acquire canal, water rights, and other property of mutual water company entered into agreement with each stockholder for transfer of his stock and property without binding itself to take any of property without all thereof, and it was not shown that city offered to pay more than reasonable value, property holder, when sued for specific performance, *held* not estopped to assert invalidity of agreement executed by agent on ground agent's authority was not in writing, since, where city did not offer to pay any more than reasonable value, there was no showing of injury.

4. Specific performance 🔑44—Payment of full purchase price of realty does not entitle buyer to specific performance.

Payment of full purchase price of real property to seller does not entitle buyer to specific performance, even though buyer is compelled to sue for recovery of consideration paid.

★Rehearing denied. Hearing denied by Supreme Court.

5. Specific performance ⚷42—Part performance of oral contract for sale of realty relied on for specific performance must be referable alone to contract (Civ. Code, § 1741).

Part performance of oral contract for sale of realty relied on to take contract out of provisions of Civ. Code, § 1741, requiring sale of real property to be in writing or executed by agent authorized in writing, and providing that court may nevertheless compel specific performance for part performance thereof, must be performance of something required by contract, and mere doing of something because of contract or in reliance thereon is not enough, that is, acts of part performance must be referable alone to contract.

6. Specific performance ⚷41—City not having partly performed oral contract to acquire property of stockholder in water company held not entitled to specific performance (Civ. Code, § 1741).

Where city seeking to acquire canal, water rights, and other property of mutual water company entered into agreement with property holder for conveyance of his property with agent who was only verbally authorized, and city had not partly performed contract, city *held* not entitled to specific performance, since, under Civ. Code, § 1741, oral contract for sale of real property cannot be specifically enforced, in absence of part performance thereof.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action by Jennie Forbes and another against the City of Los Angeles and others, in which J. L. Gish and others intervened, and in which defendant named filed a cross-complaint against intervener Katherine Francisco. From a judgment for cross-complainant, intervener last named appeals. Reversed.

Swallow & Richards, of Bishop (Edward Brody, of Los Angeles, of counsel), for appellant.

Jess E. Stephens, City Atty., W. B. Mathews, Floyd M. Hinshaw, Clarence S. Hill, and S. B. Robinson, all of Los Angeles, for respondents.

A. R. Honnold, of Escondido, amicus curiæ.

FINCH, P. J. The plaintiffs brought this action to cancel a deed purporting to convey to the defendant city the canal, water rights, and other property of the McNally Ditch Company, a mutual water company. The interveners alleged the same facts, and prayed for the same relief as the plaintiffs. The defendant city, which will be referred to as the defendant and respondent, entered into a compromise agreement with the plaintiffs and all of the interveners, except Katherine Francisco, by which it acquired their lands and water stock. The defendant filed answers to the complaint and the complaint in intervention, and also filed a cross-complaint against Mrs. Francisco. The cross-complaint contains two counts. The first count stated, or attempted to state, a cause of action for specific performance. The second stated a cause of action in eminent domain. The court found that the deed sought to be canceled is invalid. The second cause of action stated in the cross-complaint seems not to have been tried, and need not be further noticed. Judgment was entered in favor of the cross-complainant city requiring Mrs. Francisco to convey to it the lands described in the cross-complaint and 61 shares of the capital stock of the McNally Ditch Company. She has appealed from the judgment. The court found the allegations of the cross-complaint to be true. Such allegations are in substance as follows:

The cross-defendant owns the lands described in the cross-complaint and 61 shares of the capital stock of the company. The lands are entitled to receive water from the company for the irrigation thereof. On and prior to August 4, 1924, all of the plaintiffs and interveners owned land within the service area of the ditch and shares of the capital stock of the company, and such "lands and shares of stock * * * constituted all of the farm lands served by the said McNally Ditch and all of the shares of stock of the said McNally Ditch Company, owned and held in connection with farm lands, which had not then been acquired by the said defendant, * * * or in trust for it." Prior to the time mentioned, all of the interveners "had authorized and empowered W. W. Watterson and M. Q. Watterson, * * * and each of them, to act as their agents or agent in negotiating for the sale to said defendant * * * of their several lands and shares of stock, * * * and said intervener, Katherine Francisco, had authorized and empowered her said agents, and each of them, to agree on her behalf to sell her aforesaid lands and shares of stock to the said defendant * * * for the sum of $18,000."

On the day stated, the interveners, "acting by and through their said agent M. Q. Watterson, entered into and delivered to said defendant * * * an agreement in writing, whereby they agreed to sell to the said defendant * * * all of said lands and shares of stock of the said interveners for the aggregate sum of $206,450, and that at the time of the making of said agreement, it was understood between the said M. Q. Watterson and representatives of the said defendant * * * that $18,000 of said aggregate sum of $206,450 would be paid to and received by the intervener, Katherine Francisco, as the purchase price of her said lands and shares of stock." It was understood at that time by such agent, M. Q. Watterson, and the defendant that the defendant would not pur-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

chase any of the interveners' lands or stock, unless it was able to purchase all of the lands and stock of all the plaintiffs and interveners. In reliance upon such agreement, the defendant, on August 5, 1924, entered into an agreement with the plaintiffs to purchase their lands and stock for the sum of $114,000. The defendant would not have agreed to purchase the plaintiffs' lands and stock if it had not believed that Mrs. Francisco would perform her agreement to sell her lands and stock to the defendant for $18,000. Prior to any notice or intimation from Mrs. Francisco that she would not perform her agreement, the defendant paid to the plaintiffs the full purchase price of $114,000 for their lands and shares of stock, "and paid in escrow, for the benefit of all of the interveners, in proportion to their respective interests, the aforesaid sum of $206,450." On or about December 26, 1924, Mrs. Francisco, "through her said agent, W. W. Watterson, notified and advised the said defendant that she refused to perform her said agreement to sell and convey to said defendant * * * her said lands and shares of stock for the said sum of $18,000, or for any sum less than $24,000." The agreement of August 4, 1924, "is and was at all times herein mentioned just and reasonable as to said intervener, Katherine Francisco," and the "agreed purchase price of $18,000 is and was at all times herein mentioned, an adequate consideration for the transfer and conveyance of the said lands and shares of stock of the said intervener * * * and more than the actual value of said lands and shares of stock."

The court further found that Mrs. Francisco "never, at any time, authorized or empowered either W. W. Watterson or M. Q. Watterson by any instrument in writing, to act as her agent, or agents for the sale of her property to the defendant, * * * or any other person or corporation whatsoever, and that said Watterson, in negotiating and contracting for the sale of the intervener's land and water stock" to the defendant was "acting upon her verbal authorization only"; and that the defendant "never at any time, in reliance upon the contract of purchase, * * * or at all, entered into the possession of the lands of the intervener (Mrs. Francisco) or any part thereof, or into the possession, use or enjoyment of the water represented by her said 61 shares of stock, * * * and never at any time made any improvements or expended any money upon said lands or any part thereof." From the facts found the court drew the conclusions of law that Mrs. Francisco "is estopped to assert the invalidity" of the agreement of August 4, 1924, and that such agreement "was and is a valid, binding and enforceable agreement, and should be specifically performed by the said interevener."

The agreement reads as follows:

"Bishop, Cal., August 4, 1924.

"To the Board of Public Service Commissioners City of Los Angeles, Los Angeles, Calif., Gentlemen:

"The price of land of

McAvoy & Porter	160 Acres	28 NcNally	28 Farmers
C. A. Peak	160		1/32 Fish Slough
M. M. Schaffer	160	35	
W. W. Yandell			
Dell Yandell & Sidney Seymour	480	280	
J. L. Gish	181	205	
F. B. Wayman	50	30	
Carrie Neill	20	15	
Watterson Bros.	80		1/8 Fish Sl.
K. Francisco	70	61	

approximately 1361 acres, according to descriptions of documents in my possession, is $206,450.00, together with all water stock or water rights appurtenant to or used in connection with any of said lands.

"All or none of said options to be taken.

"Price subject to acceptance within ten days. Title to be clear with the usual certificates.

"Yours truly M. Q. Watterson.

"We, the undersigned, hereby agree to recommend to the Board of Public Service Commissioners of the City of Los Angeles the purchase of the above described properties at the price mentioned above.

"W. B. Mathews
"John T. Martin."

Subsequently, in due time, the agreement was completed by its acceptance by the defendant, but on the condition that it was to take all of the property of the interveners or none. The defendant did not irrevocably bind itself to take the property of any of the interveners without all thereof until after it had notice that Mrs. Francisco refused to sell her property at the agreed price. The defendant, however, had paid the plaintiffs the full purchase price of their lands and water stock before it had notice of Mrs. Francisco's refusal. Subsequently, with full knowledge of her refusal, the defendant took the lands and water stock of the other interveners at the agreed prices. The plaintiffs and the interveners constituted two separate groups, represented by different persons. An attorney at law, who represented the defendant in the negotiations, and who drafted the agreement of August 4, 1924, testified that he did not know "just what kind of authority" Watterson had, "except he stated he was authorized," and that he did not know, but assumed, that Watterson was not the attorney in fact of the interveners. M. Q. Watterson, a witness for the defendant, testified that he did not state to any of the defendant's representatives that he "had authority to bind any of these people in a binding agreement." The appellant had no personal negotiations with the representatives of the defendant, and made no statements to them concerning the sale of the property or Watterson's authority to act for her. She declined Watterson's request that she sign an option to sell her property to the defendant. She is bound, if at all, by her oral statement to Watterson that "she would accept the price" of $18,000 for her property and that he "could go ahead and close the deal on it." She knew at that time that the representatives of the defendant had said that it would take none of the property of the interveners without all thereof.

[1] It may be conceded that the evidence supports the finding that appellant verbally authorized the Wattersons to agree in her behalf to sell her property to the defendant. It cannot be held, however, that the appellant is estopped to deny that such authorization was in writing. The representatives of the respondent had convenient and ready means of ascertaining the extent and the nature of the authority which appellant had given the Wattersons, and such representatives made no reasonable effort to ascertain the truth. 10 Cal. Jur. 637; Robbins v. Law, 48 Cal. App. 555, 562, 192 P. 118. The respondent therefore is in the same position as if it had actually known, before accepting Watterson's offer, that his authorization was verbal only.

[2-4] One relying on equitable estoppel has the burden of showing that he will be injured if the truth be proved. 10 Cal. Jur. 638. The respondent failed to make any such showing in this case. Considering, first, the appellant's property alone, there was no injury, because it is alleged and found that the value of the property is less than the agreed price of $18,000. It is not to be inferred that one is injured by a refusal to sell him property for more than it is worth. Considering the properties of the interveners together, it is neither alleged nor found that the respondent paid more than the reasonable value therefor. Neither is it alleged or found that the properties of the plaintiffs are not of the reasonable value paid therefor. It clearly appears from the record in this case that the respondent desired to acquire all of the water rights involved in this action, and it is a matter of current state history that the purchase of such property at a reasonable price would be of great benefit to the respondent. Since it does not appear, therefore, that the respondent paid for any of such property a greater sum than the reasonable value thereof, there is no showing of injury. It is true that the respondent kept the purchase price of the properties in escrow for a few weeks, but it is well settled that the payment of the full purchase price of real property to the seller does not entitle the buyer to specific performance, even though the buyer is compelled to sue for the recovery of the consideration paid. Woerner v. Woerner, 171 Cal. 298, 301, 152 P. 919.

[5, 6] Considering the case from a broader standpoint, it must be conceded that, even though the respondent actually knew that Watterson's authorization was oral, yet, in a proper case, judgment of specific performance would be proper. The Legislature has not left the matter in doubt. Section 1741 of the Civil Code provides:

"No agreement for the sale of real property, or of an interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof."

"The Code section [1741] specifically excepts from the operation of the statute of frauds parol agreements, partly performed, and otherwise would be invalid under subdivision 5 of section 1624. If any other exception were intended, here was the place to make it. The framers of our statute deliberately added one express exception, and we must assume that they intended to leave their work complete." Trout v. Ogilvie, 41 Cal. App. 167, 174, 182 P. 333, 335.

"We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof." United States v. Dickson, 15 Pet. (40 U. S.) 141, 165, 10 L. Ed. 689.

Attention has not been called to any decision in this state holding that an oral contract for the sale of real property can be specifically enforced, in the absence of a part performance thereof. As shown by the terms of section 1741, the part performance relied on must be part performance of the contract sought to be enforced. As stated in Knoff v. Grace, 68 Colo. 527, 190 P. 526, 528, 10 A. L. R. 1492: "Part performance must be part performance; i. e., it must be the performance of something required by the contract. * * * Doing something because of the contract or in reliance on it is not enough." The acts of part performance must be referable alone to the contract. Hambey v. Wise, 181 Cal. 286, 291, 184 P. 9; Blanc v. Connor, 167 Cal. 719, 723, 141 P. 217; Owens v. McNally, 113 Cal. 444, 451, 45 P. 710, 33 L. R. A. 369. The decisions in this state contain many statements to the effect that an oral contract cannot be specifically enforced, in the absence of a showing of part performance thereof, among them the following:

"The contract being oral, it was essential that appellant prove sufficient part performance to take it out of the statute of frauds within the meaning of section 1741, Civil Code." Wood v. Anderson, 199 Cal. 440, 444, 249 P. 862, 864. Such a contract "could only be taken out of the statute and enforced in equity by reason of part performance." Davis v. Judson, 159 Cal. 121, 131, 113 P. 147, 152. "Treating the action as one for the specific performance of a contract relating to real property, it was necessary to prove * * * either that the contract was in writing or that it had been partially performed (section 1741, Civ. Code)." Allman v. Rich, 76 Cal. App. 601, 605, 245 P. 439, 441. See, also, Sampson v. Draeger, 88 Cal. App. 105, 262 P. 781; Viau v. Viau, 57 Cal. App. 66, 71, 207 P. 39; Hines v. Copeland, 23 Cal. App. 36, 42, 136 P. 728. "The case is reduced by the findings to an action to enforce a parol contract to convey real estate. Such an action is maintainable only where there has been a part performance sufficient to take the agreement out of the statute of frauds." Woerner v. Woerner, supra. The facts in that case were much stronger in favor of the party claiming an estoppel than in this.

Respondent relies on Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154, and other analogous cases, but the oral contract in that case did not involve the transfer of real estate, and therefore section 1741 of the Civil Code was not applicable thereto.

The judgment is reversed.

We concur: THOMPSON, J.; PLUMMER, J.

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101 Cal. App. 687

COMER et al. v. ASSOCIATED ALMOND GROWERS OF PASO ROBLES. (Civ. 7109.)★

District Court of Appeal, First District, Division 2, California. Nov. 6, 1929.

Rehearing Denied Dec. 5, 1929.

Judgment ⟹634—Defendant representing in former action ability to convey held estopped in subsequent action to recover purchase money to set up res judicata.

Where defendant, sued for specific performance to compel execution of deed, or, if unable to do so, for value of premises in controversy, stated during course of trial that he was able to convey premises if court should decide for plaintiffs, after which plaintiffs withdrew issue on defendant's ability to convey, and court found plaintiffs paid defendant $13,000 and were entitled to conveyance, defendant failing to execute conveyance as decreed because not having title *held* estopped in subsequent action for money had and received covering purchase price to set up defense of res judicata.

Appeal from Superior Court, San Luis Obispo County; A. B. McKenzie, Judge.

Action by Alice H. Comer, as administratrix of the estate of J. J. Comer, deceased, and another, against the Associated Almond Growers of Paso Robles. Judgment for plaintiffs and defendant appeals. Affirmed.

Griffith & Thornburgh and Wm. G. Griffith, all of Santa Barbara, for appellant.

M. R. Van Wormer, of San Luis Obispo, for respondents.

STURTEVANT, J. The plaintiffs commenced an action to recover a judgment against the defendant for money. Thereafter they filed a second amended complaint. The defendant demurred. Its demurrer was overruled, and thereafter it filed an answer which, among other things, pleaded an earlier judgment as a bar. A trial was had in the trial court before the court sitting without a jury. The court made findings in favor of the plaintiffs, and from a judgment entered thereon the defendant has appealed. In their second amended complaint the plaintiffs alleged the corporate capacity of the defendant; that on the 1st day of November, 1922, the plaintiffs commenced an action, No. 7251, records of the county clerk of San Luis Obispo county, in specific performance against the defendant to compel the defendant to execute a deed to certain lands, and, if it be found that defendant was unable to convey said premises, then to recover judgment in the sum of $15,000, which sum was alleged to be the value of the premises in controversy at the time of the commencement of the action; that the action came on for trial; that the plaintiffs offered to prove by Frank W. Aston that at the time action No. 7251 was commenced, and at the time the action was on trial, Frank W. Aston was the owner of the premises. Objection was made that the evidence was inadmissible because not within the issues, and the objection was sustained; that during the course of the trial the court inquired of defendant's counsel if defendant was able to convey the premises in the event that the court should decide in favor of the plaintiffs; that counsel answered the question in the affirmative and the trial continued; that thereafter the court made findings in favor of the plaintiffs and, among other things, found that the plaintiffs had paid the defendant $13,000 and that plaintiffs were entitled to a conveyance; that thereafter a decree was entered directing defendant forthwith to execute a conveyance and to deliver the conveyance, together with a certificate of title, showing the premises to be free and clear of incumbrances and liens; that for the purpose of carrying said judgment into effect the court appointed a commissioner; that thereafter plaintiffs served a copy of judgment and a notice of entry on the defendant; that the judgment has never been appealed from nor vacated and has become a final judgment; that the defendant did not execute the conveyance; that the commissioner did execute the conveyance; that at the time the said action No.

★Rehearing denied.

7251 was commenced the defendant was not, and is not, the owner of said premises; that the conveyance is void; that the plaintiffs have paid the defendant $13,000, no part of which has been returned; that by reason of the representation of defendant's counsel in open court on the trial of action No. 7251 the plaintiffs and the trial court relied thereon and acted thereon; and that the defendant is estopped from setting up the judgment in action No. 7251 as a bar in this action. The trial court made findings in favor of the plaintiffs on each of the allegations except as follows:

"That by reason of the stipulations, assurances and representations of defendant's said counsel with respect to defendant's ability to convey title to said premises, referred to in paragraphs three and four in the complaint herein, *plaintiffs' counsel* was misled and, after the representation had been made, as aforesaid, he proceeded in the said cause to its completion in full reliance thereupon, and that after the said matters were stated by defendant's counsel plaintiffs verily believed that defendant could and would convey title to said premises to them; that the issue of defendant's ability to convey title to said premises was withdrawn from said cause by reason of said remarks, stipulations and representations, and by reason thereof defendant is estopped in this action from setting up the defense of res adjudicata. Among other things, the trial court found:

"That is it true that the plaintiffs and their counsel well knew that the defendant had only a contract to purchase said premises and that its ability to convey to the plaintiffs depended upon its paying the said Aston the balance due on said contract.

"That all of the allegations of the second defense set forth in defendant's answer are true, excepting that it is not true that the plaintiffs are estopped by the judgment in said action No. 7251 from maintaining this action."

The defendant claims it was not estopped from setting up the defense of res adjudicata. It claims that the statement made by the defendant in action No. 7251 was a promise to do something in the future and should be classed in the realm of contracts and cannot be used to create an estoppel. It cites and relies on Corpus Juris 1142, § 144. It is stated in the text that such is the general rule. But in the next section of the text "Exceptions to Rule" are enumerated, and Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154, is cited in the notes. In that case, at page 797 of 156 Cal., 106 P. 95, 134 Am. St. Rep. 154, the court said: "Practically, defendants said to plaintiff: 'We want you to enter our employ at once. We know that to do so you must give up your life position in the police department and that you are not willing to do this unless you are assured of employment for ten years at $300 a month. A written contract is, under our statute, essential to guarantee you such employment. We will execute this contract just as soon as Mr. Fair returns from Europe. Go ahead and resign your position now and commence work with us at once, and it will be all right. The written contract will be given as promised.'" At another place the court quotes with approval from Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394: "All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or evil design." Then, at page 799 of 156 Cal., 106 P. 96, 134 Am. St. Rep. 154, the court said: "While the question is by no means free from doubt, we believe that it should be held that there were sufficient facts in this case to support a conclusion that the promise here to give such a written agreement as was required by the statute was made under such circumstances that the irrevocable surrender by plaintiff of his position in the police department in full reliance thereon made it, in the eye of equity, a binding contract, the subsequent repudiation of which by defendants would constitute such a manifest fraud as would justify the application of the doctrine of equitable estoppel." We think the exception, stated in 21 Corpus Juris 1142, § 145, rather than the rule, is applicable in this case.

It is unnecessary to discuss any other point. We find no error in the record.

Judgment affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

102 Cal. App. 16

MITCHELL v. TUTTLE et ex. (Civ. 5783.)

District Court of Appeal, Second District, Division 1, California. Nov. 15, 1929.

1. Fraud 🔑30—Innocent assignor of leasehold could not be held for damages for fraudulent representations of coassignor.

Where assignor of leasehold had no knowledge as to alleged fraudulent misrepresentations of her coassignor, innocent assignor could not be held for damages.

2. Fraud 🔑49—In deceit action, plaintiff need prove but single material false representation, made with intent to deceive, and which did deceive, plaintiff to his injury.

In action for deceit, plaintiff is required to prove but single material false representation, made by defendant to plaintiff with intent and purpose to deceive, and which in fact did deceive, plaintiff and was relied and acted on by him to his injury, notwithstanding multitudinous allegations of fraud.

3. Fraud 🔑12—Representation of assignor of leasehold that property was occupied by permanent tenants held material statement of fact in deceit action.

In action for deceit against assignor of leasehold, representation that property was occupied by permanent tenants, who would remain as tenants during remainder of lease, *held* material statement of fact, where assignor had knowledge that tenants were navy attachés, who might vacate property at any time.

4. Fraud 🔑13(2)—Assignor's testimony that tenancy of navy attachés varied from four months onward could not be accepted as excuse that assignor did not know falsity of statement regarding permanency of tenancy.

Where assignor of leasehold knew that tenants were navy attachés, liable to vacate at any time, testimony in action against assignor for deceit that tenancy of navy attachés varied from four months onward, and that he always considered them on par with civilians, could not be accepted as excuse that, at time he made statement regarding permanency of tenants, he did not know statement to be false.

5. Fraud 🔑58(4)—In deceit action, evidence as to reliance on false representations as to permanency of tenants held sufficient.

In action for deceit, testimony that assignee relied on representations made by assignor and his agents regarding permanancy of tenants of leasehold assigned *held* sufficient evidence as to reliance on representations.

6. Fraud 🔑59(2)—Measure of damages in deceit action is difference between actual value of property and its value had property been as represented.

Measure of damages which person is ordinarily entitled to recover in action for deceit in sale of property is difference between actual value of property and its value had property been as represented, and measure of recovery is not affected by price paid.

7. Fraud 🔑30—Innocent assignor of leasehold should not be allowed to reap benefits of assignment procured by fraud of coassignor.

Innocent assignor of leasehold should not be allowed to reap part of benefits of assignment procured by fraudulent representation of coassignor.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Nellie Hopple Mitchell against Leroy R. Tuttle and Belle M. Tuttle. Judgment for plaintiff, and defendants appeal. Reversed as to last-named defendant, reversed and remanded as to first-named defendant, and affirmed in part.

O. C. Sattinger, of Los Angeles, for appellants.

John J. Monahan, of San Pedro, for respondent.

HOUSER, J. For the sum of $780 in cash and a promissory note executed by plaintiff in favor of the defendants, plaintiff purchased from the defendants a leasehold interest in a furnished bungalow court. Shortly thereafter plaintiff brought an action against the defendants for damages, based upon alleged false and fraudulent representations made by the defendants to plaintiff in inducing her to purchase said leasehold interest. From a judgment rendered in favor of plaintiff for the sum of $881 *and the cancellation of said promissory note*, the defendants have appealed.

[1] At the outset, appellants urge that in no event can the judgment stand as against defendant Belle M. Tuttle, who was the wife of her codefendant. In that connection the evidence shows that, although Belle M. Tuttle was one of the owners of the leasehold interest which forms the subject-matter of the action, at no time did she personally make or cause to be made either or any of the alleged fraudulent misrepresentations upon which plaintiff relied, to her injury. The only action taken in the premises by said defendant was that, after the sale of the leasehold interest had been consummated, said defendant joined with her codefendant in executing a transfer or assignment thereof to plaintiff; also that said defendant verified the joint answer of the defendants to the complaint. The evidence fails in showing knowledge at any time in said defendant of any of the alleged fraudulent statements made by her codefendant to plaintiff; nor, other than the fact that the promissory note given as part of the consideration for the assignment of the leasehold interest was executed in favor of the two defendants, does the evidence show any present or possible future participation by said defendant in any of the benefits resulting or to result from the sale of said leasehold interest. Other than

some authorities which relate to the rule applicable to the ratification of contracts (as distinguished from torts), none is cited by respondent which would tend to uphold the judgment herein as against said defendant Belle M. Tuttle. To the contrary, the authorities in general are to the effect that in circumstances such as are herein disclosed no civil liability is incurred by one standing in the relation to the facts as does the defendant Belle M. Tuttle in the instant case. 12 Cal. Jur. 774, 775, and cases there cited.

[2] It is next urged by appellants that each of the false and fraudulent representations alleged by plaintiff to have been made by the defendants was but an expression of opinion, and consequently could not form the basis for an action for damages. The law is well settled that, in an action for deceit, in establishing his case, notwithstanding multitudinous allegations contained within the complaint, the plaintiff is required to prove but a single, material, false representation made by the defendant to the plaintiff with the intent and purpose to deceive him, and which in fact did deceive the plaintiff, and was relied and acted upon by him to his injury. 12 Cal. Jur. 834; Thomas v. Hacker, 179 Cal. 731, 733, 178 P. 855; Davis v. Butler, 154 Cal. 623, 626, 98 P. 1047.

[3] The evidence herein satisfactorily establishes the fact, as against defendant Leroy R. Tuttle, as found by the trial court, that "the said defendants and each of them then and there represented to this plaintiff that the income from said leased property was six hundred twenty dollars ($620) per month; that such income would be permanent, and that the tenants then and there occupying such leased premises were permanent tenants, and would remain therein as tenants during the remainder of the term of said lease." That part of such finding of fact which relates to the permanency of the tenants constitutes the subject of appellants' attack. It is conceded by appellants that, within the knowledge of defendant Leroy R. Tuttle, at the time of the execution of the assignment to plaintiff of the lease in question, all the tenants in the leased bungalow court were "navy folk," attached to a fleet at nearby anchorage, and that on the departure of the fleet (which might take place at any time) such tenants would vacate the leased premises. In such circumstances, the statement made by the defendants "that the tenants then and there occupying such leased premises were permanent tenants, and would remain therein as tenants during the remainder of the term of said lease," became a material statement of a matter of fact. 12 Cal. Jur. 725 et seq. Deceit may consist of "the suggestion, as a fact, of that which is not true, by one who does not believe it to be true." Section 1710, Civ. Code.

[4] In view of the admitted familiarity of defendant Leroy R. Tuttle with the facts regarding the possibility of an early vacation by the then tenants of the leased premises, the fact that, according to his testimony, the tenancy of rooms or apartments by "navy folk" varied from "four months onward," and that he "always considered them on a par with civilians," cannot be accepted as an excuse that, at the time he made the statement regarding the "permanency" of the tenants occupying the leased premises, he did not know it to be false. The evidence showed that he was fully acquainted with the possibilities likely to arise from the situation, and he was not warranted in making a positive assertion of something which only might be true—dependent wholly upon contingencies over which he had no control.

[5] The further contention by appellants that plaintiff did not rely upon the false representations made to her by Leroy R. Tuttle is completely answered by the following excerpt from the testimony given by plaintiff on the trial of the action:

"Q. Did you rely upon your own judgment, or did you rely upon the representations made? A. I relied upon the representations made by Mr. Tuttle and his agent, Mr. Winters."

[6] Appellants also contend that no proof of damages suffered by plaintiff was received on the trial of the action, nor any evidence introduced in support of the judgment. As to the latter contention (exclusive of the proof of damages), without here attempting to recite the evidence adduced on the trial, it may suffice to state that, in the opinion of this court, it was sufficient to justify the findings made by the trial court, and that, predicated upon such findings, the general effect of the judgment is in accordance with the law relating thereto. As to the first point, appellants' complaint appears to be that, in actions of the character of that here involved, a judgment for damages must be founded upon evidence of the difference between the value of what plaintiff received in the transaction, and what value she would have received, had the representations made by the defendants to the plaintiff been true, and that on the trial of the action no evidence was received relating to either of such values. In support of such suggestion as to the law on the question of damages, appellants cite the following authorities: Hines v. Brode, 168 Cal. 507, 143 P. 729; George Cople Co. v. Hindes, 34 Cal. App. 576, 170 P. 155; Hyman v. Harbor View L. Co., 46 Cal. App. 98, 188 P. 828; Foster v. Gorham, 63 Cal. App. 601, 219 P. 476.

In considering the question thus presented, it should be borne in mind that no attempt, either in law or in fact, was made by plaintiff to rescind the contract. To the contrary, so far as may be ascertained from the allegations contained in the amended complaint, the theory of the pleader was, not that the contract should be rescinded, but that, for the alleged deceit of defendants, plaintiff should be entitled to recover damages. An examination of the record herein discloses the fact that judgment was rendered in favor of plaintiff for the sum of $881, besides directing the cancellation of the promissory note hereinbefore referred to. Although the evidence established that, as consideration for the assignment of the leasehold interest in question, plaintiff gave the defendant Leroy R. Tuttle the sum of $780 in cash, together with said promissory note for $220, and that said sum of $780 represented and in fact was a payment by said defendant to the owner or lessor of the premises of the last two months' rental provided by the lease which was transferred, no other evidence was introduced to show either the value of the leasehold interest at the time it was assigned to plaintiff, or what its value would have been had the representations made by defendant Leroy R. Tuttle to plaintiff been true.

In the case of Hullinger v. Big Sespe Oil Co., 50 Cal. App. 6, 194 P. 742, as in the instant case, plaintiff sought to recover damages for deceit. There, as here, in the introduction of evidence the plaintiff failed to follow the rule indicated in the case of Hines v. Brode, 168 Cal. 507, 143 P. 729, 730, wherein it is said: "That rule declares that the measure of damages which a person is ordinarily entitled to recover in an action for deceit in the sale of property is the difference between the actual value of the property and its value had the property been as represented, and that the measure of recovery is not affected by the price paid. The price paid may be considered only as evidence of value. * * * This is not only the rule in California, but it is declared to be the rule under the great weight of authority. * * *"

In the case of Hullinger v. Big Sespe Oil Co., 50 Cal. App. 6, 194 P. 742, 743, a judgment in favor of the respondent was reversed. In part, it is there said: "* * * From the findings in this case, we are unable to determine if the court, in rendering its judgment, took into consideration the fact that under the contract there was due from plaintiff the sum of $13,000 in unpaid installments. It is somewhat significant that the amount allowed as damages for failure to deliver a fee-simple title is the equivalent of the amount paid by plaintiff at the time of the execution of the lease contract, with interest thereon; and it may well be inferred that it was the intention of the court to compel the defendant to *restore the amount it had received on the purchase price of the lease, without any rescission* by the plaintiff on discovery of the fraud. This inference is fortified by the circumstances that there is no testimony in the record before us upon which to base a finding that the sum so assessed was the actual damage sustained, except so far as the amount agreed to be paid might be considered as evidence of the value of the property had it been as represented."

The Supreme Court denied a petition for hearing before that tribunal and, regarding the damages recoverable in such an action, said: "* * * The law as to the *amount* that may be recovered in such an action and what must be set off against any damage proved is sufficiently declared in Hines v. Brode, 168 Cal. 507, 143 P. 729."

In the instant case it may be conjectured that the "damages" properly recoverable by plaintiff, which the judge of the trial court thought plaintiff was entitled to recover, was the $780 cash paid by plaintiff to defendant Leroy R. Tuttle, plus the sum of $101 for some unascertainable reason, and in addition thereto, have cancelled the promissory note given by plaintiff to defendants. Although in natural justice it may be that the actual legal damage suffered by plaintiff was the equivalent of the exact relief attempted to be administered by the judgment which was rendered, the law has provided a method of ascertaining damages in such cases differing from that adopted by the trial court.

[7] At the same time that the answer to the complaint in the action was filed defendants interposed a cross-demand for judgment against plaintiff on the promissory note executed by her in favor of defendants. With reference thereto, it was adjudged by the trial court that said promissory note "was and is without consideration and void, and that the same shall be forthwith cancelled and delivered to the plaintiff herein. * * *" Although, considering that the effect of the action for deceit was to ratify the contract of purchase, and consequently that, inasmuch as the promissory note was a part of the purchase price for the leasehold interest which was assigned by defendants to plaintiff, it may be said that a quasi consideration for the execution of the promissory note was present, from the entire findings made by the trial court it is clear that the intention in the premises was to declare void the entire transaction solely because of the fraudulent misrepresentations made by defendant Leroy R. Tuttle to plaintiff, to which reference has heretofore been had herein. On a retrial of the issue of damages, the status and effect of the promissory note should be taken into consideration by the trial court in arriving at the amount, if any, which plaintiff is entitled to recover as against defendant Leroy R. Tuttle; or, if the court should determine that plaintiff is entitled to recover no damages, the item represented by the promissory note may then be justly adjusted between the plaintiff and said defendants; otherwise, if

the promissory note executed by plaintiff in favor of the two defendants were to be considered as a binding obligation on the part of plaintiff and in favor of the two defendants, then the defendant Belle M. Tuttle, although not bound by the fraudulent misrepresentations made by defendant Leroy R. Tuttle to plaintiff, and not liable to respond in damages therefor, would be permitted to reap a part of the benefits of the fraudulent transaction. This she should not be allowed to do.

It is ordered that as to defendant Belle M. Tuttle the judgment awarding damages against her be and it is reversed, and that as to defendant Leroy R. Tuttle the judgment awarding damages be and it is reversed, and the cause remanded for a new trial as against him, for the sole purpose of determining the amount (if any) of the damages to be awarded against him. The judgment, in so far as it cancels said note, is affirmed.

We concur: CONREY, P. J.; YORK, J.

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101 Cal. App. 147

LOWMILLER v. MONROE, LYON & MILLER, Inc., et al. (Civ. 7053.)★

District Court of Appeal, First District, Division 2, California. Nov. 7, 1929.

Hearing Denied by Supreme Court Dec. 5, 1929.

1. Principal and agent 🔑159(1) — Ostensible principal may be liable for torts of ostensible agent.

Principal under an ostensible authority, which through fault or negligence he has permitted, may be held liable for torts of an ostensible agent.

2. Evidence 🔑272—In personal injury action, original answer could be treated as declaration against interest, in determining whether driver of automobile was servant of codefendant or independent contractor.

In action for damages for personal injuries sustained while riding in automobile, where it appeared defendant's salesmen had hired bus driver to transport plaintiff to view property which defendant had for sale, original answer, admitting that defendant had invited plaintiff to view property, could be treated as declaration against interest, to be taken into consideration with all other evidence in determining whether relationship existing between driver of automobile and codefendant was that of master and servant, or of an independent contractor.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

On petition for rehearing. Petition denied. For former opinion, see 281 P. 433.

J. Hampton Hoge, of San Francisco, for appellant.

Dinkelspiel & Dinkelspiel and Ford, Johnson & Bourquin, all of San Francisco, for respondent.

PER CURIAM. In its petition for rehearing herein, the appellant complains that the opinion heretofore filed fails to refer to certain assignments of error made by appellant and particularly to the giving of certain instructions. Notwithstanding the fact that appellant wholly failed to comply with the provisions of section 953c, Code of Civil Procedure, and with rule 8 of the rules of the Supreme Court, we did consider the assignments made, but did not touch upon them, as we considered them wholly without merit.

[1] As to the instruction covering the law of ostensible agency, it is argued that under no circumstances can the doctrine of ostensible agency apply in an action for tort, and the cases of Barton v. Studebaker Corporation, 46 Cal. App. 707, 189 P. 1025, and Smith v. Belshaw, 89 Cal. 427, 26 P. 834, are cited as authority. Neither case supports the rule contended for. Both hold that, under the facts of the particular case considered, proof of ostensible agency was insufficient to fasten liability on the purported master. The rule applicable to the case at hand is fully stated in Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 422, 49 P. 559, 560, where the express provisions of section 2330 of the Civil Code are relied on for the holding that "no reason exists why the principal under an ostensible authority, which through fault or negligence he has permitted, should be exonerated from liability for the torts of the ostensible agent, any more than would the principal in the case of an actual agency."

In the case at hand Clark, Black, and Friedman were all licensed as real estate salesmen at the request of and under the employment of the appellant herein. Their licenses were issued by the state real estate commissioner under the provisions of the act of 1919 (St. 1919, p. 1252), and any attempt to create for them the status of independent contractor or broker would have been in violation of the penal provisions of that act. The jury, of course, was entitled to presume that none of the parties hereto had purposely committed a crime within the terms of that act. At the same time the jury was entitled to believe all the testimony, which showed unmistakably that up to the time of the trial the corporation held itself out as the broker having sole authority to make the sales, and that during the same time the corporation, as well as the agents, deliberately and purposely represented to the plaintiff and to the prospective customers that these parties were merely agents of the corporation, and that the corporation and it alone had sole authority to arrange for the sale of the lots and that

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★Hearing denied by Supreme Court.

all others acting or engaged in any capacity in connection with the sales or prospective sales of the lots were acting as the agents and employees of the corporation alone.

[2] Complaint is also made of our failure to comment upon the instruction relating to the admission of the original answer in evidence. The point is that the original complaint charged that the defendant corporation invited and solicited the plaintiff to view and inspect the properties for the purpose of offering them for sale. This allegation was admitted in the original answer filed by the corporation, but after the trial had progressed this appellant asked and obtained leave to file an amended answer in which this allegation was denied. In instructing the jury the trial judge advised them that they could take these facts into consideration in determining the question as to the relation of the parties defendant. The instruction is not, as urged by appellant, an instruction that the original answer should be taken as an admission or confession of the facts pleaded in the complaint. The instruction as given means that the original answer may be treated as a declaration against interest to be taken with all other evidence in the case to determine the disputed question of fact—that of agency.

The petition for rehearing is denied.

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102 Cal. App. 97

Ex parte BROWN. (Cr. 1102.)

District Court of Appeal, Third District, California. Nov. 19, 1929.

1. Habeas corpus 🔑92(1)—Whether indictment charges an offense within jurisdiction of trial court will not be determined in habeas corpus proceedings.

Where indictment purports or attempts to state an offense of kind of which court assuming to proceed has jurisdiction, question whether facts charged are sufficient to constitute an offense of that kind will not be determined in habeas corpus proceedings.

2. Habeas corpus 🔑30(2)—Indictment for making false financial statement to bank examiner held sufficient to charge public offense on application for habeas corpus (Bank Act Wash. § 56).

Indictment for making false financial statement to bank examiner, charging violation of Bank Act Wash. § 56 (Laws 1917, p. 299), which did not allege that accused was officer, agent, or employee of bank, *held* sufficient to charge public offense, on habeas corpus proceedings to secure release of accused from custody on an executive warrant for his extradition.

3. Habeas corpus 🔑30(2)—In habeas corpus proceedings to secure release of accused from custody on extradition warrant, indictment in language of statute is sufficient.

Indictment which follows language of statute is sufficient for purposes of habeas corpus proceedings to secure release of accused from custody on an executive warrant for his extradition.

Application of H. P. Brown for writ of habeas corpus. Writ discharged, and petitioner remanded.

Inman & West, of Sacramento, and Morgan J. Doyle, of San Francisco, for petitioner.

L. B. Donley, Deputy Atty. Gen., of Washington, and Frank R. Devlin and Philip H. Angell, both of San Francisco, for respondent.

FINCH, P. J. The petitioner has applied for a writ of habeas corpus on the ground that he is illegally restrained of his liberty under an executive warrant issued by the Governor of this state, after a hearing, upon the demand of the Governor of the state of Washington for the extradition of the petitioner, who was indicted by the grand jury of the county of Grays Harbor, Wash., on five counts, in each of which it is charged, in substance: That the petitioner did "willfully, knowingly, maliciously, fraudulently, feloniously and unlawfully make, subscribe, exhibit to and file with Hayes & Hayes, Inc., bankers, a banking corporation duly organized and existing pursuant to the laws of the state of Washington as a state bank," a false financial statement of assets and liabilities, "with the intent to deceive the examiner or examiners or other person or persons who were authorized by law to examine into the affairs of said banking corporation."

The alleged false financial statement referred to in the first count purported to set forth the assets and liabilities of the petitioner and those in the other counts the assets and liabilities, respectively, of four different corporations.

Section 56 of the Washington Bank Act reads as follows: "Every person who shall knowingly subscribe to or make or cause to be made any false statement or false entry in the books of any bank or trust company or shall knowingly subscribe to or exhibit any false or fictitious paper or security, instrument or paper, with the intent to deceive any person authorized to examine into the affairs of any bank or trust company or shall make, state or publish any false statement of the amount of the assets or liabilities of any bank or trust company shall be guilty of a felony." (Laws 1917, p. 299.)

[1] Petitioner contends that the indictment fails to state a public offense, that the section quoted applies only to "the officers, agents, employees and banking personnel of banks," and that the indictment does not allege that the petitioner is an officer, agent, or employee.

"On habeas corpus the inquiry into the sufficiency of an indictment is limited. We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus." Matter of Ruef, 150 Cal. 665, 666, 89 P. 605; Ex parte Cordish (Cal. App.) 271 P. 784.

"By the laws of Pennsylvania, every indictment is to be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of Assembly prohibiting its commission, and prescribing the punishment therefor. * * * That commonwealth has the right to establish the forms of pleadings and process to be observed in her own courts, * * * subject only to those provisions of the constitution of the United States involving the protection of life, liberty, and property in all the states of the Union." Ex parte Reggel, 114 U. S. 642, 5 S. Ct. 1148, 1153, 29 L. Ed. 250.

"In extradition proceedings, * * * the purpose of the writ [of habeas corpus] is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. * * * And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide. * * * When, as here, * * * the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place." Drew v. Thaw, 235 U. S. 432, 35 S. Ct. 137, 138, 59 L. Ed. 302; Biddinger v. Commissioner of Police, 245 U. S. 128, 38 S. Ct. 41, 62 L. Ed. 193.

[2] Testing the indictment by the foregoing rules, it cannot be held, in this proceeding, that it does not substantially charge a public offense. The act of the cashier of a bank in keeping on file a false statement of the kind alleged in the indictment, with the intent to deceive a bank examiner, would doubtless constitute a violation of section 56 of the Washington Bank Act. If a customer of the bank, knowing the purpose of the cashier, should make and file with the bank such a false financial statement, even though he might be termed an accessory before the fact, would be liable to indictment, trial, and punishment as a principal. Remington's Compiled Statutes of Washington, § 2007. It cannot be said that there is not a "reasonable possibility" that the indictment may be held sufficient to warrant a conviction upon proof of facts of the kind stated.

[3] Whether the making and filing of a false financial statement with the officers of a bank, with intent to deceive a bank examiner, where such officers in good faith believe the statement to be true, is a violation of section 56 appears never to have been decided by the Washington courts. There is at least a "reasonable possibility" that such acts by a customer of a bank, for the purpose of establishing or maintaing his credit, may be held to be a violation of that section. It is true that the indictment does not allege that the petitioner was a customer of the bank at the time of the alleged acts or that he made and filed the alleged false statement for the purpose of establishing or maintaining his credit, but this defect, if it is a defect, is one of uncertainty only, which cannot be considered in this proceeding. The courts of Washington, in common with those of many other states, have held that it is sufficient generally to charge an offense defined in a statute in the language of the statute. The charge in the indictment follows the language of the statute and, for the purposes of this summary proceeding, it is deemed sufficient.

The writ is discharged, and the petitioner is remanded to the custody of respondent, W. A. Hamm, sheriff of Grays Harbor county, Wash.

I concur: THOMPSON, J.

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102 Cal. App. 136

CORNELIUS v. HOLLAND et al. (Civ. 5744.)

District Court of Appeal, Second District, Division 2, California. Nov. 21, 1929.

1. Partnership 🔑20—Parties purchasing half interests in lot, which they agreed to improve and try to sell at profit, dividing profits or losses equally, held partners (Civ. Code, § 2395).

Persons acquiring undivided half interests in lot, for which each paid half of purchase price, and agreeing to improve it, each bearing half of cost, and to endeavor to sell it at profit, dividing all profits or losses equally, *held* partners with regard thereto, under Civ. Code, § 2395.

2. Partnership 🔑140—Partner signing card listing partnership lot with broker for sale obligated partnership to pay commission (Civ. Code, § 2429).

One of two partners, acquiring half interest in lot for purpose of improving and selling it, obligated partnership to pay commission on sale thereof, under Civ. Code, § 2429, by signing card listing it with broker for sale.

3. Brokers 🔑40—Partnership 🔑157(1)—Partner signing escrow instructions to pay commission to broker, with whom copartner listed partnership lot for sale, ratified latter's act, and also entered into new, independent obligation to pay commission.

Partner signing escrow instructions, authorizing payment of commission to broker, referred to therein as "my agent," for selling partnership lot listed by copartner, not only ratified latter's act, but entered into new and independent obligation to pay commission.

4. Principal and agent 🔑23(1)—Evidence held to show agency between broker and salesman procuring purchaser.

Testimony of one, to whom partner delivered card listing partnership property for sale, that he was real estate salesman with company under name of which broker conducted business, and escrow instructions, signed by such partner providing for payment of commission to such company, "my agent," *held* to establish agency between broker and such salesman who procured purchaser.

5. Principal and agent 🔑171(6)—Agent's services held ratified by action against third person for such services.

Defendant, in action to recover for services rendered by plaintiff through his employee or agent, cannot be heard to question agent's authority to represent principal; latter having ratified and adopted agent's acts by instituting action.

6. Brokers 🔑43(2)—Salesman need not have written authority to act for broker to enable latter to take advantage of fruits of his labor.

A real estate salesman need not have written authority to act for and on behalf of broker who employs him in order for such broker to take advantage of fruits of salesman's labor.

7. Costs 🔑260(4)—Appeal from judgment for broker's commission by defendant contending solely that no agency was shown between plaintiff and salesman procuring purchaser held frivolous, warranting addition of $100 to costs as damages.

Appeal from judgment for plaintiff in broker's action for commission by defendant, whose sole contention was that no agency was shown between plaintiff and salesman who procured purchaser, *held* frivolous, so as to warrant addition of $100 to costs of appeal as damages.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by J. A. Cornelius, doing business under the name and style of J. A. Cornelius Realty Company, against Granville Holland and Norton H. Edwards. Judgment for plaintiff, and defendant Edwards appeals. Affirmed.

Philip Cohen, of Los Angeles, for appellant.

Howard F. Shepherd and B. L. Hoyt, both of Los Angeles, for respondent.

BURNELL, Justice pro tem. Prior to the transaction which gave rise to this litigation the defendants, Granville Holland and Norton H. Edwards, together with their respective wives, acquired title to a lot in the city of Beverly Hills, an undivided one-half interest therein being conveyed to each couple as joint tenants. Each of the defendants paid one-half of the purchase price of the lot, their agreement being that they would improve the same, each bearing one-half of the cost of such improvement, and would endeavor to sell the property so improved at a profit, and that all profits or losses arising from the improvement and sale should be equally divided between them. Prior to April 24, 1925, Holland, with the knowledge and consent of Edwards verbally expressed, employed the plaintiff as a broker to sell the property. Evidencing such employment Holland signed a listing card describing the property, specifying the price asked as $35,000, stating the terms of sale and agreeing to pay a commission of 5 per cent. of the sales price to the broker. The broker's name was not filled in, but the listing card was delivered so signed to one Eger, who was an employee of and a licensed salesman under the plaintiff, to whom he in turn delivered it. Thereafter the plaintiff, acting through his employee Eger, procured one Illitch—whom the court found was "ready, willing and able to buy said property"—to pay a deposit of $2,000 on account of the purchase price thereof and to sign an agreement to complete the purchase on the terms and for the price demanded by the sellers. To the deposit receipt containing this agreement was appended the following: "I agree to sell the above described property on the terms and conditions herein stated and agree to pay the above signed agent as commission the sum of Seventeen Hundred and Fifty and no/100 Dollars $1750.00 Dollars, or one-half the deposit in case same is forfeited by purchaser, provided the same shall not exceed the full amount of the commission. Granville Holland, Seller. Paul L. Eger, Witness." Thereupon Illitch and the two defendants went into escrow, the sellers' instructions being signed by both Holland and Edwards and containing a direction to the escrow holder to pay a commission of $1,750 "to Cornelius Realty Co. (Paul L. Eger) my agent in this sale. * * *" About five months later the sale fell through by reason of a failure on the part of Holland and Edwards to complete the house under construction on the lot in question. The notice to the bank to cancel the escrow instruction was signed by Edwards and wife. Cornelius then brought this action against Holland and Edwards to recover his commission, and judgment was rendered in his favor as against both defendants, from which judgment Edwards alone appeals.

[1-5] From the foregoing recital of the facts as found by the court, and as sufficiently established by the evidence, it is clear that a partnership existed between appellant Edwards and his codefendant Holland with regard to the lot (Civ. Code, § 2395), and that by signing the listing card Holland obligated the partnership to pay a commission on the sale of the partnership property (Civ. Code, § 2429). Furthermore, by signing the sellers' escrow instructions, which authorized the payment of the commission to plaintiff, referred to therein as "my agent," appellant not only ratified the previous act of Holland but entered into a new and independent obligation to pay the commission. That everything was done by the broker to entitle him to the commission (Gunn v. Bank of California, 99 Cal. 349, 33 P. 1105; Oullahan v. Baldwin, 100 Cal. 648, 35 P. 310; Tuso v. Green, 194 Cal. 574, 229 P. 327; Smith v. Schiele, 93 Cal. 144, 28 P. 857) is not disputed by appellant, whose sole contention—the basis of every point he seeks to make for a reversal of the judgment —is that no agency was shown to have existed between the plaintiff and Eger, through whom the transaction was handled. This point is so utterly without plausibility that we find it difficult to believe that it is advanced for any purpose other than delay. Eger himself testified that he was a real estate salesman with the Cornelius Realty Company, which was the name under which the plaintiff conducted his business; the escrow instructions signed by appellant provided for payment of the commission "to Cornelius Realty Co. (Paul L. Eger) my agent in this sale." Plaintiff himself, were he sought to be bound by Eger's act, might defend upon the ground that Eger was not his agent, but we can conceive of no theory upon which the defendant in an action in which the plaintiff seeks recovery for services rendered by himself through his employee or agent, thereby in the strongest manner possible ratifying and adopting such acts (Delano v. Jacoby, 96 Cal. 275, 31 P. 290, 31 Am. St. Rep. 201), can be heard to question the authority of the agent to represent the principal. A somewhat similar point was presented in Nelson v. Colton, 36 Cal. App. 69, 171 P. 701, 704, where the purchaser of certain land claimed that the sale was void for the reason that the broker's authority to sell was not in writing as required by section 1624, subd. 5, of the Civil Code, and the court there said: "In its application to this case, there is clearly no force in the point. Whether Crawford was legally authorized to make a binding contract for the sale of the land, was a matter entirely between him and Colton, the owner of the land. The latter has not questioned Crawford's authority or act in that regard. On the contrary, he ratified all that Crawford did under his verbal authority by conveying the land to Nelson."

[6] Appellant cites a number of cases as supporting his strange theory. All of them have to do with the relationship between the seller and the party claiming to have been the broker—none of them with the relationship existing between the broker and his salesman or agent. There is no provision of law that requires a real estate salesman to have written authority to act for and on behalf of the broker who employs him in order that such broker may take advantage of the fruits of the labor for which he recompenses his employee. Even if Eger, instead of being a salesman in plaintiff's service, had been an independent broker co-operating with him in the endeavor to procure a purchaser for defendants' property, with an agreement for a division of the commission between them, no writing would have been necessary as between Cornelius and Eger. Thus, in Gray v. Janss Investment Co., 186 Cal. 634, 200 P. 401, 404, which was an action by one broker against another to recover a portion of the commission paid to the latter, it was held: "There is no merit in the contention that the agreement between the plaintiffs and defendants is void because not in writing. The agreement is not one to pay a commission for the sale or exchange of real property. None of the parties to the agreement undertook to pay the other a commission. They obligated themselves in the first instance to do no more than co-operate in the exchange and divide the commissions earned therefor, and the subsequent modification of the original agreement, whether as pleaded in the plaintiffs' complaint or as found by the trial court upon the issue raised by the evidence, left it still a co-operation agreement between broker and broker to divide commissions, and consequently does not fall within the inhibition of subdivision 6 of section 1624 of the Civil Code [citing cases]."

[7] Judgment affirmed, and let there be added to the costs of appeal assessed against the appellant the sum of $100 as damages because of the frivolous nature of the appeal.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

208 Cal. 508

ATKINS et al. v. HUGHES et al. (L. A. 9964.)

Supreme Court of California. Nov. 26, 1929.

1. **Appeal and error 🔑843(2)—Question as to power of court of equity to remove corporate directors was moot, where terms of office had expired.**

Question as to power of court of equity, in the absence of statute, to remove directors of private corporation and declare office vacant was moot as respected hearing on appeal after terms of office of directors involved had long since expired.

2. **Corporations 🔑310(1)—Right of directors to exercise power given corporation by articles must be exercised for benefit of stockholders generally.**

Right of directors of corporation to exercise power given to corporation by its articles of incorporation must be exercised for the benefit of stockholders generally, and not for the benefit of some favored few.

3. **Waters and water courses 🔑231—Construction of reservoirs by irrigation district for certain stockholders at cost of corporation was illegal, and assessment for cost thereof invalid.**

Construction by board of directors of irrigation district of reservoirs at the expense of corporation for exclusive and individual use of certain stockholders without benefit to other stockholders who were required to construct and pay for their own reservoirs constituted an illegal and unlawful use of corporate funds, and assessment levied for purpose of meeting cost thereof was invalid.

4. **Waters and water courses 🔑227—Evidence sustained finding that directors of irrigation district constructing reservoirs for individual use of certain stockholders were guilty of fraud.**

Evidence *held* to sustain finding that directors of irrigation district were guilty of fraud in constructing reservoirs at expense of corporation for the exclusive and individual use of certain stockholders without any benefit to other stockholders by expenditure of funds.

5. **Waters and water courses 🔑227—Directors of irrigation district were liable for expenditure in acquiring reservoir site for individual use of certain stockholders.**

Directors of irrigation district were properly held liable for expenditure in acquiring reservoir site, in view of evidence as to its intended use for construction of reservoir for individual and exclusive use of certain stockholders in fraud of rights of other stockholders.

6. **Judgment 🔑253(2)—Judgment against directors of irrigation district for moneys wrongfully paid out improperly included attorney's fees not mentioned in complaint.**

Judgment against directors of irrigation district for moneys wrongfully and illegally paid out improperly included item for attorney's fees incurred after institution of action, and not mentioned or referred to in complaint.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

On rehearing. Former opinion modified. For former opinion, see 277 P. 862.

Haas & Dunnigan, of Los Angeles, for appellants.

Halverson & Halverson and W. T. Kendrick, all of Los Angeles, for respondents.

PRESTON, J. In this cause it is ordered that paragraph V of the judgment, which purports to remove L. F. Hughes and G. C. Chase as directors of the Rock Creek Water Corporation, a corporation, be and the same is hereby stricken out. It is further ordered that the judgment in this action also be modified by deducting, from the amount $9,767.10, the sum of $450, and that, as so modified, said judgment be and it is hereby affirmed, respondents to recover their costs on appeal.

[1] This cause was reheard to give further consideration to the question of the power of a court of equity, in the absence of a statute, to remove a director of a private corporation and to declare his office vacant. But on the hearing counsel for each side conceded that the term of office as director of said two men had long since expired; that three annual meetings had been held since the date of said judgment; and that the two defendants referred to had been reelected to office in both the years 1928 and 1929 at the annual stockholders' meeting. The question, therefore, so far as this action is concerned, has become moot. Childress v. Dinkelspiel Co., 203 Cal. 262, 263 P. 801. But for the presence of other questions in the cause it would be our duty to dismiss the appeal. Weiss v. City of Los Angeles, 190 Cal. 576, 213 P. 979.

There are, however, other questions involved, as to which we are satisfied with our conclusion heretofore announced and accordingly, we hereby adopt, as the opinion of this court, the former opinion written in this case by Mr. Justice Curtis, eliminating therefrom only the discussion of the question above declared to be moot, which former opinion, as here readopted, is as follows:

"Action by certain of the stockholders of the Rock Creek Water Corporation against said corporation and five individual defendants. Four of said individual defendants—L. F. Hughes, H. J. Hammond, Stewart Gibson and G. C. Chase—were directors of said corporation and, with the plaintiff W. A. Phillips, formed the board of directors of said company. The fifth individual defendant was George W. Hughes, who died subsequent to the commencement of this action, and the same has been dismissed as to his personal representative.

"The facts admitted by the pleadings or proven at the trial show that the Rock Creek Water Company is a corporation organized under the laws of the state of California; that said corporation is a mutual water company, and was organized by the owners of certain water rights for the purpose of facilitating the control of said water and the distribution of the same for domestic and irrigation purposes among its owners in proportion to the amount owned by them respectively. Some time prior to the annual meeting of said corporation in the year 1924 George W. Hughes, through the purchase of the Hammond and Boyce properties and the stock in said corporation representing water used on said properties, became the owner of a large amount of the capital stock in said corporation, and after said purchase the said George W. Hughes and his son, the said L. F. Hughes, owned a majority of the capital stock of said corporation. At the annual meeting of said corporation held in said year the following-named persons were elected directors of said company for the ensuing year: the said L. F. Hughes, the son of said George W. Hughes; Stewart Gibson, the private secretary of George W. Hughes; H. J. Hammond, from whom he purchased the Hammond and Boyce ranches, and who acted as foreman or ranch superintendent of said George W. Hughes up to May 15, 1925; G. C. Chase, who became such foreman after May 15, 1925, and W. A. Phillips, one of the plaintiffs in this action, who represented the minority stockholders of said company upon said board of directors. The directors organized by electing L. F. Hughes president, W. A. Phillips vice-president and G. C. Chase secretary and treasurer of said company. The by-laws of said corporation provide that 'Delivery (of water) to each (stockholder) shall be made at some point on the main ditch.' The delivery of said water to the stockholders was made by a zanjero, and it was usually run into small equalizing or distributing reservoirs, from which the water was drawn in a more or less constant flow, these reservoirs not being intended for storage purposes, but rather for distributing purposes. These reservoirs were not owned by the corporation, but by the stockholders, or groups of stockholders, individually, nor were the pipe lines or ditches connecting the main ditch with said reservoirs owned by the company, but by the individual stockholders. There were at least four of these reservoirs, referred to in the evidence as Kendrick reservoirs Nos. 1 and 2, the Hammond reservoir and the Boyce reservoir. The latter two reservoirs had been used by the owners of the Hammond ranch and the Boyce ranch, individually, for some years prior to the time these properties were acquired by George W. Hughes. They were situated below the lowest terminus of the company's ditch and from ten to fifteen feet lower than the lands of any of the stockholders except said lands of George W. Hughes purchased from Hammond and Boyce. About March 25, 1925, and after George W. Hughes had acquired the Hammond and Boyce ranches, and while he was the owner thereof, the company began enlarging and recementing said reservoirs at the expense of the corporation. On the 7th of April following, at a meeting of the board of directors of said company on that day, deeds to sites of each of said reservoirs, executed by said George W. Hughes in favor of said corporation, were presented to said board of directors. By resolution these were accepted by said board of directors and it was ordered that two reservoirs be constructed upon the land thereby conveyed to be used for the storage of water for irrigation purposes, the cost of such construction to be paid by checks drawn on the funds of said corporation. A further resolution was passed by said board of directors at said meeting levying an assessment of ten cents a share on each share of the capital stock of said corporation, 'for the purpose of paying expenses, conducting business and paying debts of this corporation.' These resolutions were adopted by the affirmative vote of directors Hammond, Gibson and Chase, director Phillips voting in the negative. At the time of the adoption of the said resolutions there was in the treasury the sum of $1,915.62, which was ample for conducting the ordinary business and paying the debts of said corporation. The purpose of levying said assessment was to furnish money 'to construct, improve, enlarge and cement reservoirs upon the property known as the "Hammond Ranch" and the "Boyce Ranch." * * *' Thereupon, plaintiffs commenced this action to restrain the collection of said assessment; to declare void the proceedings of the board of directors accepting the deed to said reservoir sites and ordering the construction of the reservoirs thereon; for an accounting of the money expended by the directors for the construction, enlargement and cementing of said reservoirs, and for the removal of the defendant directors. An answer to said complaint was filed on May 29, 1925. On June 12th following the board of directors of said company met and rescinded the resolutions adopted by them on April 7, 1925, accepting said deeds, ordering the construction of said reservoirs, and levying the assessment of ten cents per share to pay the cost thereof. Immediately thereafter and at the same meeting the said board of directors adopted similar resolutions to those previously adopted by them on April 7, 1925, whereby they sought to accept said deeds from George W. Hughes, authorize the construction of said reservoirs upon the property therein described at the cost and expense of the corporation, and levy an assessment of ten cents per share, and for the same purpose as that designated in the former resolution levying the assessment of April 7, 1925. The action taken by said board of directors at the meeting of said board on June 12, 1925, rescinding the prior resolutions adopted by them on April 7, 1925, and adopting new resolutions in their stead, so the court subsequently found, was to 'avoid and defeat the restraining order heretofore issued' in this action whereby said defendants were enjoined and restrained from carrying into effect the resolutions of April 7, 1925. After the adoption of said resolutions by the board of directors at their meeting of June 12, 1925, and on July 13, 1925, the plaintiffs filed an amended and supplemental complaint, in which they set forth in full the proceedings taken at the meeting of said board of directors on June 12, 1925, including the action of said board in rescinding its former resolutions and in adopting the subsequent resolutions already referred to. The relief prayed for in said amended and supplemental complaint was that the new assessment be declared void and the defendants restrained from collecting the same, for an accounting of the money expended by them upon the Hammond and Boyce reservoirs, the repayment thereof to the corporation, for the removal from office of said directors, and for general relief. To this pleading the defendants filed their answer. To a large extent the allegations of the complaint and those of the amended and supplemental complaint were admitted by the defendants' answers. Those that were not so admitted were, in the main, found to be true by the court. Upon these findings the court rendered judgment in plaintiffs' favor in accordance with the prayer of their amended and supplemental complaint. From this judgment the defendants L. F. Hughes, H. J. Hammond and G. C. Chase have appealed.

"The first point raised by appellants in their attack upon the judgment is that there is no evidence to support the finding of the trial court that George W. Hughes and L. F. Hughes conspired to elect directors of said corporation who were under their domination with the intent and purpose that said directors would adopt and pass said resolutions, the effect of which was to bring about the construction of said reservoirs for the use and benefit of the Hughes, but at the cost and expense of the corporation. It appears to us that whether or not such a conspiracy was formed is not a matter of material importance in this action. If the acts of the directors in passing said resolutions were legal, then it is a matter of no consequence that the Hughes conspired to cause the same to be adopted by the board of directors of said company. On the other hand, if said directors acted illegally in the enactment of said resolutions, then they are invalid for any purpose and this would be their effect whether the Hughes conspired to secure their adoption or not. In our opinion, therefore, the question of first importance in considering the validity of said judgment is to determine whether the board of directors of said company in the adoption of said resolutions acted within the scope of their lawful authority.

[2, 3] "Appellants contend that there was nothing illegal in the acts of the directors in accepting deeds to the reservoir sites from George W. Hughes and in ordering the construction of reservoirs thereon at the expense of the corporation, and that if such acts were legal the assessment levied for the purpose of paying the cost of constructing said reservoirs was free from any taint of fraud or illegality. In support of this last-mentioned contention the appellants assert in their brief that 'The board of directors, in taking such action, were exercising the authority with which they were clothed to conduct the business of the company to the best of their judgment in conformity with the charter and bylaws of the company, as well as its needs. If it accepted deeds to real property from G. W. Hughes, the corporation was not injured. On the other hand, having accepted deeds to land from said G. W. Hughes, and it being within the discretion of the board of directors under its charter, to conduct and develop the affairs of the corporation, and it being their best judgment that the reservoirs in question be constructed upon the lands so conveyed to the corporation, these acts could not be complained of nor would they be considered by the ordinarily prudent business man as being unlawful.' There can be no question that under the purposes for which said corporation was formed, as set forth in its articles of incorporation, it has the right to acquire water, water rights, dams, ditches and canals for the development, storage and carriage of water 'in connection with the principal object and purpose of this corporation, which is generally specified to be the conduct of a mutual water company.'

"While the construction of reservoirs is not expressly mentioned in the purposes for which said corporation was formed, yet from the broad general terms used in defining said purposes, we have no doubt if the construction of a reservoir, or a number of reservoirs for that matter, would result in increasing the water supply of the company, or be of any substantial advantage to the company in its business of furnishing water to its stockholders, that the right to exercise such power was given to said corporation by its articles of incorporation. But this right must be exercised for the benefit of the stockholders generally and not for the benefit of some favored few of said number. As we have stated above, the by-laws of the corporation provide that water shall be delivered to each stockholder at some point on the main ditch. The evidence shows that this has been the universal practice of the company since its organization. The water was then conducted in most instances through pipe lines or ditches to private reservoirs, built and paid for by individual stockholders who were served by the water stored therein. Upon each of the Hammond and Boyce ranches at the time the same were purchased by G. W. Hughes there was located a reservoir used by the owner thereof for the purpose of facilitating the distribution of water upon his land. The board of directors by the proceedings complained of attempted at the expense of the company to either rebuild these two reservoirs or to construct new ones upon the sites occupied by the original ones. These reservoirs were for the exclusive and individual use of G. W. and L. F. Hughes. The other stockholders of the company were not benefited in any manner by this expenditure of the company's funds. Their lands were located above these reservoir sites, and could not be irrigated with water drawn therefrom even had said stockholders desired so to do, or had the Hughes permitted such use. Then, also, the other stockholders had been compelled to build and pay for their own reservoirs, and there is no evidence that said board of directors intended to reimburse them for money so expended, or to maintain or keep in repair the reservoirs of the minority stockholders already constructed. The construction by said board of directors of the reservoirs on Hughes' property at the expense of the corporation was the use of the funds of said corporation to improve and benefit the private property of Hughes. It was an illegal and an unlawful use of the corporate funds and it resulted in a detriment to every other stockholder of the corporation. While the board of directors are clothed with broad powers and are given wide discretion in the management of the affairs of the corporation, and the expenditures of its funds, it was an abuse of that discretion for said board to use the corporate funds to improve the property or to advance the individual interests of any one or group of stockholders to the detriment of the balance of the stockholders. This proposition of law seems so simple and just that no citation of authority is necessary to support it. As we view the facts of this case there is no question but that the board of directors acted illegally in constructing said reservoirs with the funds of said company. It follows, therefore, also that the assessment levied by the directors for the purpose of meeting the cost of constructing said reservoirs was invalid, and the action of the board of directors in levying the same was illegal and cannot be upheld.

[4] "The further point is made by appellants that the judgment is erroneous in holding that the directors of the corporation were guilty of fraud in building the reservoirs, and that there was no testimony to support the findings of the court that the corporation exceeded its power in building said reservoirs. We think that there is ample evidence to support the conclusion and finding of the trial court that the directors, other than director Phillips, were guilty of fraud in constructing said reservoirs for the exclusive use of the Hughes and paying for such construction out of the funds of said corporation. The fraud is so apparent and manifest that it is unnecessary to go into any lengthy details or give any extended reasons for so holding. We might state at this time that the capital stock of said corporation was divided into 48,000 shares of the par value of one dollar per share, of which the members of the Hughes family were the owners of slightly over one-half. Being the owners of a majority of the capital stock, they were able to control the election of the board of directors. The board of directors after their election attempted to foist upon the stockholders the entire cost of improvements constructed for the exclusive use of George W. Hughes and family. The court found that the directors had paid in the construction of said reservoirs almost $6,000 from the treasury of said corporation and had otherwise misappropriated the funds of said company in an amount, including that paid in the construction of said reservoir, aggregating the sum of $9,767.10. To hold that this could be innocently done, under the claim that the directors were honestly endeavoring to carry on the business and affairs of the company, would be to challenge the credulity of human nature. A mere recital of the bare facts will, we believe, convince any person of ordinary intelligence of the bad faith of the majority of the directors, and that they designedly attempted to despoil the minority stockholders for the benefit of George W. Hughes and L. F. Hughes.

[5, 6] "The final objection made by appellants to the judgment herein is that the trial court in rendering judgment in favor of the corporation and against said defendants for moneys wrongfully and illegally paid out by the defendants, included in said amount the following items: $750 for the Boyd reservoir site and $450 to the attorneys representing the defendants in this action for services rendered in defending this action. We are of the opinion that the first of these items was properly included in the judgment. The testimony regarding the Boyd reservoir site is not as full as we might wish. The price paid therefor was $750, and there was evidence that it was worth not to exceed $100. It is not clear as to just what use was to be made of the land purchased. The company had no use for it as a reservoir site. It was above the ditch of the company, was arid in character and was underlaid with bedrock three or four feet from the surface. It evidently could not be put to agricultural purposes. In

this connection we might refer to a statement which the respondent Phillips testified to as having been made by the defendant L. F. Hughes, in which the latter was reported to have said, 'I am going to build about ten reservoirs before I get through. Going to put on an assessment every month. I hope the other stockholders won't suffer too much. I am going to break Kendrick.' The trial court may well have concluded that the Boyd reservoir site was purchased with the view of constructing thereon a reservoir for the same purpose as the reservoirs constructed on the Hammond and Boyce sites were intended to be used. If so, this expenditure would be in the same class as those incurred in the construction of the Hammond and Boyce reservoirs, and the judgment that the money expended therefor be repaid to the corporation was a proper one. The item of $450 was not mentioned or referred to in the complaint. It could not have been for the reason that it was not paid out until after the commencement of this action. Neither was it mentioned or referred to in the amended and supplemental complaint. It could not, therefore, be recovered in this action. The judgment, therefore, should be modified by deducting this sum from the amount of the judgment."

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

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208 Cal. 546

ELCONIN v. YALEN et al. (L. A. 11918.)

Supreme Court of California. Dec. 5, 1929.

1. **Attorney and client ⇨134(1)—Attorney's recovery on wrongful discharge may be measured by amount of compensation provided by contract.**

Provisions of attorney's employment contract as to compensation would have measured amount of recovery, in case of wrongful discharge.

2. **Attorney and client ⇨140—Attorney is entitled to recover reasonable value of services rendered client, if contract makes no provision for compensation.**

Where contract for employment of attorney makes no provision for compensation, attorney is entitled to reasonable value of services rendered before being discharged.

3. **Attorney and client ⇨140—In determining reasonable value of services rendered by attorney for client, court may use its own experience and judgment.**

Where, in attorney's action for services rendered client, court has evidence as to nature and extent of services rendered, it may use its own experience and judgment in determining reasonable value thereof.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action by Benjamin Elconin against William Yalen and another. From a judgment for an amount less than amount sued for, plaintiff appeals. Affirmed.

Superseding opinion in 280 P. 559.

Benjamin Elconin, of Los Angeles, Fred H. Moore, of Stockton, and Geo. D. Higgins, of Los Angeles, for appellant.

Koenig & Ransom, J. S. Garnett, and V. H. Koenig, all of Los Angeles, for respondents.

Ralph H. Lewis and George L. Popert, both of Sacramento, amici curiæ Local Committee of the Sacramento County Bar Association.

V. L. Hatfield, Martin I. Welsh, and W. H. Hatfield, all of Sacramento, amici curiæ Sacramento Committee of the State Bar.

PRESTON, J. In this action, brought by plaintiff to recover fees alleged to be due for services rendered by him as an attorney at law on behalf of defendants in the matter of negotiating for settlement or instituting and prosecuting a suit on account of certain personal injuries and damages sustained by defendant William Yalen, the judgment is hereby affirmed. In the following statement of the case may be found the ground upon which we base our conclusion:

Plaintiff, by the first count of his amended complaint, alleged an oral contract with defendants whereby he was to render all necessary services for them in the matter of said claim, receiving as consideration therefor one-third of any sum accepted by them in settlement thereof or one-third of any judgment obtained and collected in the event of institution of suit, exclusive of court costs. He further alleged the following fact, established by the evidence: That, after an unsuccessful attempt to effect a settlement, he filed suit on behalf of defendants, and caused the case to be set for trial, after which he was discharged by them; that a judgment in their favor was subsequently obtained in the sum of $5,000, which they compromised for $4,500. He therefore prayed that one-third of the sum so received by defendants, or $1,500, plus costs in amount of $15.90, be awarded him. His second cause of action was on a common count alleging an indebtedness of $1,546.90 for services rendered and costs, which sum was a reasonable charge therefor. Said amount, $1,546.90, included, in addition to said $1,500 and $15.90, an item of $31 which plaintiff also sought to recover, and which he alleged by the third count of said amended complaint, covered the amount due him for legal services rendered defendants and costs advanced in their behalf in a justices' court action. Said items of $31 and $15.90, totaling $46.90, are not disputed, and no dissatisfaction is expressed with that portion of the judgment awarding plaintiff said sum.

The answer of defendants was a general denial, denying the existence of any contract with plaintiff, any agreement for payment of a one-third contingent fee, or any indebtedness whatsoever to him. Upon the trial, however, defendants testified to the existence of an oral contract whereby they had employed plaintiff, but they denied that the terms thereof were as alleged by him, or that they had ever entertained his proposal that they pay him one-third of any sum recovered; that is, they claimed that said contract, with respect to plaintiff's fee, provided for payment to him of 10 per cent. of the sum recovered in the event of settlement without suit, or 20 per cent. of any judgment obtained and collected in event of settlement after trial.

From the judgment entered in his favor for the sum of $346.90, plaintiff appealed. As above stated, the item of $46.90 is conceded, but appellant attacks strenuously that portion of said judgment awarding him only $300 for his said services rendered in said matter. In this behalf he contends that the judgment is contrary to the evidence, and that the findings upon which it is based are likewise inconsistent and not supported by the evidence.

We cannot accede to this claim. The court found that "plaintiff and defendants entered into an oral contract," whereby it was understood that "plaintiff would render his legal and professional services in the matter of negotiating for settlement or the institution and prosecution of a suit" in said matter. This finding has full support in the evidence. Both parties virtually admitted, and the correspondence between them which was introduced in evidence showed, that they in fact made an oral contract whereby plaintiff was to represent them in matters pertaining to said damage claim.

But the court further found, and this finding likewise has full support in the evidence, that defendants did not agree to pay plaintiff one-third of any sum accepted by them as settlement of said cause or one-third of any judgment obtained and collected; that, by reason of plaintiff's failure to accept the offer made by defendants to pay him 10 per cent. on settlement before trial, or 20 per cent. of recovery on or after trial for his services, "there was no agreement by or between said parties for any specific sum or compensation to plaintiff therefor, whereby he became and is entitled only to reasonable compensation for such services as he rendered"; that $1,500 was not a reasonable sum therefor, but that $300 was and is the reasonable value of the services so rendered by plaintiff to defendants.

[1] In other words, the evidence proves clearly a valid oral contract of employment between the parties; in this respect the minds of the parties met, and they were in complete accord, but it also shows plainly that no agreement was ever reached between them as to the compensation to be paid plaintiff for his services thereunder.

Had there been included in said contract a provision as to plaintiff's compensation, such provision upon his wrongful discharge would have measured the amount of his recovery. Kirk v. Culley, 202 Cal. 501, 261 P. 994; Webb v. Trescony, 76 Cal. 621, 18 P. 796.

[2, 3] Said contract, however, lacking any provision whatsoever by which to measure plaintiff's compensation, he was entitled to recover the reasonable value of said services admittedly rendered by him, before his discharge by defendants. Gage v. Atwater, 136 Cal. 170, 173, 68 P. 581; Buck v. City of Eureka, 124 Cal. 61, 56 P. 612; Young v. Bruere, 78 Cal. App. 127, 248 P. 301. This issue as to quantum meruit was squarely presented by the second count of said amended complaint, alleging $1,500 as a reasonable charge for said services, and was determined by the trial court in accordance with the averments thereof, except as to the reasonable value, which was found to be $300 instead of $1,500. This was a finding well supported by the evidence and within the power of the trial court to make. The court had before it detailed evidence as to the nature and extent of the services rendered, and was empowered to use his own experience and judgment as to the reasonable value thereof, with or without the aid of testimony of witnesses as to value. Kirk v. Culley, supra; Estate of Duffill, 188 Cal. 536, 206 P. 42; Estate of Straus, 144 Cal. 553, 77 P. 1122; Spencer v. Collins, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 49.

It is our conclusion that both findings and judgment are consistent and amply supported by the evidence, and that a review of the record compels affirmance of the action of the trial court, as first herein announced.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

208 Cal. 528

MARELLI v. KEATING et al. (S. F. 13586.)

Supreme Court of California. Dec. 2, 1929.

1. Homestead 🔑186—Levy of execution is necessary to subject excess value of homestead over exemption to judgment, and creates valid lien against third person, to whom judgment debtor conveys (Civ. Code, §§ 1240, 1245–1259; Code Civ. Proc. § 541).

Levy of writ of execution is necessary step in proceedings under Civ. Code, §§ 1245–1259, to subject excess of value of homestead above exemption to satisfaction of judgment, and is effectual to create lien on property which is valid against third person to whom judgment debtor may convey property, in view of Code Civ. Proc. § 541, that all property of defendant not exempt from execution may be attached.

2. Homestead 🔑107—Where execution is necessary to preserve judgment creditor's rights, homestead property is subject to execution and attachment (Code Civ. Proc. § 541).

Property such as homestead is not exempt from and is liable to execution, where execution levy is necessary step to secure or preserve to judgment creditor valuable rights, and hence, where not exempt from execution, property is by terms of Code Civ. Proc. § 541, subject to attachment.

3. Homestead 🔑5—Courts liberally construe homestead law to extent of exemption only.

Liberal construction of homestead law, object of which is to protect homesteader and those dependent on him or her in enjoyment of domicile not exceeding $5,000 in value, will be indulged in by courts to extent only of exemption.

4. Homestead 🔑128—Husband, to whom wife conveyed homestead pending litigation against her, took title subject to judgment creditor's right to attach value above exemption, and was charged with notice of rights of attaching creditor as to excess (Civ. Code, §§ 1245–1259; Code Civ. Proc. § 541).

Husband, to whom wife conveyed homestead pending litigation against her and after writ of attachment had been levied on the property, but prior to rendition of judgment, took title subject to right of judgment creditor, under Code Civ. Proc. § 541, to reach excess over $5,000 as exempted value of homestead through proceedings provided for in Civ. Code, §§ 1245–1259, and was charged with notice of rights of attaching creditor as to excess.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Charles Marelli against John J. Keating, as Sheriff of the county of Marin, and another. Judgment adverse to plaintiff, and he appeals. Affirmed.

Thomas P. Boyd, of San Rafael, for appellant.

Marcus D. Wolff, of Oakland, for respondents.

SEAWELL, J. Plaintiff, Charles Marelli, appeals from a decree of the superior court of the county of Marin, dissolving an injunction restraining the sheriff of said county until the further order of the court from selling certain real property claimed by plaintiff upon which said sheriff had levied execution. The execution was levied and the said property advertised for sale to satisfy a judgment in favor of Henry Heide, defendant in this injunction suit, and against plaintiff's grantor. Plaintiff's grantor at the time of the conveyance was his wife, the parties having intermarried after the institution of the action, in which the wife, then Jennie Marquard, was a defendant. The conveyance to plaintiff, which is not attacked on the ground of fraud, was made after a writ of attachment had been levied on said property, but prior to the rendition of the judgment. Several years previous to the institution of the action said Jennie Marquard, a widow and the head of a family, had filed a declaration of homestead covering the real property in suit. It is by virtue of this declaration that plaintiff claims the property conveyed to him was exempt from forced sale, and that the court below was in error in not perpetually restraining a sale by the sheriff.

The defendants filed an answer after the court had granted the injunction restraining the sale until its further order. They alleged therein that the value of the property was approximately $24,000, and therefore greatly exceeded the maximum homestead exemption of $5,000, and further set forth that they had taken the required statutory steps to subject the excess to forced sale under the provisions of sections 1245–1259, Civil Code. After a hearing held, following the filing of said answer, at which it appeared that the appraisers appointed in the statutory proceeding had reported said property to be of a value of $24,000, the court made the order dissolving the injunction, from which this appeal is taken.

The judgment in the action was not rendered or the execution issued until after the property had been transferred by the homestead claimant to the plaintiff. This being so, the execution levy was unauthorized, and the owner entitled to enjoin the sale, unless the attachment, levied before the transfer, was effectual to secure to the judgment creditor the right to hold the excess after the ownership of the property had passed from the judgment debtor.

[1, 2] Plaintiff has contended that homesteaded property, whatever its value, is not subject to attachment. We cannot accede to this view. By the terms of section 541, Code of Civil Procedure, all property of the defend-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ant not exempt from execution may be attached. Section 1240, Civil Code, provides that homesteaded property is exempt from execution or forced sale, except as in the subsequent sections of that chapter provided. Sections 1245–1259, Civil Code, authorize a levy of execution upon homesteaded property exceeding $5,000 in value and a court order "directing its sale under execution" upon a compliance with the procedure prescribed by said sections. The excess value over the homestead exemption is subject to execution and forced sale, the difference being that in such cases certain additional requirements must be followed before the excess may be applied to the satisfaction of the judgment.

The levy of the writ of execution is a necessary step in the proceedings in order to subject the excess to the satisfaction of the judgment and is effectual to create a lien upon the property which is valid against third persons to whom the judgment debtor may convey the property. Lean v. Givens, 146 Cal. 739, 81 P. 128, 106 Am. St. Rep. 79; Martin v. Hildebrand, 190 Cal. 369, 212 P. 618. Property cannot be said to be exempt from, or not liable to, execution where the execution levy is a necessary step to secure or preserve to the judgment creditor valuable rights, and, not being exempt from execution, it is, by the terms of section 541, Code of Civil Procedure, subject to attachment.

[3] The object of the homestead law is to protect the homesteader and those dependent upon him or her in the enjoyment of a domicile not exceeding $5,000 in value, and to this end a liberal construction of the law and facts will be indulged by courts. When this object has been accomplished, courts will not suffer this salutary statute to be used as a shield behind which those who would deal unjustly with creditors may find refuge.

We are not compelled to reach a contrary conclusion by the decisions in such cases as Boggs v. Dunn, 160 Cal. 283, 116 P. 743, wherein it was held, in construing section 671, Code of Civil Procedure, which then provided that a judgment, from the time it is docketed, becomes a lien "upon all the real property of the judgment debtor not exempt from execution" owned by him or which he may afterwards acquire until the lien ceases, that a judgment does not become a lien upon homesteaded property, whatever its value.

[4] Marelli took title subject to the right of the judgment creditor to reach the excess through the proceedings provided for in sections 1245–1259, Civil Code, and was charged with notice of the rights of the attaching creditor as to the excess. Defendant Heide, as judgment creditor, has followed the procedure in said sections provided. The court, therefore, did not err in dissolving the injunction and authorizing the sale of the property.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

208 Cal. 559

GUNDER v. GUNDER. (L. A. 11033.)

Supreme Court of California. Dec. 5, 1929.

Appeal and error ⚷80(4)—Judgment setting aside certain conveyances and requiring defendant to account to trustee, who was to render his report and findings to court, held not an appealable "final judgment" (Code Civ. Proc. § 963, subd. 1).

In action to rescind a property settlement agreement made between parties, and for other relief, including an accounting, judgment of trial court, setting aside and canceling certain conveyances and requiring defendant to render an account to referee appointed to take such account and to render his report and findings to court, at which time court would give final judgment against defendant, *held* not a "final judgment," within Code Civ. Proc. § 963, subd. 1, from which an appeal will lie.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Final Decree or Judgment.]

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Samuel H. Gunder against Agnes Gunder. From the judgment, defendant appeals. On plaintiff's motion to dismiss appeal. Appeal dismissed.

McAdoo, Neblett, O'Connor & Clagett and E. H. Mitchell, all of Los Angeles, and A. E. Ganahl, of Corona, for appellant.

Sarau & Thompson, of Riverside, and Woodruff, Musick, Pinney & Hartke and H. L. Pratt, all of Los Angeles, for respondent.

SHENK, J. The plaintiff and respondent moves to dismiss the appeal herein, on the ground that it is taken from a judgment which is not a final judgment, within the meaning of section 963, subdivision 1, of the Code of Civil Procedure.

The action was instituted to rescind, on the grounds of fraud and undue influence, a property settlement agreement made between the parties, husband and wife, who were divorced prior to the commencement of this action. Other relief, including a decree declaring an involuntary trust, canceling prior transfers, and ordering reconveyances and retransfers, granting an injunction, and ordering an accounting, was sought. The trial court found that the plaintiff was entitled to the relief, and rendered a judgment which, after its formal recitals, provided that a certain quitclaim deed covering a half interest in the Elsinore Gas Works—the other half interest having previously, and during their married life, been conveyed by the plaintiff to the defendant—and a certain bill of sale of personal property be canceled, set aside, and declared to be null and void, and that the plaintiff was entitled to have and was given the right of possession of the personal property and the right of possession with the defendant of the real property; that the defendant render a full, complete, and true account to a referee appointed by the court of all moneys and bonds received by the defendant from the plaintiff during their married life, of all proceeds from the sale of bonds, of bonds or other property purchased with such funds, of all moneys, profits, or proceeds derived from the operation of the Elsinore Gas Works, etc.; that "said defendant render * * * a full, complete, and true account of the true condition of the accounts and business of the Elsinore Gas Works from the 30th day of April, 1926, until the date of said referee's report, and a full, complete, and true account of all receipts, expenditures, collections, and moneys had, received, or expended by or in the hands of the defendant, Agnes Gunder, on account of her dealings with or handling of any personal property during her married life with said plaintiff, and on account of the sale, purchase, or exchange of any bonds during said time, and on account of any dealings with or deposits in any bank, wheresoever located, and on account of any matter or thing pertaining to business transactions with any bank or business of said plaintiff, and that the referee hereinafter named and appointed herein take such account and such other accountings as may be necessary to clarify and show the exact situation in regard to the matters in issue in this case, and render his report and findings to the above court"; that "upon the rendition of said account of said referee to the court, and the court's approval thereof, said plaintiff is [entitled to] and shall be given a final judgment against said defendant for the immediate possession of any and all personal property, including bonds and money and proceeds thereof, in the hands of said defendant, or under her control, or any one on her behalf, belonging to said plaintiff, or the value thereof, as well as also for a final judgment in favor of said plaintiff and against said defendant in such amount as the court may find that the plaintiff is entitled to"; that "the defendant is hereby restrained and enjoined, pending the accounting and report of said referee and until the entry of final judgment, from incumbering, * * *" etc.

It is contended by the appellant that the judgment is a final judgment, in accordance with the rule stated in the case of Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. As stated by the court in that case, however, the decree there was similar to the decree from which an appeal was taken in the case of Clark v. Dunnam, 46 Cal. 204, and the decision of the latter case was followed by the court in the Zappettini Case. In neither of those cases did the decree involve a reference for an accounting, but in each case it ordered a sale of property and specified the distribution to be made of the proceeds. There was, therefore, in those cases no further judicial action required on the part of the court to adjudicate finally the rights of the parties.

While there is a conflict of authority on the question whether a decree which settles the basic issues between the parties, adjudges the complainant's right to an accounting and refers the items of the account to be found by a master, etc., is an appealable judgment (see Wells v. Shriver, 81 Okl. 108, 197 P. 460), we are persuaded from an examination of the authorities that the rule adopted by the courts of this state and applicable to the present case is based on the desirability of subjecting the parties to but one appeal at the determination of the entire controversy between them (see Doudell v. Shoo, 159 Cal. 448, 454, 114 P. 579; Gianelli v. Briscoe, 40 Cal. App. 532, 536, 181 P. 105; Bancroft's Code Practice and Remedies, p. 8329), and is stated in Pomper v. Superior Court, 191 Cal. 494, at page 496, 216 P. 577, as follows: "The general rule is that where a decree is made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final. 2 Cal. Jur. §§ 19, 20, p. 142; California Nat. Bank v. Stateler, 171 U. S. 447, 19 S. Ct. 6, 43 L. Ed. 233. See, also, Rose's U. S. Notes; Clement v. Duncan, ante, p. 209, 215 P. 1025; Doudell v. Shoo, 159 Cal. 448, 453, 114 P. 579."

It is apparent upon the showing made in this case that the judgment is not and was not intended by the court to be a final determination of the controversy in the trial court, but that final judgment as to the issues adjudicated was reserved by the court, to be entered upon the submission of the referee's report, which would then be subject to "the court's approval," and at which time the court would also render its "final judgment in favor of said plaintiff and against said defendant in such amount as the court may find that the plaintiff is entitled to," and that the appeal should therefore be dismissed.

It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

208 Cal. 562

JACOBUS et al. v. JACOBUS. (L. A. 10140.)

Supreme Court of California. Dec. 5, 1929.

1. Attorney and client 🔑75(1)—Supreme Court is only forum within which parties to perfected appeal may move for substitution of attorneys during appeal.

Supreme Court is the only forum within which parties to perfected appeal may move for a substitution of attorneys during pendency of appeal to such court.

2. Appeal and error 🔑456—Motion to set aside order trial court made substituting attorneys after appeal was perfected could not prevail; there being no record in appellate court on which to reverse order.

Motion of attorney of record to have Supreme Court set aside an order which trial court made long after appeal was perfected purporting to substitute another attorney for petitioner could not prevail, because there was no record in Supreme Court on which Supreme Court could consider or reverse order of trial court made after final judgment, however erroneous or lacking in jurisdiction such order might be.

3. Attorney and client 🔑75(1)—Attorney of record will be recognized on appeal, notwithstanding trial court's order substituting attorneys after appeal was perfected.

Attorney of record for plaintiff on appeal will be recognized as such, notwithstanding trial court's order made after appeal was perfected substituting attorneys, until proper order for substitution is made in Supreme Court.

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Divorce action by Antonia C. Jacobus against Elmer L. Jacobus, in which defendant filed cross-complaint against plaintiff and Julia C. White and William O. Sauer. From a decree for defendant, plaintiff and cross-defendants appeal. One Frank J. Rehorst was substituted as attorney for plaintiff in the place and stead of George W. Rochester, and the latter moves to set aside the order for substitution of attorney. Motion denied.

Oscar W. Houge and Peter J. Youngdahl, both of Los Angeles, for appellants.

Geo. W. Rochester and Frank P. Doherty, both of Los Angeles, and Frank J. Rehorst, of Pasadena, for respondent.

PRESTON, J. The record and briefs on the appeal in the above-entitled cause are on file. The notice of appeal to this court was filed on July 12, 1927. The action is for divorce and for an adjustment of property rights. The interlocutory decree of divorce was given for respondent, Elmer L. Jacobus, on his cross-complaint, and property rights were also settled thereby.

Petitioner George W. Rochester was the attorney for respondent throughout the litigation, and has a written contract with him for a 45 per cent. contingent fee to be calculated upon the amount of property recovered or secured by respondent in the action. On June 11, 1929, the court below directed that one Frank J. Rehorst be substituted as attorney for respondent in the place and stead of petitioner. On August 1, 1929, petitioner came to this court with a document styled "Motion of opposition to substitution of attorney for defendant and respondent by George W. Rochester, Petitioner," but in the body of it appearing to be a motion "for an order setting aside an order of the superior court of the state of California in and for the county of Los Angeles substituting Frank J. Rehorst as attorney for Elmer L. Jacobus in the above entitled cause in place of George W. Rochester."

[1-3] Manifestly this court is the only forum within which the parties to a perfected appeal may move for a substitution of attorneys during the pendency of such appeal. Manifestly, also, the motion of George W. Rochester, the attorney of record for the respondent upon this appeal, to have this court set aside an order which the trial court has made or attempted to make long after this appeal was perfected, purporting to substitute another attorney for said Rochester, cannot prevail, for the reason, if for none other, that there is no record herein upon which this court could consider or reverse an order of the trial court made after final judgment, however erroneous or lacking in jurisdiction such order might be. So far as the record upon appeal herein discloses, George W. Rochester is still the attorney of record for respondent upon this appeal, and will be recognized as such until such time as a proper order for the substitution of another as the attorney of record for the respondent herein shall have been made.

In denying this quite unnecessary motion we deem it proper to say that the question as to the right of the respondent to discharge his attorney of record and to substitute another in his stead is not a proper subject of consideration by this court upon the present motion; nor is the question as to what may be the right and remedy of an attorney of record who has been thus discharged presented for our determination upon the state of the record before us.

The motion is denied.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

208 Cal. 564

WOODILL v. CITY OF GLENDALE et al.
(L. A. 10085.)

Supreme Court of California. Dec. 5, 1929.

Municipal corporations ⟹293(1)—Jurisdiction of proceedings for street improvements attached, where resolution of intention was in proper form, published as required, and properly posted (St. 1911, p. 730, as amended).

Where resolution of intention to institute proceedings for street improvements under St. 1911, p. 730, as amended, was in proper form, published as required by law, and properly posted, jurisdiction to carry out proceedings attached.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by H. B. Woodill against the City of Glendale and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Chas. S. Conner, of Los Angeles, for appellant.

W. Turney Fox, City Atty., Bernard Brennan, Deputy City Atty., and Ray L. Morrow, all of Glendale, Leslie R. Tarr, of Los Angeles, and Frank M. Moody, of Glendale, for respondents City and Kerns.

Arthur M. Ellis, of Los Angeles, for respondent Fleming.

PRESTON, J. The judgment is affirmed. The action is an attack upon certain proceedings taken and completed by the city of Glendale under the Street Improvement Act of 1911, as amended (St. 1911, p. 730, c. 397, as amended), followed by the issuance of bonds or warrants as provided in the Bond Act of 1915 (St. 1915, p. 1441, c. 733). The attack is purely collateral; no single protest or objection of any kind having been made to the city council at any time.

The resolution of intention was in proper form; it was published as required by law, and the proper posting was also done. Jurisdiction to carry out these proceedings thus attached. Sections 7 and 16 of said act (St. 1911, p. 730); Chase v. Trout, 146 Cal. 350, 359, 360, 80 P. 81; Watkinson v. Vaughn, 182 Cal. 55, 58, 186 P. 753; In re East Bay, etc., Water Bonds of 1925, 196 Cal. 725, 735, 239 P. 38.

The complaint of some 34 pages is a general technical criticism of the steps taken, all of which were matters first to be addressed to the city council, all of which are covered by the various curative provisions of the statutes involved, and none of which are proper subjects for court proceedings. Sections 16, 21, and 26 of the Act of 1911 (St. 1911, p. 730), and section 8 of said Bond Act of 1915 (St. 1915, p. 1446). It is unnecessary to undertake to detail them. In principle, if not in fact, they have each been disposed of in recent decisions of this court, none of which have been considered by appellant San Francisco Sulphur Co. v. County of Contra Costa (Cal. Sup.) 276 P. 570; Noyes v. Chambers & De Golyer, 202 Cal. 542, 261 P. 1006; Blake v. City of Eureka, 201 Cal. 643, 258 P. 945.

The trial court sustained general demurrers to the complaint, without leave to amend, followed by judgment for defendants, appealed from by plaintiff, and now affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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208 Cal. 786

W. R. McNAUGHTON, Plaintiff and Appellant, v. The CITY OF GLENDALE (a Municipal Corporation), Ruth Kerns, as Treasurer of the City of Glendale (a Municipal Corporation), Thomas Gibbons and Homer Reed, Copartners, Doing Business in the Name and Style of Gibbons & Reed, Contractors, et al., Defendants and Respondents. (L. A. 10096.)

Supreme Court of California. Dec. 5, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Chas. S. Conner, of Los Angeles, for appellant.

W. Turney Fox, City Atty., Bernard Brennan, Deputy City Atty., and Ray L. Morrow, all of Glendale, Leslie R. Tarr, of Los Angeles, and Frank M. Moody, of Glendale, for respondents City and Kerns.

Arthur M. Ellis, of Los Angeles, for respondent Fleming.

PER CURIAM. This cause relates to street improvement proceedings which, although instituted under a resolution of intention bearing a different number, are otherwise identical with, and were started the same day as, those referred to in case No. 10085, Woodill v. City of Glendale, 204 Cal. ——, 282 P. 797, this day decided. The pleadings in the two actions are in the same form, and the law points made are identical.

Therefore, upon authority of said cause, Woodill v. City of Glendale, supra, and upon the same grounds, and for all the reasons set forth therein, the judgment rendered in this cause for defendants upon the sustaining of their demurrers, without leave to amend. is hereby affirmed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

208 Cal. 787

George W. PETERS, Jr., and Clara M. S. Peters (his Wife), Plaintiffs and Appellants, v. The CITY OF GLENDALE (a Municipal Corporation), Ruth Kerns, as Treasurer of the City of Glendale (a Municipal Corporation), Thomas Gibbons and Homer Reed, Copartners, Doing Business in the Name and Style of Gibbons & Reed, Contractors, et al., Defendants and Respondents. (L. A. 10097.)

Supreme Court of California. Dec. 5, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Chas. S. Conner, of Los Angeles, for appellants.

W. Turney Fox, City Atty., Bernard Brennan, Deputy City Atty., and Ray L. Morrow, all of Glendale, Leslie R. Tarr, of Los Angeles, and Frank M. Moody, of Glendale, for respondents City and Kerns.

Arthur M. Ellis, of Los Angeles, for respondent Fleming.

PER CURIAM. This cause relates to street improvement proceedings which, although instituted under a resolution of intention bearing a different number, are otherwise identical with, and were started the same day as, those referred to in case No. 10085, Woodill v. City of Glendale, 204 Cal. —, 282 P. 797, this day decided. The pleadings in the two actions are in the same form, and the law points made are identical.

Therefore, upon authority of said cause, Woodill v. City of Glendale, supra, and upon the same grounds, and for all the reasons set forth therein, the judgment rendered in this cause for defendants upon the sustaining of their demurrers, without leave to amend, is hereby affirmed.

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208 Cal. 788

C. G. SCHILLER and Gunhild Schiller (Husband and Wife), Plaintiffs and Appellants, v. The CITY OF GLENDALE (a Municipal Corporation), Ruth Kerns, as Treasurer of the City of Glendale (a Municipal Corporation), C. L. Hill et al., Defendants and Respondents. (L. A. 10098.)

Supreme Court of California. Dec. 5, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Chas. S. Conner, of Los Angeles, for appellants.

W. Turney Fox, City Atty., Bernard Brennan, Deputy City Atty., and Ray L. Morrow, all of Glendale, Leslie R. Tarr, of Los Angeles, and Frank M. Moody, of Glendale, for respondents City and Kerns.

Arthur M. Ellis, of Los Angeles, for respondent Fleming.

PER CURIAM. This cause relates to street improvement proceedings which, although instituted under a resolution of intention bearing a different number, are otherwise identical with, and were started the same day as, those referred to in case No. 10085, Woodill v. City of Glendale, 204 Cal. —, 282 P. 797, this day decided. The pleadings in the two actions are in the same form, and the law points made are identical.

Therefore, upon authority of said cause, Woodill v. City of Glendale, supra, and upon the same grounds, and for all the reasons set forth therein, the judgment rendered in this cause for defendants upon the sustaining of their demurrers, without leave to amend, is hereby affirmed.

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208 Cal. 789

C. G. SCHILLER and Gunhild Schiller (Husband and Wife), Plaintiffs and Appellants, v. The CITY OF GLENDALE (a Municipal Corporation), Ruth Kerns, as Treasurer of the City of Glendale (a Municipal Corporation), E. L. Fleming et al., Defendants and Respondents. (L. A. 10099.)

Supreme Court of California. Dec. 5, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Chas. S. Conner, of Los Angeles, for appellants.

W. Turney Fox, City Atty., Bernard Brennan, Deputy City Atty., and Ray L. Morrow, all of Glendale, Leslie R. Tarr, of Los Angeles, and Frank M. Moody, of Glendale, for respondents City and Kerns.

Arthur M. Ellis, of Los Angeles, for respondent Fleming.

PER CURIAM. This cause refers to the same street improvement proceedings, and is in every respect, both as to the facts and as to the law involved, identical with and controlled by case No. 10085, Woodill v. City of Glendale, 204 Cal. —, 282 P. 797, this day decided.

Upon authority of that case, for all the reasons set forth therein, and upon the same grounds, the judgment herein, which passed for defendants upon the sustaining of their demurrers, without leave to amend, is hereby affirmed.

208 Cal. 790

M. A. CRYDERMAN, Plaintiff and Appellant, v. The CITY OF GLENDALE (a Municipal Corporation), Ruth Kerns, as Treasurer of the City of Glendale (a Municipal Corporation), Thomas Gibbons and Homer Reed, Copartners, Doing Business in the Name and Style of Gibbons & Reed, Contractors, et al., Defendants and Respondents. (L. A. 10100.)

Supreme Court of California. Dec. 5, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County, Ruben S. Schmidt, Judge.

Chas. S. Conner, of Los Angeles, for appellant.

W. Turney Fox, City Atty., Bernard Brennan, Deputy City Atty., and Ray L. Morrow, all of Glendale, Leslie R. Tarr, of Los Angeles, and Frank M. Moody, of Glendale, for respondents City and Kerns.

Arthur M. Ellis, of Los Angeles, for respondent Fleming.

PER CURIAM. This cause relates to street improvement proceedings which, although instituted under a resolution of intention bearing a different number, are otherwise identical with, and were started the same day as, those referred to in case No. 10085, Woodill v. City of Glendale, 204 Cal. ——, 282 P. 797, this day decided. The pleadings in the two actions are in the same form, and the law points made are identical.

Therefore, upon authority of said cause, Woodill v. City of Glendale, supra, and upon the same grounds, and for all the reasons set forth therein, the judgment rendered in this cause for defendants upon the sustaining of their demurrers, without leave to amend, is hereby affirmed.

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208 Cal. 791

Glyndon L. CRAWFORD and Daisy S. Crawford (his Wife), Plaintiffs and Appellants, v. The CITY OF GLENDALE (a Municipal Corporation), Ruth Kerns, as Treasurer of the City of Glendale (a Municipal Corporation), Thomas Gibbons and Homer Reed, Copartners, Doing Business in the Name and Style of Gibbons & Reed, Contractors, et al., Defendants and Respondents. (L. A. 10101.)

Supreme Court of California. Dec. 5, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Chas. S. Conner, of Los Angeles, for appellants.

W. Turney Fox, City Atty., Bernard Brennan, Deputy City Atty., and Ray L. Morrow, all of Glendale, Leslie R. Tarr, of Los Angeles, and Frank M. Moody, of Glendale, for respondents City and Kerns.

Arthur M. Ellis, of Los Angeles, for respondent Fleming.

PER CURIAM. This cause relates to street improvement proceedings which, although instituted under a resolution of intention bearing a different number, are otherwise identical with, and were started the same day as, those referred to in case No. 10085, Woodill v. City of Glendale, 204 Cal. ——, 282 P. 797, this day decided. The pleadings in the two actions are in the same form, and the law points made are identical.

Therefore, upon authority of said cause, Woodill v. City of Glendale, supra, and upon the same grounds, and for all the reasons set forth therein, the judgment rendered in this cause for defendants upon the sustaining of their demurrers, without leave to amend, is hereby affirmed.

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208 Cal. 792

George J. MATHIAS, Plaintiff and Appellant, v. The CITY OF GLENDALE (a Municipal Corporation), Ruth Kerns, as Treasurer of the City of Glendale (a Municipal Corporation), Thomas Gibbons and Homer Reed, Copartners, Doing Business in the Name and Style of Gibbons & Reed, Contractors, et al., Defendants and Respondents. (L. A. 10102.)

Supreme Court of California. Dec. 5, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Chas. S. Conner, of Los Angeles, for appellant.

W. Turney Fox, City Atty., Bernard Brennan, Deputy City Atty., and Ray L. Morrow, all of Glendale, Leslie R. Tarr, of Los Angeles, and Frank M. Moody, of Glendale, for respondents City and Kerns.

Arthur M. Ellis, of Los Angeles, for respondent Fleming.

PER CURIAM. This cause relates to street improvement proceedings which, although instituted under a resolution of intention bearing a different number, are otherwise identical with, and were started the same day as, those referred to in case No. 10085, Woodill v. City of Glendale, 204 Cal. ——, 282 P. 797, this day decided. The pleadings in the two actions are in the same form, and the law points made are identical.

Therefore, upon authority of said cause, Woodill v. City of Glendale, supra, and upon the same grounds, and for all the reasons set forth therein, the judgment rendered in this cause for defendants upon the sustaining of their demurrers, without leave to amend, is hereby affirmed.

102 Cal. App. 148

DAVIS v. WESTPHAL. (Civ. 6250.)

District Court of Appeal, Second District,
Division 2, California. Nov. 25, 1929.

1. Usury 🔑88—Whether interest specified be treated as usury or bonus was immaterial, where plaintiff suing on note waived both interest and bonus.

Whether interest specified in contract for use of money be treated as usury or as additional compensation for lender's work in business under contract for temporary association was immaterial, where, in action on note, plaintiff waived both interest and bonus at opening of trial.

2. Usury 🔑75—Allowing attorney's fees in action on note, though interest specified was illegal, held not error (Usury Act).

In action on note, allowance of attorney's fees *held* not error whether or not rate of interest specified was illegal, since under Usury Act (St. 1919, p. lxxxiii) such contracts are valid, except that interest is forfeited.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by W. R. Davis against J. M. Westphal. Judgment for plaintiff, and defendant appeals. Affirmed.

Cooper & Collings, of Los Angeles, for appellant.

Fred M. Bottorff, of Los Angeles, for respondent.

CRAIG, Acting P. J. It appears that the parties to this action entered into a tentative agreement in writing on March 7, 1925, by the terms of which respondent agreed to loan the appellant $2,500 for the conduct of the latter's business, and to enter into his employment for a period of six months at a salary of $150 per month, in contemplation of forming a copartnership. It is contended that appellant received the $2,500 and gave to respondent his promissory note therefor; that he also paid said salary for the first five months, but refused to repay the amount of the note, or to pay the salary for the sixth month. Suit having been instituted for both sums, and judgment entered in favor of the plaintiff, this appeal is taken from said judgment.

The note is controversy called for the legal rate of interest upon the principal for a period of six months, together with a bonus of 8 per cent. per annum. The defendant incorporated the original agreement in his answer as an exhibit, alleging that said note was usurious, and that the monthly salary was merely a bonus which he had agreed to pay for the use of the money loaned. As a counterclaim the defendant allowed a credit of $50 per month for said five months, which the plaintiff was alleged to have earned in commissions and otherwise, and prayed judgment in the sum of $1,500, or treble the amount claimed to have been paid illegally, under the terms of the contract and promissory note. It is respondent's contention that the salary and the amount of the note were separate and distinct items, and that, in the event of the formation of a copartnership, the $2,500 was to have gone into the business, and a new contract was to have been executed between the parties. Said contract reads, in part, as follows:

"Witnesseth: That whereas the parties contemplate a permanent business association together as partners, this memorandum of agreement is made for a period of six (6) months from its date for the purpose of permitting the parties to determine whether or not a permanent association between them shall prove satisfactory.

"The said William R. Davis agrees to loan to the said J. M. Westphal, upon the signing of this agreement, the sum of twenty-five hundred dollars ($2500.00), which the said J. M. Westphal shall use in the general conduct of the business as above outlined. The said William R. Davis is to, and shall associate himself with said business commencing upon the signing of this agreement and the payment of the said sum of $2500.00, devoting his full time and efforts jointly with J. M. Westphal in promoting and building up, and increasing and developing said business.

"The said J. M. Westphal agrees to pay to the said William R. Davis, in lieu of his services as general salesman and assistant in said business, a commission of ten per cent (10%) upon all sales made by him, and repeat orders from his customers, which said commissions shall be credited to his personal account once a month and he shall be permitted to draw against said commissions the sum of one hundred fifty dollars ($150.00) monthly for a period of six (6) months.

"At the end of six months, unless the partners shall mutually agree to a sooner termination, or a longer extension of said period, the parties may, agreeable to both of them, enter into a joint partnership in the ownership and conduct of said business with such proportionate ownership to each as they at the time may mutually agree. In the event the partners fail to reach a satisfactory agreement after the period of this contract and the said William R. Davis should withdraw from said business, he shall be entitled to receive all commissions then due him, together with a repayment to him of the sum of twenty-five hundred dollars ($2500.00), plus interest at the rate of fifteen per cent. (15%) per annum for said period. * * *

"It is particularly provided and agreeable to both parties, that in the event the aggregate commissions earned by the said William R. Davis during the period of this contract, shall not equal the aggregate of $150.00 per month for said period, the said J. M. Westpbal guarantees that the said $150.00 per month shall be paid in lieu of services rendered, with no obligation on the part of said William R. Davis for any overdrawings in excess of any commissions earned.

"In the event the partners agree at the termination of this contract to enter into partnership as the owner of said business, they shall do so in writing under an agreement of copartnership which said agreement shall set forth the ownership, of each of the partners and the conditions under which said partnership is entered into."

[1] Whether the rate of interest above specified be treated as a usurious charge for the use of the money represented by the note, or as additional compensation within the purview of the temporary association, is immaterial, since at the opening of the trial the plaintiff waived both interest and bonus. Judgment was rendered in the sum of $2,500 as principal, $250 attorney's fees, and $150 salary for the last month of the temporary term.

It is admitted that at the expiration of the six months' period the parties did not enter into a permanent agreement of copartnership. The plain language of the temporary contract required that this be done, or that the respondent should receive in return the full amount of $2,500, and that he should be paid $150 per month, regardless of the amount of commissions earned. It was further stipulated that respondent rendered services for the entire period of six months. The contract and the promissory note were contemporaneous, and it is immaterial whether the amount advanced be deemed a loan or an investment, since both documents guaranteed its return in the event of a failure to agree upon a continuance of the joint adventure. It results that the court did not err in rendering judgment therefor.

[2] It is also contended by appellant that, if the rate of interest specified in the promissory note was excessive and illegal, the whole transaction was rendered void by such charge, and that it was error to allow attorney's fees in an action founded thereon. It has been held that the Usury Act (St. 1919, p. lxxxiii) does not so provide, and that such contracts are valid except that the interest shall be forfeited. Haines v. Commercial Mtg. Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725.

Finally, appellant insists that the contract was but a subterfuge to evade the Usury Act, and that the evidence did not support the judgment of the trial court. We have carefully perused the record, and it is plain from appellant's own testimony that this point is so obviously unfounded as to leave no room for extended discussion. He testified that he entered into the agreement with a copartnership in view; that, had Davis signified an intention to remain in the business, he originally intended to accept him; and that he did in fact pay him for a period of five months in accordance with the terms of the contract.

No error appearing, the judgment is affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

102 Cal. App. 71

RICHMAN v. BANK OF PERRIS et al. ★

(Civ. 2.)

District Court of Appeal, Fourth District, California. Nov. 18, 1929.

Rehearing Denied Dec. 18, 1929. Hearing Denied by Supreme Court Jan. 16, 1930.

1. Corporations 🔑298(3)—Notice of special meeting of directors of corporation must be given each director, unless notice is waived (Civ. Code, § 320a).

In absence of statute or by-law providing to the contrary, notice of special meeting of board of directors of corporation must be given to each director, except when waived as provided in Civil Code, § 320a, and stock assessment levied at special meeting held without notice to all of directors is void.

2. Banks and banking 🔑52—Special meeting of directors of bank, called by two directors without notice to third or waiver, and stock assessment levied at meeting, held void, where by-laws required notice to all (Civ. Code, § 320a).

Where by-laws of bank provided that special meeting of board of directors might be called by president on notice to directors, meeting had on call of two of three directors without notice to the third director or without waiver by him under provisions of Civ. Code, § 320a, and stock assessment levied at meeting, *held* void.

3. Banks and banking 🔑52—That bank's assets had been converted by president who absconded did not validate special meeting of directors had without notice to president or waiver, where bank was in superintendent's hands and regular meeting could have been had without notice (Civ. Code, § 320a; Bank Act, § 136).

Fact that bank had been deprived of large amount of cash and securities converted by its president, who disappeared and could not be located, and that immediate action on part of board of directors was necessary to save the bank, did not validate special meeting of board of directors held without notice to the president as the third director, in violation of provisions of by-laws, and without waiver under Civ. Code, § 320a, and did not render valid purported assessment on bank stock levied at the special meeting where the bank was closed by the superintendent on April 21st and regular meeting of directors could have been held without notice on May 3d or June 7th, whereas special meeting was had on May 24th; bank superintendent having power, under Bank Act, § 136 (St. 1909, p. 115), to take possession of bank

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★Rehearing denied. Hearing denied by Supreme Court.

and retain possession until bank shall resume business or its affairs be finally liquidated.

4. Sales 🔑113—Equitable relief does not necessarily follow plaintiff's strict legal right to have sale set aside.

That plaintiff may have strict legal right to set aside sale does not necessarily entitle him to relief in equity, but his own actions are of greatest importance in determining equitable relief.

5. Equity 🔑65(1)—One otherwise entitled to profit by illegality of contract cannot receive equitable relief if he has participated in wrong (Civ. Code, §§ 3517, 3539).

While time does not confirm a void act, under Civ. Code, § 3539, no one can take advantage of his own wrong under section 3517 and party otherwise entitled to profit by invalidity of illegal contract cannot be heard in equity, if by his own act he has participated in the wrong.

6. Equity 🔑65(1)—In proper case, equity may set aside effect of statute, where party seeking relief was wrongdoer (Civ. Code, § 3517).

In a proper case, equity may set aside the effect of a statute in order to prevent an unconscionable thing, when the party seeking the relief is the actor in the wrong involved, in view of Civ. Code, § 3517, under which no one can take advantage of his own wrong.

7. Equity 🔑66—Maxim, "He who seeks equity must do equity," means court will not confer equitable relief unless party has acknowledged or will provide for equitable rights of adversary.

Rule of equity that "he who seeks equity must do equity" means that court will not confer equitable relief upon party seeking its aid unless he has acknowledged or will provide for all equitable rights justly belonging to adversary party necessarily involved in subject-matter of controversy.

8. Equity 🔑66—Plaintiff may be forced to do equity as condition to claiming statutory right.

Rule that one who seeks equity must do equity applies to actions authorized by statute, and plaintiff may be forced to do equity as condition of claiming right fixed by statute and established law.

9. Equity 🔑66—One seeking equity must do equity, regardless of kind of equitable remedy applied for.

Rule that one who seeks equity must do equity applies, regardless of the particular kind of equitable remedy which is applied for.

10. Equity 🔑65(1)—One coming into equity has burden to show his hands are clean.

Burden is on one coming into court of equity for relief to prove, not only his legal rights, but that he has clean hands, and otherwise court will deny relief.

11. Equity 🔑65(2)—Equity will not aid one committing fraudulent acts in original transaction which constitutes foundation of cause of action.

Equity will not aid plaintiff who has been guilty of fraudulent acts in original transaction which constitute foundation out of which action for relief goes, and rule would specially apply where acts are not only fraudulent but criminal.

12. Attachment 🔑175—Attaching creditor of bank president who converted bank's assets and absconded, had no greater right than president to set aside sale of his stock without offering to reimburse purchasers for moneys contributed to save bank (Deering's Gen. Laws 1923, Act 652, § 133; Code Civ. Proc. § 699).

President of bank owning majority of stock, who converted cash and securities and absconded, would not be able to set aside sale of his bank stock made under delinquent assessment levied at special meeting of board of directors illegally held without notice to him, without offering to reimburse purchasers of the stock attempted to be sold under Deering's Gen. Laws 1923, Act 652, § 133, for amount advanced by them to save the bank from the effect of the defalcation; hence attaching creditor of president of bank, having notice of transfer of stock on books, could not, under certificate of sale at execution, maintain suit in equity to set aside sale under the assessment and have himself declared owner, his rights being limited to those of his debtor, under Code Civ. Proc. § 699.

13. Execution 🔑268, 269—Purchaser at execution sale takes subject to existing liens and equities (Code Civ. Proc. § 699.)

Purchaser at execution sale under Code Civ. Proc. § 699, takes subject to such existing liens and equities as property was subject to in hands of debtor, unless he can show he purchased the same without notice, either actual or constructive, of the existence of such liens or equities.

14. Attachment 🔑175—Attaching creditor of former stockholder takes stock transferred on books of corporation subject to existing equities (Code Civ. Proc. § 699).

Where stock has been transferred on books of corporation, creditor of former owner of stock by writ of attachment takes stock subject to existing equities, under Code Civ. Proc. § 699.

15. Corporations 🔑149—Constructive notice of interest in corporation's stock is given by entries in corporate books (Code Civ. Proc. § 699; Civ. Code, § 3521).

Constructive notice in relation to interest in corporation stock is given, not by instruments filed in office of county recorder, but by entries in books of corporation; certificate of sale under execution conveying only right which debtor had in property in question on day attachment was levied, under Code Civ. Proc. § 699; one taking benefit being required to bear burden under Civ. Code, § 3521.

16. Attachment 🔑175—Creditor of absconding bank president attaching president's stock had constructive notice of defects and outstanding equities from defendants' possession of stock and from book entries showing stock was canceled and reissued to defendants (Deering's Gen. Laws 1923, Act 652, § 133; Code Civ. Proc. § 699).

Where bank stock was sold under Deering's Gen. Laws 1923, Act 652, § 133, for failure of stockholders to pay assessments, and defendants contributing to bank to make good losses suffered through president's defalcation, had possession and control of stock and business of corporation, and book entries showed cancellation of president's stock and reissue of substitute stock to defendants, creditor of absconding bank president, who attached president's stock and bought it in on execution under judgment recovered by him, had constructive notice of any defects in president's title and of any equities existing against president's interest arising out of the transaction under Code Civ. Proc. § 699.

17. Banks and banking 🔑43—Action by attaching creditor of bank president to set aside sale of president's stock under delinquent assessment held not barred after six months (Deering's Gen. Laws 1923, Act 652, § 133; Code Civ. Proc. § 341, subd. 2; Civ. Code, § 347).

Action in equity by attaching creditor of bank president to set aside sale of president's bank stock, made under delinquent assessment pursuant to Deering's Gen. Laws 1923, Act 652, § 133, on ground of invalidity of assessment, *held* not barred by Code Civ. Proc. § 341, subd. 2, and Civ. Code, § 347, imposing six months' limitation relative to actions to recover stock sold for delinquent assessments.

18. Banks and banking 🔑44—Sale of bank stock for delinquent assessment under statute providing for enforcement without creating personal liability held not void (Deering's Gen. Laws 1923, Act 652, § 133; Const. art. 12, § 3).

Sale of bank stock for delinquent assessments under Deering's Gen. Laws 1923, Act 652, § 133, which provides only for enforcement of assessment by the sale of stock, *held* not void under Const. art. 12, § 3, as attempt to create personal liability for corporation's debts, as is the case in Deering's Gen. Laws 1923, Act 653.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Fred H. Richman against the Bank of Perris and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John E. Biby and Harry C. Biby, both of Los Angeles, for appellant.

A. Heber Winder, of Riverside, for respondents.

BARNARD, J. This is an action in equity, brought to set aside a sale of certain bank stock made under a purported assessment, and to declare the plaintiff the owner of said stock.

On a previous appeal (Richman v. Bank of Perris, 73 Cal. App. 321, 238 P. 754), it was held that a demurrer to the complaint had been improperly sustained that the complaint stated a cause of action, and the case was reversed, with directions to permit an answer. An answer having been filed and a trial had on the issues set up, the matter is now before us on the facts alleged in both the complaint and the answer, so far as the same were proved or admitted at the trial. These facts, so far as they affect the decision of this case, are as follows:

The defendant bank is a corporation organized under the laws of the state of California, with a capital stock of 250 shares of the par value of $100 each. The articles of incorporation provide for three directors. On April 15, 1919, the defendants Stewart owned 209 of the 250 shares of stock outstanding. On April 16, 1919, one J. B. Moffere purchased these 209 shares of stock and new certificates were issued by the corporation as follows: To Moffere, 199 shares, to Louis Vaiani, 5 shares, and to Louis Casaretto, 5 shares. The shares were issued to the last-named persons in order to qualify them to act as directors. The circumstances of the purchase are not in evidence. On the same day, April 16, 1919, the old board of directors of the bank met and resigned, and Moffere was elected a director and president, Vaiani a director and secretary, and Casaretto was elected a director. On the same day, or on the next day, April 17, 1919, which was the day he was last seen at the bank, the new president, Moffere, robbed the bank of a little over $40,000 in cash and securities and disappeared, and up to the date of the trial (July 14, 1926) had never been apprehended. On April 18, 1919, the Stewarts began a search for Moffere, and on April 21, 1919, a well-known detective agency was employed to endeavor to locate him. On the same day the state superintendent of banks closed the bank and placed its affairs in charge of a deputy, H. P. Maynard. On April 22, 1919, a warrant was issued for the arrest of the absent Moffere and placed in the hands of the sheriff. Continuously from that time the detective agency and the sheriff made frequent reports of their inability to find Moffere. On May 24, 1919, the superintendent of banks, finding the capital of the bank impaired "resulting from the felonious actions of your newly elected president, J. B. Moffere," directed that its capital be repaired, and fixed the amount necessary at $40,000, and further directed that an assessment of $160 a share be levied.

At all times herein involved the by-laws of the bank provided: "Special meetings of the Board may be called by the President on one day's notice to each director, either personally or by wire; special meetings may be called in like manner and on like notice, on the written request of two directors."

On May 26, 1919, the two available directors signed the following instrument in writing:

"Los Angeles, May 26, 1919.

"Mr. James B. Moffere, President of the Bank of Perris, Huntley Apartments, Los Angeles, Calif. Dear Sir: The undersigned, being a majority of the Board of Directors of the Bank of Perris, hereby request a special meeting of said board, to be called and held in the Bank of Perris at one o'clock in the afternoon of Tuesday, the 27th day of May, 1919.

"Louis Vaiani,
"Louis Casaretto."

On the same day the said two directors caused the original of said instrument to be delivered at the Huntley Apartments in Los Angeles, which was the last-known place of residence of the said Moffere, and obtained from the proprietor of said apartments the following written instrument:

"Los Angeles, Cal. May 26, 1919.

"This is to certify that Mr. James B. Moffere, formerly a tenant of the Huntley Apartments, 1207 West Third Street, Los Angeles, was not here present (nor has he been for over thirty days, his present whereabouts being unknown here) to receive a letter personally delivered by messenger, said letter being a call to the meeting of the Directors of the Bank of Perris, addressed to James B. Moffere, Huntley Apartments, and signed by Louis Vaiani and Louis Casaretto, as Directors.

"[Signed] Huntley Apartments,
"By E. Blalack.
"Witness: H. E. Maynard."

On May 27, 1919, the said Vaiani and Casaretto, as directors of said bank, met and caused to be entered in the minutes of the proceedings of the board of directors a resolution, of which the following is a copy: "Whereas, Charles F. Stern, Superintendent of Banks of the State of California, has made requisition upon the Bank to repair its Capital in the sum of $40,000, therefore, be it resolved and ordered that an assessment of $160.00 per share be levied upon each share of the stock of this corporation, said assessment to be payable on June 26, 1919, to Louis Vaiani, the Secretary and Cashier of this Bank, at the banking room of this Bank in the town of Perris, County of Riverside, State of California. Any stock upon which this assessment shall remain unpaid upon the 26th day of June, 1919, will be delinquent and advertised for sale at public auction, and unless payment is made before, will be sold to pay the delinquent assessment together with costs of advertising and expenses of sale, or will be sold at private sale and without such public notice."

The court found that, at the time this resolution was passed, the said Moffere was absent from the state of California; that he was a fugitive from justice, having robbed the defendant bank of over $40,000; that his whereabouts were unknown to any of the defendants and to any person connected with the said bank; that every effort had been made to locate him and personally notify him of said meeting; but that, owing to these facts and to his absenting himself, it was impossible to locate him and to give him notice of said or any meeting of the board of directors of said bank. The court also found that each of the defendants herein knew that said purported meeting of said directors was held without any notice to the absent director. Moffere, other than that hereinbefore mentioned, and without his being present, that it was not held on a regular meeting day, and that the said meeting was not called by the president. The court also found that the call for said special meeting, made as above outlined, was in accordance with the provisions of the by-laws; that everything possible was done to procure the service of the notice on the said Moffere, and that the failure to personally serve him was due wholly and entirely to his absence from the state, under the circumstances above indicated. The court further found that none of the owners of the outstanding shares of stock in the bank paid said assessment, except one man, who made a partial payment, that a notice of intention to sell such stock was not published in any newspaper of general circulation, but such notice was served upon each of the stockholders by mail, and that each and all of the stockholders had personal notice of such intention to sell such stock.

It was further found that on May 28, 1919, three individuals, acting as agents for all of the defendants herein, except the Bank of Perris, made a written offer to pay to the defendant Bank of Perris the sum of $40,000 in cash, in payment of the amount assessed, as above mentioned. On the same day the bank mailed to each stockholder, at his last-known address, a notice reading as follows:

"Perris, California, May 28, 1919.

"Dear Sir: Please be advised that we have this day been offered full payment of the amount assessed against your stock of this corporation, a notice of which assessment was mailed to you at your last known address, a copy of which offer is enclosed. If you refuse or neglect to pay such assessment on or before July 14, 1919, please be advised that such offer will be accepted by the Board of Directors of this Corporation.

"Yours very truly,
"Bank of Perris,
"By Louis Vaiani, Sec."

On July 15, 1919, the said two directors, Vaiani and Casaretto, met at the office of the bank, and, by resolutions which were entered on the minutes of the proceedings of the directors, canceled 249 shares of stock, including the 209 shares then owned by said Moffere, and declared the said stock to be null and void, and issued new shares in lieu of the shares purported to have been canceled, to the defendants in this action, excepting the defendant Bank of Perris. After the new certificates were issued, the defendants, other than the Bank of Perris, acquired all other issued stock and then claimed to own the entire outstanding stock of the bank. The court found that the above proceedings were the only proceedings under or by which the stock owned by Moffere was canceled or attempted to be canceled. On July 17, 1919, the superintendent of banks withdrew from the control of the bank, and on August 9, 1919, a new board of directors was elected.

On August 14, 1922, the plaintiff herein commenced an action in Los Angeles county against the said Moffere, and on August 15, 1922, a writ of attachment in said action was levied upon the shares of stock in said bank, alleged to be the property of Moffere, and to have been illegally canceled, being the 200 shares above referred to. Later plaintiff recovered judgment against Moffere in said action, in the sum of $34,027.50, and an execution was issued and levied upon said stock. Subsequently Moffere's interest in said stock was sold at execution sale to the plaintiff, for the amount of his judgment. The plaintiff presented his certificate of sale to the bank, and demanded the issuance to himself of the stock claimed to have been owned by Moffere, which demand was refused. The court found that from and after July 15, 1919, said Moffere was not entitled to any of the rights of a stockholder in said bank, and that the defendants, other than the Bank of Perris, are the legal owners of the outstanding stock in said bank. This appeal is from a judgment in favor of the defendants, and that the plaintiff take nothing.

The appellant contends that the purported sale or cancellation of the Moffere stock is void, the meeting of the directors at which the proceedings were initiated not having been called upon legal notice, and that, as a consequence, appellant is the owner of said stock, having acquired the same through the execution sale. California Jurisprudence, vol. 6, p. 1055, states the rule relied upon by appellant, as follows: "It is the general rule, therefore, that a special meeting held without notice is void, and the directors present at such meeting cannot perform any valid corporate act. The provision that a majority of the whole number of trustees shall form a board for the transaction of business and every decision of a majority of the persons duly assembled as a board shall be valid, does not change the rule."

While respondents freely admit this to be the rule, they strongly urge that the circumstances here present an emergency which forms an exception to the general rule. They insist that such an exception arises where three conditions prevail: (1) the existence of an emergency; (2) a reasonable necessity for immediate action; (3) the impossibility of giving notice.

They argue that these conditions were all present in this case; that a much needed and only bank in a small community had been robbed, almost double its capital wiped out, and its doors closed; that it was not only impossible to serve the absent director, but this impossibility arose from his own crime and the fact that he intentionally secreted himself; that it was necessary for immediate action to be taken to rehabilitate the bank by an assessment, in order to save the financial structure of the community, and to carry out the orders of the state superintendent of banks; that it was necessary to do this within 60 days, and, to meet this sudden necessity, the remaining directors acted under the advice of the superintendent of banks; and that they made the best service of the notice possible under the circumstances. Therefore, as an exception to the general rule, they contend that the remaining directors were legally justified in holding the meeting and levying the assessment involved. In support of their contention that there is an exception to the general rule, in such cases of emergency, respondents cite a number of cases from foreign jurisdictions including the following: Chase v. Tuttle, 55 Conn. 455, 12 A. 874, 3 Am. St. Rep. 64; Bank of Little Rock v. McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. Rep. 60; Smith v. Sinaloa Land & Fruit Co., 42 Utah, 445, 132 P. 556; Doernbecher v. Columbia City Lbr. Co., 21 Or. 573, 28 P. 899, 28 Am. St. Rep. 766; Re Lisk Mfg. Co. (D. C. N. Y.) 167 F. 411; Singer v. Salt Lake Copper Co., 17 Utah, 143, 53 P. 1024, 70 Am. St. Rep. 773; Stiewel v. Webb Press Co., 79 Ark. 45, 94 S. W. 915, 116 Am. St. Rep. 62; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; In re Kenwood Ice Co. (D. C.) 189 F. 525. In addition to these authorities, respondents further rely on certain California cases which, it is contended, show a tendency to let down on the strict rule that notice is necessary under all circumstances, and in which, it is asserted, the courts have swept aside strict and exclusive compliance with the requirements of the statutes. See Bell v. Standard Q. Co., 146 Cal. 699, 81 P. 17; Scott v. Superior S. O. Co., 144 Cal. 140, 77 P. 817; Whitcomb v. Giannini, 43 Cal. App. 229, 184 P. 887; also, see Civ. Code, § 320a.

[1, 2] Without going into details, it may be observed that the California cases cited fall far short of going to the extent of establishing such a tendency as supports the exception contended for. A careful study of the cases from other states relied upon by respondents discloses that while much appears in some of the decisions which apparently supports the contention that such emergency may at times exist as to change the general rule, a large part of the language used is dictum, and in none of the cases cited does it clearly appear that there existed statutes and by-laws similar to those involved in this case. The great weight of authority elsewhere, as well as in California, is to the effect that, in the absence of a statute or a by-law providing to the contrary, notice of a special meeting of a board of directors must be given to each director, except when waived, as provided for in section 320a of the Civil Code. It has been uniformly held in this state that an assessment levied at a special meeting held without notice to all of the directors is void. Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Harding v. Vandewater, 40 Cal. 77; San Buenaventura Mfg. Co. v. Vassault, 50 Cal. 534; Thompson v. Williams, 76 Cal. 153, 18 P. 153, 9 Am. St. Rep. 187; Alta Silver Mining Co. v. Mining Co., 78 Cal. 629, 21 P. 373; Smith v. Dorn, 96 Cal. 73, 30 P. 1024; Pauly v. Pauly, 107 Cal. 8, 40 P. 29, 48 Am. St. Rep. 98; Curtin v. Salmon River, etc. Co., 130 Cal. 345, 62 P. 552, 80 Am. St. Rep. 132; Reilley v. Campbell, 134 Cal. 175, 66 P. 220; Cheney v. Canfield, 158 Cal. 342, 111 P. 92, 32 L. R. A. (N. S.) 16; Raisch v. M. K. & T. Oil Co., 7 Cal. App. 667, 95 P. 662; Beatty v. Rianda, 34 Cal. App. 180, 167 P. 185; Richman v. Bank of Perris, 73 Cal. App. 321, 238 P. 754.

In Cheney v. Canfield, 158 Cal. 345, 111 P. 92, 32 L. R. A. (N. S.) 16, the court said: "It is the settled law that an assessment can be legally levied upon the capital stock of a corporation by the board of directors only at a regular meeting of the board or at a special meeting thereof regularly called. (Citing cases.) As all proceedings whereby an assessment is levied upon the stock of a corporation, and under which a forfeiture of the stock of the stockholders may be had are in invitum, it is elementary law that they must be strictly followed. The levy of such an assessment can only be accomplished legally by a strict compliance with the statutory provisions relative thereto, or with the provisions of the charter of the corporation upon the subject."

[3] Even if it be assumed that such an exception to the established rule as is here contended for could be sanctioned in an emergency where the necessity for immediate action is sufficiently great, we cannot agree that the existence of such a necessity here appears. Regardless of the general emergency that unquestionably existed, it appears without dispute that the superintendent of banks closed the bank in question and took charge thereof on April 21, 1919. It is apparent that the conditions were then known, and a *regular* meeting of the directors could have been held on May 3, 1919, no notice of such meeting being required by their by-laws. It also appears that the order, directing the repairment of the impaired capital by an assessment, was made by the superintendent of banks on May 24, 1919, and that another regular meeting, no notice of which was required, could have been held on June 7th, just eleven days later. Even if the proceedings were not started on May 3, 1919, and if 60 days' time following May 24, 1919, was not sufficient to enable the assessment to be levied and collected, if proceedings were begun at the next regular meeting, the bank superintendent had the power, under section 136 of the Bank Act (St. 1909 p. 115), to take possession of the bank and "retain such possession until such bank shall resume business or its affairs be finally liquidated, as herein provided." The bank was already closed, and the superintendent of banks was vested with a certain discretion in the matter. It is not to be assumed, with his order being complied with as rapidly as legally possible, that, if a brief further delay appeared necessary, his action would have been any different than it apparently was in other phases of this case, where every effort seems to have been made to co-operate and assist in the early opening of the bank. We feel that no sufficient necessity is here shown for holding this meeting, other than in a legal manner. It must therefore be held that, because of the failure to give a notice to all of the directors of the bank, in accordance with the by-laws, no legal meeting of the board of directors of defendant bank was held on May 27, 1919, and, therefore, that the purported assessment then levied was void.

However, a further question arises, namely, whether one may, under such circumstances as existed here, come into a court of equity, seeking its broad and liberal relief, while basing his claim on the strictest possible interpretation of law, without himself offering to do equity. If the offending president, Moffere, had himself filed this action asking the relief here prayed for, having by his own theft created this situation, which more or less naturally led the defendants in good faith to put into the corporation $40,000 in cash, in an apparently honest desire to save the bank and serve the community, can it be imagined that a court of equity, which, as has been said, "is founded in conscience," would have heard him, and extended its broad powers to assist him, unless, at least, he offered to return the $40,000, thus mistakenly but honestly furnished by the defendants for the benefit of the bank? We think not.

[4-6] It is not in every case where there is a strict legal right to set aside a sale that a plaintiff may have relief in equity. His own actions are of the greatest importance. In Sayre v. Gas-Light & Heat Co., 69 Cal. 207, 7 P. 437, 10 P. 408, a sale of stock under an assessment was held invalid. But the plaintiff's assignor had considered the stock as practically valueless, and had waited until a reorganization of the company through the efforts of others had made the stock valuable, and it was held that, although his legal right existed, it was incumbent upon him to act with diligence; and in equity he could not acquiesce as long as the stock was worthless, but seek the aid of equity to reclaim it after it had become valuable through the exertion of others. It is the action of the party that is important, and, while a different rule here applies, the actions of the defaulting president in this case were far more inequitable than the actions of the stockholder in the case just mentioned. While time does not confirm a

void act (Civ. Code, § 3539), no one can take advantage of his own wrong (Civ. Code, § 3517). Nor is it merely in cases where the acts complained of are voidable and not void that this rule applies. An illegal contract is void; yet a party otherwise entitled to profit by this fact cannot be heard in equity if by his own acts he has participated in the wrong. In a proper case, equity may set aside the effect of a statute, in order to prevent an unconscionable thing, when the party seeking relief is an actor in the wrong involved. It would be hard to imagine a case where the conduct of a party seeking relief involves greater fraud or criminality than that found in the transaction that was the beginning and cause of the acts here complained of.

[7] There is no rule of equity more firmly established than the one which says that "he who seeks equity must do equity." This maxim means "that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy." Cox v. Hughes, 10 Cal. App. at page 561, 102 P. 956, 959.

[8] Nor is this rule that one who seeks equity must do equity confined to cases which were formerly cognizable only in equity. It applies as well to actions authorized by statute, and a plaintiff may be forced to do equity, as a condition of claiming rights fixed by statute and established law. Benson v. Shotwell, 87 Cal. 49, 25 P. 249, 681; Hancock v. Plummer, 66 Cal. 337, 5 P. 514; Brandt v. Wheaton, 52 Cal. 430; Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, 261, L. R. A. 1915C, 492. In the last-named case, which was a suit to quiet title as against certain tax deeds, the court said:

"Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession. * * *

"It will be observed from the statements of the rule above given that the defendant who has removed encumbrances or paid claims which the plaintiff ought justly to repay to him as a condition of obtaining the equitable relief sought by the suit is entitled to interest on the sums so paid, and to have the repayment secured to him in some manner."

[9] The particular kind of equitable remedy applied for is immaterial. Couts v. Cornell, 147 Cal. 560, 82 P. 194, 109 Am. St. Rep. 168. The rule is applied where a debt has been barred by the statute of limitations. Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844. It applies where a party, as *actor*, is appealing to a court of equity in order to obtain some equitable relief. It may apply to, and its operation may obtain for a defendant, an equitable right or equitable relief which he could not otherwise have obtained, in cases where even equity would not have assisted him in a suit brought by him as plaintiff, for that purpose. Holland v. Hotchkiss, supra; Coleman v. County of Los Angeles, 180 Cal. 714, 182 P. 440. Irrespective of the illegality of the assessment in the case at bar, it is obvious that, without the assessment and its payment, the stock concerned would have been valueless. It is worth contending for now, because the defendants paid a large sum of money to remove a condition as serious and as inescapable as that in the cases where taxes or assessments are justly due and a proper burden on the property involved and which must be repaid before an owner can, through the aid of equity, reclaim his property. Had Moffere protected his interests at the time, he would have had to return or pay a similar sum to meet the conditions he himself created. The amount having been paid for him by the defendants, for the benefit of his stock, under the peculiar circumstances here existing, we feel that the rule under discussion would apply to him if he were himself the plaintiff in this action.

[10] Another rule closely associated with the one just mentioned is that, "he who comes into equity must come with clean hands." In Allstead v. Laumeister, 16 Cal. App. 59, 116 P. 296, 297, the court quotes with approval the following explanation of the meaning of this rule, from Pomeroy's Equity Jurisprudence:

" 'It says that whenever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf to acknowledge his right, or to award him any remedy.' * * *

" 'Any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience.' "

The same opinion closes with this statement: "In any event, as stated, a court of conscience cannot consistently with the very principles which have occasioned its existence lend its aid to relieve a party from the results of his own fraud."

In Chateau v. Singla, 114 Cal. 91, 45 P. 1015, 1016, 33 L. R. A. 750, 55 Am. St. Rep. 63, which was an action in equity brought by one partner in an illegal business against another partner, the court said "Equity would no more entertain an action founded upon such contract, for the relief of either of the parties to it, than it would entertain an action between two thieves for an equitable division of their plunder." It appears to us it would very closely approximate the situation just quoted, as an illustration of the ultimate extreme, if one who, by his own theft, has created a situation that has quite naturally led other interested parties to put into a corporation $40,000 in cash, to protect themselves and others from the result of his robbery, all to the great benefit of the corporation, could come into a court of equity and ask to have their rights ended and the property turned over to him, without any offer of reimbursement, on the ground that, under a strict and stringent rule of law, the proceedings under which they had so acted, although apparently followed in an effort to comply with the law, were in fact and unfortunately illegal. We cannot so hold. If it were a question of comparative equities, the fact that defendants had mistaken their strict legal rights would pale into insignificance beside the guilt of the absconder. It is true that, as a general rule, equity will not aid a forfeiture or assist in divesting an estate, but in this case the parties who might be interested in sustaining the legality of the assessment and sale are not the *actors*. The burden is on the one coming into a court of equity for relief to prove, not only his legal rights, but his clean hands, and he may not rely on any deficiencies that may be laid at the door of the defendants. Unless the plaintiff brings himself within its rules, equity will leave the parties where it finds them.

"A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal, and ought not to be enforced, it will of its own motion instigate an inquiry in relation thereto." Kreamer v. Earl, 91 Cal. 112, 27 P. 735, 737.

[11] This rule applies not only to illegal *contracts*, but to illegal *transactions*. Equity will not aid the plaintiff when he has been guilty of merely fraudulent acts in the original transaction, which constitutes the foundation out of which the action for relief grows. Jose v. Utley, 185 Cal. 656, 199 P. 1037; Powell v. Bank of Lemoore, 125 Cal. 468, 58 P. 83; Brandt v. Krogh, 14 Cal. App. 39, 111 P. 275. The reasons for such a rule would seem even more potent where the guilt involved consists of acts, not only fraudulent, but criminal. The proceedings, which it is the object of this action to set aside, were the natural result of the attempt of the defendants to remedy the effects of a crime.

In Fritz v. Mills, 170 Cal. 449, 150 P. 375, 377, where a party paid a mortgage in accordance with the directions of a judgment, and where the judgment was later reversed, the Supreme Court said: "Upon these facts, we are of the opinion that the plaintiff is entitled to relief on account of the payment of said mortgage out of the money deposited in court, * * * The payment was made in good faith for the purpose of complying with the judgment given by the court and with the agreement which that judgment purported to enforce. The plaintiff cannot justly be made to suffer loss by such compliance, and it would be inequitable to allow the defendants to profit by a successful appeal taken after the plaintiff, relying on that judgment, had complied with its terms by paying money on the defendant's debt which the plaintiff was otherwise under no obligation to pay."

And, in a later hearing of the same case (Fritz v. Mills, 48 Cal. App. at page 335, 192 P. 92, 95), the District Court of Appeal uses this language: "If plaintiff shall now be denied the amount of money originally invested by her in this transaction, which is represented by the present judgment, and if appellants are allowed to take the property free and clear of a lien, toward the liquidation of which they contributed nothing, it would be manifestly unjust and contrary to the established principles of equity and justice. We can find no merit in the contention of appellants that the respondent does not come into court with clean hands."

[12] While ordinarily money paid under a mistake of law, is to be considered a voluntary payment, it may not always be inequitable if the inability of the plaintiff to establish his own case should result in protecting one who has made such an advance. It would be manifestly unjust and contrary to the principles of equity if one who, acting in good faith and on what, without doubt, appeared to be the best advice obtainable at the time, in an honest effort to protect himself, other stockholders, depositors, and the public, has paid a large sum of money to meet such a serious emergency, as here existed, could, after several years, be dispossessed and compelled to surrender what has been built up and made valuable by his own money, in an action in equity brought by the very one whose wrongful acts caused the emergency, and who contributed nothing to remedy it, unless the guilty party be compelled to restore the money so paid in. This is especially true when he had himself received and kept the money for which the payment so made was a substitute. And in this action we are asked, not only to allow the wrongdoer to keep his plunder, with-

out restoration, but to still further profit him by compelling his victims to pay an almost equal amount of his other debts.

[13, 14] If it be true that the attachment debtor, the absconder in this case, could not himself maintain this suit, without bringing himself within the rules of equity, we think the plaintiff here is in the same position. The lien of an execution and attachment proceedings attaches to the real and not to the apparent interest of a judgment debtor in and to his property, and the purchaser at an execution sale takes subject to such existing liens and equities as the property was subject to in the hands of the debtor, unless he can show he purchased the same without notice, either actual or constructive, of the existence of such liens or equities. Whitney v. Sherman, 178 Cal. 435, 173 P. 931; Riley v. Martinelli, 97 Cal. 575, 32 P. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209; De Celis v. Porter, 59 Cal. 464; Weston v. Bear River, etc., Co., 6 Cal. 425. The general rule has been applied to various kinds of cases. An execution sale of land in which the debtor has only an equitable estate operates only as an assignment of the equitable estate. Le Roy v. Dunkerly, 54 Cal. 452. Where the debtor is actually but a partial owner, the purchaser gets only his interest. Clark v. Cushing, 52 Cal. 617. An execution purchaser takes subject to a prior recorded mortgage, even though the record may not show a valid mortgage, as he is bound to make inquiry as to whether or not the record speaks the truth. Meherin v. Oaks, 67 Cal. 57, 7 P. 47. If the attachment creditor has no notice or knowledge to the contrary, he may rely on the entries on the books of a corporation as to who is the owner of the stock. West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 65 P. 622, 85 Am. St. Rep. 171. We think the converse is also true, and that, where the stock has been transferred on the books of the corporation, an attachment creditor takes subject to any existing equities; that, if he desires to obtain the benefits of the stock as it actually is, he must also assume its burdens as actually existing. A pledgee is protected in his rights as against attaching creditors if he has caused to be entered in the books of the corporation a statement of his interest in the stock. Spreckels v. Nevada Bank, 113 Cal. 272, 45 P. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348.

[15, 16] The plaintiff had no rights in this matter prior to the levy of his attachment. It is probably a reasonable inference from the facts that he had actual notice at that time, as it is improbable he would have attached stock standing in the name of other people on the books of the corporation, claiming the real owner to be Moffere, unless he had theretofore investigated and found out the actual situation. In any event, he must be held to have had constructive notice. Constructive notice in relation to interests in corporation stock is given, not by instruments filed in the office of the county recorder as in the case of interests in real estate, but by entries in the books of the corporation. The possession and control of the stock here in question and the business of the corporation, by the defendants, and the entries in the books, including the purported cancellation of Moffere's stock and the reissue of the substituted stock to the defendants, were constructive notice to plaintiff of any defects in Moffere's title, and of any equities existing against his interest, arising out of the transaction involved in this proceeding. Moffere had the right, subject to the rules of equity, to set aside the purported sale of his stock. The plaintiff acquired this same right, but subject to, and not in disregard of, those same rules.

The plaintiff is claiming under a certificate based upon a sale under execution. Such a certificate conveys to him all the right which the debtor had in the property in question on the day the attachment was levied (Code Civ. Proc. § 699), and nothing more. The plaintiff stands in the shoes of the debtor. Such rights as the debtor had were limited by such restrictions as are placed upon their enforcement by the rules of equity. Long before the attachment was levied, the debtor had himself taken the real value of his holdings, leaving only what was worse than an empty shell. The debtor having, by his own acts, placed himself where he must do equity before asking for relief, has to the same extent tied the hands of the plaintiff. "He who takes the benefit must bear the burden." Civ. Code, § 3521. The plaintiff is asking a court of equity to give him, not only the benefits, without the burdens, of his debtor's position, but to include benefits created and put in by others.

On the first appeal of this case, when only the facts alleged in the complaint were before it, the court remarked that this was one of the "hard" cases that make "bad law." This was the case when, as then appeared, the defendants had voluntarily stepped in and, in a misguided manner, attempted to assist a bankrupt institution when the judgment debtor appeared blameless, with no equities appearing against him. It now appears that the judgment debtor is not merely the unfortunate owner of stock in a bank that has become involved in difficulties, but is himself guilty of robbing the bank. When such equities as have been enumerated appear, and there appears such a failure to come within the rules of equity on the part of plaintiff's predecessor, which failure is binding on the plaintiff, it becomes unnecessary and impossible to so hold as to violate the conscience of a court of equity. When a man who has obtained control of the majority of the stock in a bank, robs the bank, wrecks the institution, paralyzes the community, and jeopardizes the rights of other stockholders and depositors, secretes himself so that notice of meetings may not be served on him, and, when other interested parties have in good faith taken effective, but unfortunately not strict legal, measures to meet the emergency, and have replaced the money out of their personal funds, under such circumstances as exist in this case, his creditor may not, after waiting for years, during which time values have increased, come in and, although having constructive, if not actual, notice of the existence of the equities, take the results of the labor and money of others, without doing the equity he asks for himself. To hold otherwise would be to hold that a court of equity is too feeble and impotent to do justice and to require justice in so new and so unusual a situation. We think that, while the facts are new and passing strange, the fundamental principles of equity are broad enough to meet the situation. The framers of our statutes cannot foresee such contingencies as this, but equity opens many a door closed by the strict rules of law. To apply the strictest rules of technical law alone, to this case, as demanded by the plaintiff, would work an injustice, and would give to him, not only the pound of flesh he claims, but also innocent blood to which he is not entitled.

[17] Respondent contends that this action is barred by section 341, subd. 2, of the Code of Civil Procedure and section 347 of the Civil Code. There is no merit in this contention. Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 P. 143; Cheney v. Canfield, 158 Cal. 342, 111 P. 92, 32 L. R. A. (N. S.) 16; Richmond v. Bank of Perris, supra.

[18] The only other point calling for attention is one raised by a supplemental brief filed by appellant, in which attention is called to the case of Wood (State Superintendent of Banks) v. Hamaguchi et al. (Cal. Sup.) 277 P. 113. It is argued that in this case it was held that the State Bank Act is void, and therefore, since the act under which the whole proceedings were taken resulted in the sale of the stock involved in this action is void, the purported sale of stock herein is also void, and the plaintiff entitled to recover. A casual inspection shows the fallacy of this argument. It was held in the case cited that Act 653 of Deering's General Laws 1923, is void and unconstitutional, being in conflict with section 3, art. 12, of the Constitution, because it attempts to create a personal liability for corporation debts, even when not incurred during the time the stockholders sought to be charged held the stock. But this case pointed out that provisions for assessments upon paid-up stock, enforceable only by the sale of the stock, do not deal with the personal liability of the stockholder, and hence are not in conflict with this section of the Constitution. All of the proceedings in this case were taken, or attempted to be taken, under section 133 of Act 652 of the same General Laws, which provides only for the enforcement of assessments by the sale of the stock, with no attempt to create a personal liability. Not only does the case relied on not apply to the case at bar, but the plaintiff, in asking equitable relief, subjects himself to the requirements of equity, as above set forth.

For the reasons given, the judgment is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

102 Cal. App. 110

IRWIN v. NEWBY et al. (Civ. 7099.)★

District Court of Appeal, First District, Division 2, California. Nov. 20, 1929.

Rehearing Denied Dec. 19, 1929. Hearing Denied by Supreme Court Jan. 16, 1930.

1. Libel and slander 🔑80—Complaint alleging libel in "pretended" cross-complaint, not uniformly so characterized, held not demurrable, in view of allegations showing that it was in a pleading filed by defendant.

Complaint stating that alleged libelous matter was in "pretended" cross-complaint, filed by defendant in former action by plaintiff *held* not demurrable because not uniformly so characterizing cross-complaint, in view of other allegations showing that libelous matter was in a pleading filed by defendant.

2. Libel and slander 🔑80—Plaintiff alleging publication of libel in pleading filed in judicial proceeding was bound to allege facts disproving privilege (Civ. Code, § 47, subd. 2).

Where face of complaint showed that alleged libelous matter was published in cross-complaint or other pleading filed by defendant in judicial proceeding against her by plaintiff, it was incumbent on plaintiff to allege facts showing that matter was not privileged under Civ. Code, § 47, subd. 2.

3. Libel and slander 🔑97—Privilege may be raised by demurrer to complaint showing publication of alleged libel in judicial proceeding (Civ. Code, § 47, subds. 1, 2).

While plea of privilege is a defense to action for libel, the privilege may be raised by demurrer when complaint shows that alleged libel was published in a judicial proceeding or comes under either subdivision 1 or subdivision 2 of Civ. Code, § 47.

4. Libel and slander 🔑80—Allegation that court struck out alleged libelous matter in pleading as immaterial, irrelevant, and sham held insufficient, in absence of allegation that order had not been vacated or become final.

Allegation of complaint, in action for libel, that court struck out libelous matter, alleged to have been published in pleading filed by defendant in plaintiff's former action against her, on ground that it was immaterial, irrelevant, and sham, *held* insufficient allegation of finality to make order binding judgment against defendant, in absence of allegation that it had not been vacated or set aside, nor become final.

★Rehearing denied. Hearing denied by Supreme Court.

5. Libel and slander 🔑38(3)—Mere fact that defamatory matter, published in judicial proceeding, is irrelevant or insufficient defense, does not destroy privilege (Civ. Code, § 47, subd. 2).

Mere fact that alleged defamatory matter, published in pleading of defendant in former action between parties, is irrelevant as matter of law or insufficient as defense, does not bring it within exception to privilege given by Civ. Code, § 47, subd. 2, but it must have no reasonable pertinency to matter involved in subject-matter of pending action and no relation or reference to cause in hand.

6. Libel and slander 🔑38(3)—Wife's cross-complaint, alleging that plaintiff fraudulently proceeded with sheriff's sale to rob her of interest in stock levied on as husband's held privileged (Civ. Code, § 47, subd. 2).

Wife's cross-complaint, alleging that plaintiff and others fraudulently proceeded with pretended sheriff's sale of husband's stock in corporation to satisfy judgment against him for purpose of robbing her of her interest therein, *held* within privilege accorded publications in judicial proceedings by Civ. Code, § 47, subd. 2, even if insufficient as matter of law.

7. Libel and slander 🔑129—Each of several defendants is entitled to $100 attorney's fee on dismissal of single plaintiff action for slander (Deering's Gen. Laws 1923, Act 4317, § 7).

St. 1871–72, p. 534, § 7 (Deering's Gen. Laws 1923, Act 4317, § 7), does not require that $100 attorney's fee, allowed as costs, be divided among several defendants appearing separately, on dismissal of action by single plaintiff for slander; each defendant being entitled to such fee.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Harry M. Irwin against Nathan Newby and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Wm. A. Alderson and John C. Packard, both of Los Angeles, for appellant.

Newby & Palmer and Newby & Newby, all of Los Angeles, for respondent Stockwell.

Dee Holder, of Los Angeles, for respondents Palmer and Newby.

KOFORD, P. J. In this action defendants' demurrer to plaintiff's complaint was sustained. A judgment of dismissal followed, and the plaintiff has appealed. The action was for libel. The main point of the demurrer was that the complaint showed upon its face that the alleged defamatory matter was privileged under the provisions of subdivision 2 of section 47 of the Civil Code, which makes a publication privileged if made in a judicial proceeding. It appears from the face of the complaint that the alleged libelous matter was published in the allegations of a cross-complaint filed by the respondent B. C. Stockwell and respondents Newby and Palmer, her attorneys, in a previous action entitled McAlvay v. Consumers' Salt Company (a corporation) and B. C. Stockwell. The appellant contends that the privilege given by subdivision 2 of Civil Code, § 47, has an exception, and that the alleged defamatory matter comes under the exception. The exception is that such privilege given to judicial proceedings will not be allowed to serve as a cloak to conceal a palpable libel where not necessary to preserve the legitimate freedom of action of the parties in a judicial proceeding. In Carpenter v. Ashley, 148 Cal. 422, 83 P. 444, 445, 7 Ann. Cas. 601, it is stated: "The great weight of authority, however, is that this privilege is not absolute, but is limited to words which have some reasonable pertinency, or relevancy, or reference to the matter involved as the subject-matter of the pending action. * * * 'The privilege of counsel in the trial of a cause is not absolute and unqualified, and slanderous words spoken by him having no relation or reference to the cause in hand or to any subject-matter involved therein are actionable.'"

The complaint tells the following things about the litigation leading up to the alleged libel: B. D. McAlvay obtained a judgment of $16,000 against V. E. Stockwell in action No. 147367. Under execution issued in that case the sheriff sold all the interest of said V. E. Stockwell in 225,000 shares of the capital stock of Consumers' Salt Company. In all the proceedings in said action the plaintiff and appellant herein was the attorney for the plaintiff McAlvay therein. Said McAlvay next instituted action No. 184338 against said Consumers' Salt Company and B. C. Stockwell, and "the sole issue made by the pleadings in said action number 184338 is whether at the time of the levy of the said execution * * * said B. C. Stockwell was the owner of said 225,000 shares * * * as her separate property or whether said V. E. Stockwell was the owner of said 225,000 shares at said time either as his separate property or as community property." In said action B. C. Stockwell, defendant therein, filed a cross-complaint signed by herself and the other defendants, her attorneys therein. It contained the matter which is alleged to be libelous. We quote it as it is quoted in the complaint herein:

"Cross complainant avers that the said B. D. McAlvay and the said Harry M. Irwin and A. H. Rose frauduently proceeded with said pretended sheriff's sale with the intent and purpose of robbing this cross complainant of her interest in the said two hundred twenty-five thousand (225,000) shares of the capital stock of said Consumers Salt Company. * * * and as the price and award for a successful conspiracy to wrongfully deprive this complainant of her property."

[1] Emphasis is made of the fact that the

complaint states that the libelous matter was in a pretended cross-complaint, but the cross-complaint is not so characterized uniformly in the complaint. Whatever force should be given to the adjective "pretended" in this case, the other allegations in the complaint show that the libelous matter was in a pleading filed by the defendant in an action which put in issue the title to certain capital stock in which said defendant claimed an interest. It is of no consequence in this action whether it was stated in a cross-complaint or stated in an answer as a matter of defense.

[2, 3] It fairly appears from the face of the complaint that the alleged libelous matter was published in a judicial proceeding either in a cross-complaint or some other pleading filed by B. C. Stockwell, a defendant therein. From this fact it follows that the matter was privileged, unless the matter was such as to come within the claimed exception to the privilege granted by Civ. Code, § 47, subd. 2. It was therefore incumbent upon appellant herein to go still further with allegations of fact in his complaint in order to show that the matter was not privileged. While the plea of privilege is a defense, the privilege may be raised by demurrer when the complaint shows that the publication of the alleged libel was made in a judicial proceeding or comes under either subdivisions 1 or 2 of Civil Code, § 47. Stevens v. Snow, 191 Cal. 58, 64, 214 P. 968, and cases cited; Reid v. Thomas (Cal. App.) 279 P. 226.

[4, 5] Appellant claims that his complaint meets this test. He does not rely upon the general allegations in the complaint which allege that the libelous matter was not pertinent, relevant, material, or a matter of defense which said B. C. Stockwell was entitled to file in said action. These allegations would not overcome statements of detailed facts in the complaint, if such facts would make the matter privileged. There is also an allegation in the complaint herein that the court struck out the alleged libelous matter upon the ground that it was immaterial, irrelevant, and sham, but the allegation falls short of alleging such finality to the order as would make it a binding judgment against B. C. Stockwell. It is not alleged that said order has not been vacated or set aside nor has become final. To show that the matter was irrelevant and immaterial, appellant especially relies upon the point that the sheriff is alleged to have sold all the interest of said V. E. Stockwell in said shares of stock. It is argued that this means that the interest of B. C. Stockwell was not affected; that, because her property was not sold, she could have no cause of action on account of the sale. The mere fact that the alleged defamatory matter is irrelevant as a matter of law or that it is insufficient as a defense does not bring it within the exception contended for by appellant. It must go further. As stated in Carpenter v. Ashley, supra, it must have no reasonable pertinency to the matter involved in the subject-matter of the pending action and have no relation or reference to the cause in hand. In Taylor v. Iowa Park Gin Co. (Tex. Civ. App.) 199 S. W. 853, at page 855, the kind of relevancy meant by the rule is thus explained: "As to the degree of relevancy or pertinency necessary to make alleged defamatory matter privileged, the courts favor a liberal rule. The matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety. In order that matter alleged in a pleading may be privileged, it need not be in every case material to the issues presented by the pleadings. It must, however, be legitimately related thereto, or so pertinent to the subject of the controversy that it may become the subject of inquiry in the course of the trial. The fact that the person alleged to have been defamed in the pleadings is not a party to the proceedings has been held not to detract from the privileged character of the publication."

[6] Measured by the rule as thus explained, it follows that the respondent B. C. Stockwell, as a defendant in the previous action, and her attorneys therein, were acting within the privilege accorded judicial proceedings. The judgment sought against her in that action would estop her from asserting title to the capital stock sold under execution. She claimed an interest in it. She claimed the sale was a fraud upon her. She had a right to say so and plead it in her defense. In doing so she was acting within the privilege, even though her pleading may have been insufficient as a matter of law.

[7] In taxing costs the court awarded $100 attorney fees to each of two defendants who appeared separately. Such attorney fees are allowed as costs under the terms of St. 1871–72, p. 533, Deering General Laws 1923, part one, p. 1620. The constitutionality of this law has been upheld. Smith v. McDermott, 93 Cal. 421, 29 P. 34; Gaffey v. Mann, 5 Cal. App. 712, 91 P. 172. The fact that there is but one plaintiff and two or more defendants does not require an interpretation of the statute which will permit a total of but $100 attorney fees for defendants to be divided amongst them. While appellant states that such a construction is necessary in order to avoid an unconstitutional discrimination between parties plaintiff and defendant, the respondents state that the construction contended for by appellant would itself lead to such a discrimination by giving a successful plaintiff more for his attorney than a successful defendant who might be jointly sued with others without any choice on his part. The interpretation asked for by appellant was disapproved in Hills v. Schaeffer (Cal. App.) 274

P. 388. The $100 attorney fees is properly awarded as costs to any successful party.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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PEOPLE v. OLIVER.★ (Cr. 2.)

District Court of Appeal, Fourth District, California. Nov. 15, 1929.

Hearing Denied by Supreme Court Dec. 14, 1929.

1. Licenses 🔑40—Promoter accused of selling securities without permit held bound by signature to contract, where his name was signed by another in his presence at his express direction (Corporate Securities Act 1917, § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12).

In prosecution for selling securities without permit, in violation of Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12, promoter *held* bound by signature to subscription contract signed by another in promoter's presence and at his express direction.

2. Licenses 🔑42(4)—Testimony of purchasers of subscription contracts held sufficient to sustain conviction for selling securities without permit (Corporate Securities Act 1917, § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12).

Evidence consisting of testimony of three purchasers of subscription contracts for stock issued by promoter *held* sufficient to sustain conviction for sale of securities without permit, in violation of Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12.

3. Licenses 🔑40—Contracts of promoter to organize corporation, license it to his patent rights in return for stock, and to deliver some of such stock to subscriber, under which contract subscriber made payments, held illegal (Corporate Securities Act 1917, § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12).

Contracts of promoter to organize corporation, to license corporation to use his patent rights, and to issue and deliver certain stock to subscriber, in consideration of payments of money made by subscriber, which stock was to come from that received by promoter for his license to use patent rights in California, constituted agreement of promoter's own issue rendering him liable for selling securities without permit, in violation of Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12, since contracts were preorganization subscriptions to capital stock of foreign corporation, not set forth in articles of incorporation, and since promoter collected thereunder portion of consideration.

4. Licenses 🔑40—That corporation, contemplated in subscription contracts, was not then in existence, did not relieve promoter from liability of unlawfully selling securities; "security" (Corporate Securities Act 1917, § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12).

Contract of promoter to organize corporation and issue stock therein to subscriber, in return for which subscriber made payments, constituted sale of "security" within meaning of Corporate Securities Act (St. 1917, p. 675), § 2, subd. 8, as amended by St. 1925, pp. 962, 963, § 1, defining security as present right to present or future participation in income or assets of business carried on for profit, and fact that stock was to be issued and delivered at future date, and that the delivery was contingent also on promoter's sale to corporation of interest in patent, did not relieve promoter from liability for violation of Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subds. 3, 6, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Security.]

5. Licenses 🔑40—Interest in corporation's assets or income not returning profit until performance of future act may be a "security" (Corporate Securities Act 1917, § 3, and § 2, subd. 8, amended by St. 1925, pp. 962, 963, § 1).

Fact that interest given subscriber in assets or income of corporation will not return profit until performance of a future act, such as the sale of an interest in the patent, or a grant to the licensee of a right to use it, does not prevent interest from being a security within definition of term contained in Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subd. 8, as amended by St. 1925, pp. 962, 963, § 1, prohibiting sale of securities without authority from commissioner.

6. Criminal law 🔑1137(5)—Defendant's counsel who permitted witness to testify that his contract was similar to another could not on appeal object that secondary evidence was admitted.

Defendant's counsel having permitted witness to testify that he had read another contract which was introduced in evidence, and that his own contract was similar, could not complain for first time on appeal, in prosecution for illegal sale of securities, that secondary evidence was admitted in trial court.

7. Licenses 🔑40—Unit representing division of assets of business carried on for profit is "security" within statute licensing sale of securities (Corporate Securities Act 1917, § 3, and § 2, subd. 8, as amended by St. 1925, pp. 962, 963, § 1).

Unit issued by individual representing a division of the assets of a business carried on for profit or right to participate in profits, earnings, or income derived from such assets is a security under Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subd. 8, amended by St. 1925, pp. 962, 963, § 1, defining term security and requiring license from commissioner for sale

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★Hearing denied by Supreme Court.

thereof; capital stock not being limited to amount derived from issuance of shares in corporation, but including money invested in business operations of individual or partnership.

8. Licenses 🔑40—Contracts for subscription to units in syndicate to be organized constituted "sale of securities" by company within statute requiring permit (Corporate Securities Act 1917, § 3, and § 2, subds. 3, 6, 8, amended by St. 1925, pp. 962, 963, § 1).

Contract entered into by promoter with subscriber on organization of syndicate for issuance of unit therein to subscriber constituted contract for sale of securities under Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subd. 8, amended by St. 1925, pp. 962, 963, § 1, defining term "security" and requiring permit from commissioner for "sale of securities," since syndicate possessed all necessary characteristics of company as defined by section 2, subds. 3, 6, as amended by St. 1925, pp. 962, 963, § 1.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Sale of Securities.]

9. Licenses 🔑42(4)—Admission of articles of newly organized corporation bearing name of that set forth in subscription contracts, but organized in different state, held admissible in prosecution of promoter for selling securities without permit (Corporate Securities Act 1917, § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12).

In prosecution of promoter for violation of Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12, requiring license from commissioner before any company may sell its securities, admission in evidence of exemplified copy of articles of incorporation of corporation organized in Nevada bearing same name as corporation referred to in subscription contracts entered into by promoter, except for state of domicile designated, *held* not error.

10. Criminal law 🔑878(4)—Acquittal on counts charging promoter with selling corporation's securities and conviction for issuing and collecting for subscription agreements held not inconsistent, where promoter agreed to deliver stock which he should obtain from sale of patent rights (Corporate Securities Act 1917, § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12).

In prosecution of promoter for violation of Corporate Securities Act (St. 1917, p. 675), § 3, and § 2, subds. 3, 6, 8, 9, § 25, amended by St. 1925, pp. 962, 963, 972, §§ 1, 12, verdicts of guilty on counts charging promoter with selling and issuing subscription agreements and collecting therefor *held* not inconsistent with verdict of not guilty on counts charging sale of securities of corporation, where contract entered into by promoter provided for his organization of corporation and for issuance to subscribers, in return for present payments, of stock which promoter was to receive for transfer of patent right to corporation.

11. Criminal law 🔑1167(2)—Where trial court pronounced sentence on only one count, defendant could not complain that more than one penalty was inflicted.

Where trial court suspended judgment on five of six counts of information, under which defendant was convicted, and imposed sentence on remaining count, defendant could not object on appeal that all of counts charged only a single offense, for which but one penalty could be inflicted.

12. Criminal law 🔑1144(17)—It must be assumed that trial judge suspending sentence would not subsequently impose double penalty for single offense.

Where several counts under which defendant was convicted charged single offense, but trial court suspended pronouncement of judgment on all of counts but one, it must be assumed that trial judge, in case of defendant's violation of probation, would not impose double penalty for single offense.

13. Criminal law 🔑1144(½)—Appellate court cannot anticipate error on part of trial court.

Appellate court cannot anticipate that trial court will commit error.

Appeal from Superior Court, Riverside County; F. A. Leonard, Judge.

Dew R. Oliver was convicted of violation of the Corporate Securities Act, and he appeals. Affirmed.

Theodore Stensland, of Los Angeles, and Trent Penland and J. R. Le Gallez, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

MARKS, J. By an information, filed by the district attorney of Riverside county on the 23d day of April, 1929, appellant was accused of violation of the Corporate Securities Act in nine counts thereof, and of grand theft in two counts thereof. Count 11, charging grand theft, was dismissed. The jury found the appellant guilty on counts 1, 3, 4, 6, 8, and 10, all of which charged violations of the Corporate Securities Act; and not guilty on counts 2, 5, and 9, charging violations of the same act, and also not guilty on count 7, charging grand theft. After the verdict was entered, appellant filed his motion for new trial, which motion was denied. He then applied for probation, which was granted on counts 1, 3, 6, 8, and 10, for the period of two years with the ordinary requirements and restrictions, and pronouncement of judgment was suspended. On count 4, the trial court sentenced appellant to two years in the county jail, and granted him probation, in which he suspended one year and nine months of the jail sentence, and imposed the other conditions of probation applying to the other counts. The offenses of which the appellant was convicted were committed during the months of May, June, and July, 1927.

Counts 1 and 3 of the information are based upon a transaction between appellant and Grant Powell, which is evidenced by a written contract, dated July 5, 1927, and entitled "Memorandum of Agreement for the promotion of The Oliver Electric Power Corporation of California or State of Delaware." Stripped of its verbiage, this contract provided: That appellant was the owner of certain patents and patent rights; that it was proposed to organize a corporation to which appellant agreed to transfer and assign the exclusive right to use said patent rights for the state of California, retaining, as a consideration for such assignment, one-third of the capital stock of the corporation; in consideration of the payments of money to him by Powell, appellant agreed to deliver, assign, and cause to be transferred to Powell certain shares of stock of the corporation when organized out of stock which appellant was to receive for his license to use the patent rights in California.

Powell paid Oliver $50 on July 5, 1927, the date of the contract, $50 on August 1, 1927, $50 on September 23, 1927, and $50 on October 16, 1927. According to the contract, the money was to be used by appellant in advertising the merits of his patents, organizing the corporation, and interesting the public in the purchase of stock therein.

[1] The contract bears the signature "Dew R. Oliver by Frank S. Trump." Trump testified that he signed the name "Dew R. Oliver" to the contract in appellant's presence and at his express direction, and that the payments made by Powell were all paid to Oliver. Appellant contends that under these circumstances the signature to the contract is not his, and that he cannot be held bound by it. In this state the law is too well settled to the contrary to need the citation of authorities.

In the first count of the information appellant is accused of having sold and issued to Powell one subscription agreement purporting to convey an interest in a business to be carried on for profit without a permit from the commissioner of corporations, and in the third with collecting the sum of $50 from Powell on said contract at the same time without having any permit so to do.

Counts 4 and 6 of the information probably are based upon a contract, signed by appellant and Frank S. Trump, different from the Powell agreement. The record is not clear as to whether this contract was similar to the Powell agreement or to the one issued by appellant to Josephine Roach Trump, wife of Frank S. Trump. The opening paragraphs of this agreement are as follows: "Pre-organization Syndicate. Oliver Electric Power Corporation of Delaware. To be incorporated under the laws of Delaware. Capital Stock $25,000,000.00. Divided into 250,000 shares. Par value $100.00 each. Organization stock 82,500 shares. Syndicate stock 5,000 shares. Treasury stock 162,500 shares. This syndicate is being organized for the purpose of underwriting a block of five thousand shares of the capital stock of the above proposed company at ten dollars per share. To provide immediate funds for the incorporation, organization and promotion of a parent holding and operating company, and the building of demonstration models, etc. Capital of Syndicate $50,000.00 divided into five thousand equal units of $100.00 each. Subscription contract to Dew R. Oliver. * * * I hereby subscribe for thirty units, or shares, of the preorganization syndicate being organized by you, to underwrite a block of five thousand shares of the capital stock of the proposed Oliver Electric Power Corporation of Delaware * * * and agree to pay you three hundred dollars for same upon the following express terms and conditions, to wit: One. The sum of $300.00 upon the signing of this subscription, the receipt whereof is hereby acknowledged." The contract is long and verbose. It provides for the exchange of units for stock in the corporation, for additional subscriptions in excess of $300, and that all payments be made to Dew R. Oliver, syndicate manager. Trump made several payments to appellant; the one in question being paid on May 25, 1927.

The eighth and tenth counts are based on a sale to Frank Cessna on June 19, 1927. The Cessna contract was not in evidence, but he testified, without objection, that it was similar to the Powell contract, which he had read. He paid appellant $50 on the last-named date.

In the fourth and eighth counts of the information appellant is accused of the sale of securities to Trump and Cessna, respectively, and in the sixth and tenth counts with the collection of money from these two purchasers in connection with the same sales and at the same time.

Appellant urges four grounds for reversal as follows: (1) That the evidence was insufficient to justify the verdict; (2) that the court erred in rulings on questions of law during trial; (3) that the court erred in its instructions to the jury, and in refusing to give, and in modifying, the instructions proposed by appellant; (4) in denying appellant's motion for new trial. The grounds urged under the fourth assignment of error were the same as those presented under the other three, so it will not be necessary to consider it separately.

[2] Under his first assignment of error appellant insists that the evidence was not sufficient to justify the verdict, because the three purchasers were the only witnesses produced against him, and because the contracts issued by appellant were not in violation of the Corporate Securities Act.

The testimony of one competent witness, when accepted by the jury, is sufficient to sustain a verdict. The testimony of Powell, Trump, and Cessna was each corroborated by the other, and was also supported by documentary evidence and other evidence. It was not contradicted, and amply supports the verdict.

[3] We also conclude that appellant's second contention under this assignment of error is without merit. The Corporate Securities Act (Stats. 1917, p. 673, c. 532), as amended by the Legislature in various sessions down to and including the one in 1925 (St. 1925, p. 962, c. 447), in so far as it applies to this case, provides as follows:

Section 2, subd. 3: "The word 'company' includes all domestic and foreign private corporations, associations, joint stock companies, and partnerships, of every kind, trustees, as hereinafter defined, and also individuals as hereinafter defined; * * *."

Subdivision 6: "The word 'individual' in so far as it is included in the definition of a 'company' includes only persons selling, offering for sale, negotiating for the sale of, or taking subscriptions for any security as hereinafter defined in subdivision eight of this section, of their own issue."

Subdivision 8: "The word 'security,' in so far as it applies to 'individuals' includes: * * * (c) Any instrument offered for sale, or sold, or issued, to the public by an 'individual,' evidencing or representing any right to participate or share in the profits, earnings or income, gross or net, derived from the assets, or any thereof of any business carried on for profit or in the distribution of such assets; excepting therefrom any lease, not offered to the public, whereby the lessee obtains the right to use or control the property leased and to receive for his use, in whole or in part, the profits, earnings or income derived from the property so leased."

Subdivision 9: "A 'sale,' within the meaning of this act, includes every contract, by which, for a pecuniary consideration, called a price, one transfers to another an interest in property, and also an exchange, a pledge, a hypothecation, and any transfer in trust or otherwise as security for the performance of an obligation, and also any issue of any security by a company; and the word 'sell,' as used in this act, includes every act by which such sale is made; * * *."

Section 3 (St. 1917, p. 675): "No company shall sell * * * or offer for sale, negotiate for sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do.

Section 25 as amended (St. 1925, p. 972, § 12): "Neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic corporation made prior to the incorporation thereof and set forth in the articles of incorporation; but such subscription shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter and, when incorporated, shall with reasonable diligence apply for and secure from the commissioner a permit authorizing the issue of the shares so subscribed for, in accordance with such subscriptions; provided, however, that except as may be specifically required by any law of this state, nothing herein contained shall be construed as permitting the collection of any portion of the consideration to be paid on account of such subscriptions, unless and until a permit shall have been issued by the commissioner authorizing such collection; nor except as may be specifically required by any law of this state, nothing herein contained shall be construed as permitting the taking of subscriptions for any security of any company other than a domestic corporation or to make collection of any portion of the consideration to be paid on account of subscriptions unless and until a permit shall have been issued by the commissioner authorizing the taking of such subscriptions or the collection thereof."

The record before us shows that the appellant stipulated that neither he nor the Oliver Electric Power Corporation ever applied for or received a permit to sell stock.

Appellant attacks the verdict under the Powell contract, asserting that he could not be deemed a "company" under the definition of the Corporate Securities Act, either by reason of acting as a "trustee" or an "individual" as therein defined. For the purpose of this opinion it is not necessary to decide whether or not appellant acted as a "trustee" in this transaction.

In the Powell contract appellant entered into a personal obligation to organize the Oliver Electric Corporation, to license this corporation to use his patent rights in California, and to issue and deliver certain stock in the corporation to Powell, which stock was to come out of certain stock to be issued to appellant by this corporation for the license to use the patent rights. Certainly this was an agreement of "appellant's own issue." He was the chief party to benefit by it, if the patents proved successful. The contract was a preorganization subscription to the capital stock of a foreign corporation not set forth in the articles of incorporation, and under which appellant collected a "portion of the consideration on account of such subscription," both acts being prohibited by section 25 of the Corporate Securities Act as amended.

[4, 5] Appellant contends that, because the proposed corporation was not in existence, and might never be organized by appellant, no crime was committed in agreeing to sell its stock and accepting payment therefor. This is indeed a novel contention. If the corporation were formed and the stock were available, the sale without a permit would be admittedly illegal, but, if the corporation were not formed, the promoter would escape punishment because of his own fraud in refusing to organize it, one of the very things for which he accepted the money from his purchaser. We cannot subscribe to any such doctrine.

If the instrument of sale creates a present right to a present or a future participation in either the income, profits, or assets of a business carried on for profit, it is a "security," as defined in the Corporate Securities Act. Because the interest created will not return a profit until the performance of a future act, such as the sale of an interest in a patent, or the grant to a licensee of the right to use it, does not bring it without the provisions of this act. Agnew v. Daugherty, 189 Cal. 446, 209 P. 34. To hold otherwise would make the real test of the legality or illegality of the sale the ultimate success or failure of the venture. The law was passed to protect the investors against unprincipled promoters, as well as to keep valueless securities off the market. It is the act of selling that is primarily placed under the examination of the commissioner of corporations, and his action in granting or withholding his permit to sell cannot be made contingent upon the future success or failure of the business venture. To hold otherwise would put a premium on fraud and permit a promoter to sell a mythical security without any intention of ever attempting to engage in the business in which he purported to sell an interest.

Because the stock in a corporation was to be issued and delivered at a future date is no defense to this action. Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285.

In the case of Reno v. American Ice Machine Co., 72 Cal. App. 409, 237 P. 784, 785, the court used the following language: "No application to issue the stock attempted to be sold to plaintiff, and containing a copy of the contract for the sale thereof, was ever made to the commissioner of corporations prior to the commencement of this action, and it was never possible for the defendant company to have lawfully issued its stock to plaintiff. That being true, we think it must follow that the contract for the sale of the same was void. Section 12 of the Corporate Securities Act provides that any security issued without a permit shall be void. But appellant contends that this provision does not apply to a contract for the sale of stock. Can it be contended seriously that, while an executed contract forbidden by statute is void, the same contract, while executory, is valid? If the issuance of the stock to plaintiff during the term of his employment by the defendant would have been void, certainly the contract for the issuance of the same was equally void."

[6] Appellant complains of the verdict on the two counts in the Cessna transaction because Cessna's contract was not produced in evidence. It appears that it could have been obtained by Cessna, but, without objection, counsel for appellant permitted him to testify that he had read the Powell contract, and that his was similar to Powell's. Counsel cannot be heard to complain here for the first time that this secondary evidence was admitted in the trial court when by objection there they could have kept it out of the record and compelled the introduction of the written agreement.

It appearing that the Cessna contract was similar to Powell's, it will not be necessary to consider it further. The same is true of the Trump contract, if the Powell form was used. If, however, the form of the contract between appellant and Mrs. Trump were used, it needs further consideration. In so far as this contract provided for the purchase of stock in the Oliver Electric Power Corporation, by Trump and others from Oliver, what has already been said concerning the Powell contract will apply.

[7, 8] This contract went further than the Powell contract, in that it purported to organize a syndicate, with a capital of $50,000, divided into 5000 equal units of $100 each. The contracts were signed by appellant, and the subscriptions were paid to and expended by him. The syndicate was a child of his brain, and the contracts were of his own issue. He undoubtedly expected to profit by the undertaking by using the money paid to him by the subscribers, to build demonstration models of his invention, and to organize, incorporate, and promote the corporation that would put his invention to practical use in the industrial life of the state. The subscribers undoubtedly expected to share these profits in participating in stock of the corporation which they were to receive at a price much below par.

This syndicate possessed all of the necessary characteristics of a "company" as defined in the Corporate Securities Act. It had a capital stock of $50,000, divided into 5,000 units of the par value of $100 each, which were sold in blocks of 30 for $300, and were exchangeable on the basis of one unit for 10 shares of the capital stock of the Oliver Electric Corporation of Delaware. The mathematics of the proposed transfer were not carefully worked out by appellant. According to his contract, he proposed to set aside only 5,000 shares of the corporate stock with which to effect the exchange when 50,000 shares would have been necessary. This, however, only changes the amount to be received by the subscribers, and not the general plan of operation which must control. If a unit issued by an individual represents a division of the assets of a business carried on for profit, or in the distribution thereof, or the right to participate in the profits, earnings, or income derived from such assets, it is a security under the definition of subdivision 8, section 2, of the Corporate Securities Act as amended. In re Girard, 186 Cal. 718, 200 P. 593. "While the term 'capital stock' is often used in the sense of the amount derived from the issuance of shares in a corporation, still its signification is by no means limited to that definition. On the contrary, it has been defined to be 'money invested in business operations, whether that business is conducted by a single individual, partnership, corporation, or a government.' 9 C. J., p. 1280. It has been said to be 'the amount fixed upon by the partners or associates as their stake in the concern' (Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412); also as the fund or property belonging to a firm or corporation and used to carry on its business (Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220)." People v. Main, 75 Cal. App. 471, 242 P. 1078, 1081.

[9] Under his second assignment of error appellant complains of the introduction in evidence of an exemplified copy of the articles of incorporation of the Oliver Electric Power Corporation, a Nevada corporation. Articles of incorporation were filed in Nevada on July 9, 1928. The record does not show that appellant had any direct connection with the organization of this company. The Powell contract was headed "Memorandum of Agreement for the promotion of the Oliver Electric Power Corporation of California or State of Delaware," and provided for the organization of the corporation. Some time after July 10, 1928, Powell received a certificate of stock in the Nevada corporation through the mail. The same general state of facts apply to the Trump and Cessna cases, except that under the Mrs. Trump contract the corporation was to be organized under the laws of the state of Delaware. The name of the corporation organized was identical with the one set forth in the contracts except the state of its domicile, and its purpose and powers were the same. Appellant promised the three purchasers stock in the Oliver Electric Power Corporation of either California or Delaware, and they received stock in the Oliver Electric Power Corporation, a Nevada company. We believe that the objection of appellant went more to the weight and sufficiency of the evidence than to its admissibility, and that the trial court properly submitted the same to the jury.

The instructions given by the trial court complained of by appellant correctly paraphrased the sections of the Corporate Securities Act quoted in this opinion. The instructions of the trial judge and his rulings on questions of law during the trial were fair to the defendant, and we can find no error in them.

[10] Appellant contends that the verdicts of not guilty under counts 2, 5 and 9 of the information are inconsistent with the verdicts of guilty on counts 1 and 3, 4 and 6 and 8 and 10 of the information. Counts 2, 5, and 9, charged appellant with selling and issuing a security of the Oliver Electric Power Corporation to Powell, Cessna, and Trump, respectively, while, as we have seen, counts 1, 4, and 8 of the information charge him with selling and issuing subscription agreements to the same persons, and counts 3, 6, and 10 with collecting money therefor. In this case, if any corporate security was sold by appellant, it was the stock of the proposed corporation.

Where a promoter conceives a plan to obtain money from others for his own use in advertising the merits of patents secured by him, in organizing a corporation to put them into operation in a single state, and in interesting the public in the purchase of the corporate stock, and issues a contract over his own signature proposing to do these things, the contract itself forms a security of his ow issue, even though it offers to the subscriber shares of stock in the corporation to be organized, as it goes beyond the mere sale of stock in the proposed corporation. In the sale of corporate stock the original price goes, or is supposed to go, into the treasury of the corporation, less permitted expenses of sale. In the instant case the money went into the pockets of the promoter, not only to defray the expenses of the organization of the corporation, but to make possible the very marketing of his patent rights, not only in California, where the corporation was presumed to operate, but in any other place that might be chosen by him. If the promotion had been successful and the invention of practical value, the profits from the sale of the patent rights or the licensing of their use in any place outside of the state of California would would have gone to appellant in their entirety. No subscriber would have had any claim thereon. The fact that the subscriber was to receive shares of stock of the corporation does not make the transaction one of the mere sale of the corporate stock which was but one of its incidents. The security sold was one of the issue of appellant himself and not of the Oliver Electric Power Corporation. Such being the case, the verdict of not guilty of the charge of the sale of the corporate security is not inconsistent with the verdict of guilty of the sale of the security issued by appellant. People v. Day, 199 Cal. 78, 248 P. 250; People v. Vanderbilt, 199 Cal. 461, 249 P. 867.

[11-13] Appellant urges with great earnestness that counts 1, 4, and 8 of the information charge three several sales of securities, and that counts 3, 6, and 10 charge collection of money from each respective purchaser at the time and place of the sale, and therefore constitute a part and parcel of the one transaction; that therefore each sale, and the collection of money therefor, constituted but one offense, for which but one penalty could be inflicted. He cites the case of People v. Clemett (Cal. Sup.) 280 P. 681, decided on September 14, 1929, in support of this contention.

In the case of People v. Clement, supra, the information contained two counts, which the Supreme Court held were based upon but one offense. The jury returned separate verdicts of guilty on both counts, and the trial court sentenced the defendant on both. The Supreme Court affirmed the judgment on one count, and reversed on the other. The vice is not the charging of the offense in two counts, but in judgment and sentence on both, thereby inflicting double punishment for one offense. In the case before us the trial court suspended the pronouncement of judgment on all five counts and imposed sentence in one. In each case the two offenses charged relate to the same transaction, and neither is inconsistent or repugnant to the other. Should the appellant violate his probation, and be brought back into court for sentence, we will assume that the trial judge will follow the doctrine of People v. Clement, if it applies to this case. Appellant has suffered no injury from the returning of verdicts on the various counts of the information (People v. Vanderbilt, supra). We cannot anticipate error on the part of the court below.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

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102 Cal. App. 230

WILLIAMS v. SEYMOUR et al. (Civ. 3908.)★

District Court of Appeal, Third District, California. Nov. 29, 1929.

As Modified, on Denial of Rehearing Dec. 28, 1929.

1. Trial ⟹12(1)—Placing cause on short cause calendar is within discretion of trial court.

Where, in civil action, trial by jury is not demanded, and taking of testimony and argument will not exceed one hour, placing cause on short cause calendar is within discretion of trial court.

2. Trial ⟹106—Time allowed for presenting case is within discretion of trial court.

Time allowed party to present evidence and argument is within discretion of trial court.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by R. T. Williams against H. C. Seymour and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm. P. Mealey, of Los Angeles, for respondents.

PULLEN, Justice pro tem. The Citizens' Trust & Savings Bank of Los Angeles held in trust certain real property in which respondents were beneficiaries to the extent of a one-fourth thereof. While such beneficiaries, respondents purchased from the trustee one of the pieces of real property affected by said trust, and as part payment therefor gave to the Citizens' Trust & Savings Bank their promissory note, and as part of the same transaction assigned to the bank, as security for the payment thereof, all of their interest in and to said trust. Thereafter respondents entered into negotiations with W. R. Wheat for the sale and purchase of respondents' interest in said trust, which negotiations were, with consent of the trustee, consummated by the formal assignment of respondents' beneficial interest in said trust to Wheat, and was by him accepted in writing. When the note above referred to, and which was secured by the property acquired by Wheat, became due, he paid it; but the bank, instead of satisfying such note, indorsed the same without recourse and delivered it to Wheat, who thereupon, retaining the interest in the trust, transferred the note to appellant, and an action was commenced thereon to recover the amount due under said note. The trial court held that, the note having been paid, appellant, who was the plaintiff below, was entitled to nothing, and judgment was given for defendant.

[1, 2] Appellant claims that he did not have sufficient time to present his case before the trial court, for over his objection this cause was placed upon the short cause calendar, as the same is designated under the rules of the superior court for Los Angeles county, to which calendar any civil action in which a trial by jury is not demanded, and in which the taking of testimony and argument will not exceed one hour, may be assigned. The trial consumed more than one hour for the testimony and argument, but an examination of the record shows that appellant was accorded sufficient time to present his evidence, and that he did present the facts in the case. Such matters as are here complained of are within the discretion of the trial court. No abuse of discretion is shown, and the objection is without merit.

From the foregoing it appears that the judgment should be affirmed; and it is so ordered.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

★Rehearing denied.

101 Cal. App. 769

DENMAN v. CITY OF PASADENA et al.★
(Civ. 7111.)

District Court of Appeal, First District, Division 2, California. Nov. 14, 1929.

Rehearing Denied Dec. 12, 1929. Hearing Denied by Supreme Court Jan. 13, 1930.

1. Appeal and error ⚷901—Appellant, alleging error in judgment after demurrer sustained without permission to amend, must make record showing of error (Code Civ. Proc. § 953c).

On appeal from judgment following order sustaining demurrer without leave to amend, appellant must show error in denying leave to amend, and, in absence of record showing abuse of discretion under Code Civ. Proc. § 953c, no such error is presented for review.

2. Theaters and shows ⚷6—Complaint for injuries to spectator by falling of grand stand on private property held to state no cause of action against Tournament of Roses Association and its members.

Complaint against Tournament of Roses Association and its members for injuries to plaintiff by falling of grand stand, which was erected by private individual on private property, *held* insufficient to state cause of action.

3. Negligence ⚷56(1)—Unless negligence of defendant was direct and proximate cause of injury, no recovery can be permitted.

Where injury has resulted in consequence of unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as the direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote.

4. Theaters and shows ⚷6—Promoters of public spectacle cannot be held liable for injuries to spectators on private property, resulting from owner's negligence.

An association or its members, promoting a public spectacle, cannot be held responsible for injuries caused by the negligence of private in-

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★Rehearing denied. Hearing denied by Supreme Court.

dividuals toward spectators, viewing spectacle from private premises.

5. Evidence 🔑14—It is common knowledge that spectators, going to or returning from public festivals and celebrations, have been frequently injured.

It is matter of common knowledge that, in many public festivals and celebrations, accidents have occurred to guests while going to or returning from place of amusement.

6. Negligence 🔑17—Test of negligence with respect to instrumentalities and methods is the ordinary usage and custom of mankind.

The test of negligence with respect to instrumentalities and methods is the ordinary usage and custom of mankind.

7. Pleading 🔑34(2)—General allegations and conclusions of negligence are controlled by specific allegations inconsistent with negligence.

General allegations and conclusions of negligence are controlled by specific allegations inconsistent with negligence.

8. Theaters and shows 🔑6—Allegations of complaint against association promoting public celebration held insufficient to state cause of action for injuries to spectator by defective grand stand on private property.

Allegations that association promoting public spectacle knew or should have known that grand stand erected by private individual on private property was not safe, together with other allegations showing that association had nothing to do with grand stand, *held* insufficient to state cause of action against association or members.

9. Theaters and shows 🔑6—Allegations that defendant caused grand stand on private property to be erected held insufficient, in view of allegations of specific facts.

Allegations that defendant caused grand stand, which collapsed and injured plaintiff to be constructed, *held* insufficient to show defendant's responsibility, in view of specific allegations, showing that defendant had nothing to do with grand stand on private property.

10. Municipal corporations 🔑747(1)—Municipality is not liable for carelessness of officers or employés inspecting or supervising construction of grand stand on private property under municipal permit.

The granting of a permit to construct a grand stand on private property and the supervision and inspection of its construction is a governmental function, in the performance of which a municipality is not liable for carelessness of officers or employés.

11. Pleading 🔑21—Allegation of city's interest in grand stand held negatived by positive allegation that grand stand which collapsed was privately owned and controlled.

In action against city and association promoting Tournament of Roses, allegation that city, which permitted tournament association to conduct parade along the public streets, had some pecuniary interest in celebration, making it liable for injuries to spectator in private grand stand, which collapsed, *held* negatived by positive allegation that grand stand was built on private property and controlled by private individual.

12. Theaters and shows 🔑6—Complaint for injuries to spectator by collapse of grand stand on private property stated no cause of action against city.

Complaint for injury to spectator at public celebration from collapse of grand stand erected by private individual on private property *held* to state no cause of action against city.

13. Appeal and error 🔑1078(1)—Point not considered in appellant's brief must be considered as abandoned.

In the absence of anything in appellant's brief as to the liability of persons joined as defendants, appellant must have been considered to have abandoned the point.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Abram C. Denman, Jr., against the City of Pasadena and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Bertrand J. Wellman, of Los Angeles, and Geo. W. Padgham, of Pasadena, for appellant.

Harry M. Ticknor and R. Maxwell, both of Pasadena, and John Perry Wood and Paul Sandmeyer, both of Los Angeles, for respondent Tournament of Roses Association.

Harold P. Huls, City Atty., of Pasadena, for respondent city of Pasadena.

NOURSE, J. The plaintiff sued for damages for personal injuries resulting from the collapse of a temporary wooden "grand stand" erected for the convenience of spectators at festivities known as the "Tournament of Roses," held in the city of Pasadena. Demurrers to the complaint were sustained without leave to amend. A motion for leave to amend was later denied, and judgment was entered for the defendants. The plaintiff has appealed from the judgment upon a typewritten transcript.

The plaintiff sued the city of Pasadena, its "board of directors," the city manager, chief of police, and the chief inspector, the Tournament of Roses Association, a corporation, its directors, and all members of the association, Paul F. Mahoney, who constructed the grand stand under permit of the city authorities, and E. H. Lockwood, the owner of the land upon which the grand stand was erected and maintained. The defendant city officials (other than the chief inspector) joined with the city of Pasadena in a demurrer to the complaint. The directors and members of the Tournament of Roses Association joined with the corporation in a demurrer to the complaint. The other defendants named in the complaint do not appear to have been served with process, and are out of the case so far as this appeal is concerned.

The two demurrers mentioned came on for hearing at the same time, and both were sustained without leave to amend. The plaintiff then moved for leave to file an amended complaint, and this motion was denied. The respondents argue that on this appeal we may not consider the substance of the proposed amended complaint, because the appellant has failed to follow the settled rule of section 953c, Code of Civil Procedure, requiring the printing of such portions of the typewritten record as are desired to be called to the attention of the court.

[1] When the appeal is from a judgment following an order sustaining a demurrer without leave to amend, and the appellant urges as one of his grounds that the trial court abused its discretion in denying leave to amend, it is incumbent on the appellant to show error in that regard. Here the appellant, without claiming or making any showing of an abuse of discretion, merely argues that the trial court "should have" granted leave to amend. But with no record to support the argument we cannot say that error was committed. Stewart v. Douglass, 148 Cal. 511, 512, 83 P. 699; Philbrook v. Randall, 195 Cal. 95, 104, 231 P. 739; Duvall v. White, 46 Cal. App. 305, 307, 189 P. 324; Farber v. Greenberg (Cal. App.) 277 P. 534, 538.

But, aside from the absence of affirmative evidence of error in this respect, we are unable to perceive how the appellant could amend his complaint to state a cause of action against any of these respondents, if the facts alleged in his complaint be true. This seems to be conceded by the appellant in his reply brief, wherein he states that the proposed amendment complaint was no different than the original, "except as to a more correct statement therein of the defendant city's financial interests." Thus as to all defendants other than the city of Pasadena the issues here are confined to the propriety of the order sustaining their demurrer to the original complaint. The virtue of the proposed amendment as to the city alone can be considered more logically in the discussion of the pleadings in relation to that defendant.

[2] The demurrer of the Tournament of Roses Association, and of the members thereof who joined with the corporation, was properly sustained without leave to amend. The complaint plainly fails to state a cause of action against any of them, and, assuming, as we must do, that the facts alleged therein are true, no cause could be pleaded by amendment. The facts alleged are that the grand stand was erected by a private individual upon private property with the consent of the property owner. The Tournament Association had nothing to do with the use of this private property, nor with the construction, maintenance, or operation of the grand stand. It had no supervision over the sale of seats in the grand stand, no direction or control over the number of people permitted to occupy it, and no participation in the profits from seat sales.

Briefly, the appellant sought to fix liability for his injuries on these respondents by the allegations that they had staged the tournament festival; that through their efforts a large number of people were invited to and did come into the city to view the spectacle and to attend a football contest, which was conducted in a stadium constructed by the association for that purpose; that the financial interest of these respondents in the tournament was in the large profit they received from this contest; that prior to the football game, and as an inducement to people to purchase tickets therefor, these respondents conducted a spectacular parade through certain designated streets of the city; that, by occupying the entire width of these streets for the purposes of this parade, these respondents forced and "invited" spectators to purchase tickets for seats on the viewing grand stands; and that these respondents knew or "should have known" that this particular grand stand was dangerous, a public nuisance, and a menace to the lives and safety of those who occupied it.

[3] Aside from the allegations of knowledge, or means of knowledge, of the unsafe condition of this particular grand stand, every other allegation of the complaint relating to these respondents pleads this and nothing more—a situation whereby these respondents made it possible for the appellant to put himself in a position in which, wholly through the act of another, he was injured. Thus the complaint merely pleads facts which would tend to charge these respondents with the remote cause of appellant's injuries, while also pleading facts which show beyond doubt that another's acts were the sole proximate cause of such injuries. The rule is settled that, "if injury has resulted in consequence of a certain unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote." Cooley on Torts (2d Ed.) p. 73, quoted in Trice v. Southern Pacific Co., 174 Cal. 89, 96, 161 P. 1144.

[4, 5] The reason for such a rule is well illustrated by the efforts of appellant to attach liability upon these respondents. Their "act of negligence" was in inviting a large concourse of people into the city and in leading a parade along a city street in front of the lot on which the grand stand was erected. But if, without having any supervision or control over the grand stand, they are to be held responsible for any injuries caused by the negligence of the owners thereof, they would likewise be liable for all injuries arising out of the negligence of all railroads and

other public conveyances bringing people into the city on this same "invitation." Likewise it is possible that people stood upon the housetops of private dwellings, and that many hung out of private windows to see the spectacle. Some boys might have climbed trees or telephone poles to get a better view. Would there be any reason in a contention that these respondents would be liable for injuries resulting under such circumstances?

In Wright v. City of Pasadena (U. S. Dist. Court, Aug. 19, 1929) 36 F.(2d) ——, Judge McCormick, in sustaining a demurrer to a complaint identical with the proposed amendment filed herein, held that it failed to allege any act or acts of the association which operated to cause the injuries complained of as a proximate cause, and that "it appears to the court that every merchant of Pasadena who financially contributed to the success of the Tournament of Roses, and every property owner thereof who shared in the emoluments of such event, would be liable to plaintiff for damages if the theory of liability as set forth in the amended complaint were tenable." We might add, what is a matter of common knowledge, that public fairs, festivals, and celebrations have been held in this country since the days of the first Indian war dance; that many of these affairs have been conducted for profit, while many (as the complaint alleges was the case here) have been conducted to advertise or "boost" a particular locality. Likewise, football games have been held for the financial profit of the management and as a means of education and training of the participants, and these have attracted large crowds of people. It is also a matter of common knowledge that in many of these events accidents have occurred to the guests while either going to or returning from the place of amusement. If those managing such events are legally liable for personal injuries to their guests, which are received on private property over which the management has no control, and which are the result of the negligence of private individuals over whom the management has no supervision or control, we would expect to find some judicial expression recognizing such liability.

[6] As appellant has failed to cite any decision in support of his theory, and as we have found none, we may assume that the point should be decided on the general principle that liability rests on negligence, that negligence is "the want of such care as a person of ordinary prudence would exercise under the circumstances of the case" (19 Cal. Jur. p. 548), and that a person of ordinary prudence under these circumstances would not assume the burden of controlling the activities of every property owner in the locality, nor would he hold himself out as an insurer of the safety of all visitors while engaged in their private amusements. Therefore, when through a long period of years a particular mode of conduct has been followed as the proper and reasonable mode for a prudent man to follow under particular circumstances, one cannot be charged with negligence in following that mode of conduct alone. The proper conduct of "a person of ordinary prudence" may thus be established by long-approved practice and custom, and this becomes just as potent as a standard of conduct prescribed by law. Manifestly a complaint which merely alleges that a defendant had done the very acts which the law prescribes he must do under the circumstances fails therein to charge negligence on his part. And since "the test of negligence with respect to instrumentalities, methods, etc., is the ordinary usage and custom of mankind" (20 R. C. L. p. 27), a complaint which discloses that the parties merely followed such recognized usage and custom, and which does not plead any departure therefrom, or any other act or omission which a prudent person would not have done or omitted under the same circumstances, does not state a cause of action for negligence. The rule of law is succinctly stated in Tallman v. Nelson, 141 Mo. App. 478, 125 S. W. 1181, 1183, as follows: "If one does what the great body of other prudent men do, in a like situation, he is not negligent." And in Brands v. St. Louis Car Co., 213 Mo. 698, 112 S. W. 511, 514, 18 L. R. A. (N. S.) 701, it is said: "No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed."

[7, 8] But it is argued that, as these respondents knew "or should have known" that this particular grand stand was unsafe, they come within the rule of Indianapolis St. Car Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909. In that case the street car company was held liable for injuries to a colored man and woman whom they had conveyed to a park where they were assaulted by whites. Liability was attached to the car company, because it knew that there was an intense feeling against colored people at the park, but failed to impart this information to its passengers. This rule simply goes back to the general principles which we have been discussing. An ordinarily prudent person would not invite, urge, or carry another into a known place of danger without warning. But the difficulty with the complaint in this respect is that it is so inconsistent and contradictory in its allegations that it does not come within the rule. To say that the defendant knew this grand stand was unsafe is more or less a conclusion of the pleader; but to say in the same sentence that he "should have known" it is to say that he did not know.

Further inconsistencies appear from the allegations of specific facts which contradict this general allegation of knowledge. Thus it is alleged that this grand stand was erected, maintained, and controlled by a private individual on private property for "his own pecuniary benefit and profit," pursuant to license therefor by the municipal government, and subjected to inspection as to its safety by the proper public officials. To plead generally, in face of these specific facts, that these respondents should have known that this grand stand was unsafe, compels us to presume, contrary to the legal presumptions found in the Code, that these public duties were not performed, and that the public officials were guilty of fraud. But "where a conclusion is alleged, and also the special facts from which the conclusion is drawn, if the special facts are inconsistent with and do not support the conclusion, the former control, and the sufficiency of the complaint is to be determined from the special facts pleaded." Little v. Union Oil Co. of Cal., 73 Cal. App. 612, 619, 238 P. 1066, 1068, where many cases are cited.

[9] It is argued that the averment that "the said defendants" *caused* the grand stand to be constructed and to remain in a dangerous condition is broad enough to include the Tournament Association, its officers and members. But this allegation follows the paragraphs which are definitely tied down to the city of Pasadena and its officers, and the expression "said defendants" has no reference to the association, its officers, or members. Furthermore, this general averment is in direct conflict with the pleading that the defendant Lockwood "caused" this particular grand stand to be erected "for his own pecuniary benefit and profit, and had the right and authority to control the construction, use, and seating capacity thereof." Here again the averment of specific facts must control over the general conclusions of the pleader. Taking these allegations together, it is apparent that the pleader means that the association, by staging the festival and inviting guests to witness the parade, offered an inducement to Lockwood to obtain pecuniary profit by constructing the grand stand, but that the latter did this for his own benefit, and had sole supervision and control over it. Here again these respondents are merely charged with the remote cause of the injury to appellant, while the proximate cause is definitely laid to others, over whom these respondents had no control.

Appellant cites a large number of cases, generally referred to in the briefs as the "Bathing Beach" and "Amusement Park" cases, holding that those conducting such places of amusement are liable for injuries to patrons on the premises. Some of these cases hold that the owner is liable where the injury is the result of the negligence of a concessionaire. It would serve no purpose to refer to these cases, other than to say that without exception they place liability on the party who had the supervision and control of the premises, and upon whom rested the legal duty to keep the premises in a safe condition. Thus, in Johnstone v. Panama-Pacific I. E. Co., 187 Cal. 323, 329, 202 P. 34, 36, it is said "there was a duty imposed upon respondent [Exposition Company] to use ordinary care to keep *its grounds*, including the thoroughfares, in a safe condition for its invitees." In that case the exposition company had granted a concession to another to rent electric vehicles to visitors, to be operated by the party renting them throughout the exposition grounds. The plaintiff, while walking along one of the paths maintained in the grounds by the exposition company for pedestrians, was injured by being struck by another visitor while operating one of these electric vehicles. The ruling followed the great weight of authority—that the owner was responsible for the premises under its control.

This rule is clearly stated in Thornton v. Main State Agr. Soc., 97 Me. 108, 53 A. 979, 981, 94 Am. St. Rep. 488, 493, where it was said: "Therefore, having invited the public to its fair, it was the duty of the defendant to use reasonable care to keep its grounds, and the usual approaches to them, so far as the approaches were under its control, in a safe condition—safe for all who were invited." The bathing beach cases follow the same principle. Even where the injury occurred in the public water of the ocean it was held that the proprietor of the beach resort was bound to exercise reasonable care for the safety of those he invited to patronize his resort. But none of the cases cited supports the theory of appellant that the owner or proprietor is liable for injuries arising beyond the premises and on private property over which another has full supervision and control.

What has been said concerning the allegations relating to the Tournament Association applies equally to its directors and members, and the demurrer on their behalf was properly sustained.

The demurrer of the city of Pasadena involves a consideration of the capacity in which it was acting at the time of the injury. Appellant takes the position that the city was financially interested in the tournament, and hence was acting in a proprietary capacity. The argument is that the proprietary capacity of the city is disclosed in the averments of the complaint that the city received a large annual profit from pay features of the festival, including the football game, and that the tournament parade and the football game were held "for the immediate financial benefit and profit of said defendant city of Pasadena's citizenry and tradespeople, * * * and for the future and ultimate pecuniary profit of its landholding and real estate property owning class." But it is also alleged that said city issued permits for the building of grand stands to seat the guests, and "supervised, inspected, and approved the security, safety and carrying capacity of said grand stands." We may concede that the complaint is sufficient to charge the city with acting in a proprietary capacity in conducting the football game and other pay features of the festival, but so far the city is merely charged with the remote cause of appellant's injuries—furnishing the occasion whereby the appellant found himself in the city on the day of the injury. The proximate cause of these injuries—the collapse of the grand stand—is alleged to have been due to the city's employment of unskillful and incompetent inspectors.

[10] Manifestly the granting of a permit to construct a grand stand on private property and the supervision and inspection of its construction is a governmental function. That a municipality is not liable for the carelessness of its officers or employees under such conditions is settled by the authorities. Wickstrom v. City of Laramie, 37 Wyo. 389, 262 P. 22, 23; Miller v. City of Palo Alto (Cal. Sup.) 280 P. 108.

[11] Through the maze of inconsistencies and contradictions in the complaint the real charge against the municipality is that, in permitting the Tournament Association to conduct its parade along the public streets, it indirectly invited the pedestrians to purchase seats in the grand stand, the better to view the spectacle. The parade is said to be the inducement for the spectators to enter the stadium and purchase tickets for the football game. In the sale of these tickets the city is said to have had a direct financial interest. The positive allegations that the grand stand which collapsed was erected and maintained for the pecuniary profit and benefit of the defendant Lockwood, who had the control over its construction and use, negatives the general innuendoes that the city had some part in the construction and use of it.

[12] Thus, so far as the city is sought to be charged with any liability for the injuries in its proprietary capacity, the complaint pleads the most remote cause that might be imagined. If the city is liable under such conditions, then the doctrine of proximate cause becomes a mere shadow. It might as well be said that one holding a ticket to this football game and injured while traveling on the public highway, hundreds of miles from the place of the contest, could hold the city liable because he had been induced to travel by the city's advertisement of its New Year's climate.

In answer to the city's demurrer, the appellant again cites a number of "Bathing Beach" and "Amusement Park" cases. In the former the owner of the resort is held liable for injuries to his guests, received while bathing in the waters adjoining the resort. The rule of these cases is that, because the patrons paid for the privilege of bathing in the adjoining waters, the proprietor owed them the duty of keeping the waters reasonably safe, or of providing life guards or other means of protecting the patrons from injury.

The rule of the amusement park cases is stated in Stickel v. Riverview, etc., Park Co., 250 Ill. 452, 95 N. E. 445, 446, 34 L. R. A. (N. S.) 659, where it is said: "In amusement places where space is granted for conducting attractions * * * there is unanimity of authority that the owner assumes an obligation that the devices and attractions operated by the concessioners are reasonably safe for the purposes for which the public is invited to use them." In each group of cases there is authority holding that the owner of private property is liable for injuries received on public property adjoining when the use of such public property is a necessary incident to the use of the private property. But none of the cases hold the converse of this—that the public as the owner of the public property is liable for injuries received on private property, over the use of which the public had no control.

It is argued that the rose festival was a joint enterprise, and that, because the city expected some profit from the football game, it must be held to have been jointly interested with Lockwood and Mahoney in this grand stand. The answer to the argument is that the specific allegations are that the city did not have any such interest. If the general allegations of the complaint are true, all "florists, hostelries, theaters, sweet shops, cafes, food venders, drink dispensers, * * * vacant lot owners, * * * and real property owning class" would be jointly interested in the enterprise because it is alleged the *festival* was held for their "immediate financial benefit and profit." But, if the city were held liable for every act of negligence of its citizens under such circumstances, then it would become an insurer of the safety of the individual far beyond anything contemplated in its incorporation.

[13] As to the city officials and employees who are joined as parties defendant, the complaint does not pretend to state any cause of action against them. There is not a word in appellant's briefs defending his action in joining them, and we may therefore treat the point as having been abandoned, because the duty is on appellant to show that error has been committed. Etienne v. Kendall, 202 Cal. 251, 257, 259 P. 752.

The judgment as to all defendants is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

102 Cal. App. 271

PEOPLE v. EDWARDS. (Cr. 1099.)

District Court of Appeal, Third District. California. Dec. 2, 1929.

Criminal law ⚷1182—Where accused files no brief on appeal and makes no appearance at hearing, judgment will be affirmed (Pen. Code, § 1253).

In prosecution for robbery, where, on appeal, accused files no brief and makes no appearance at time case is set for hearing, judgment will be affirmed, under express provisions of Pen. Code, § 1253.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

J. J. Edwards was convicted of robbery in the first degree, and he appeals. Affirmed.

John R. Connelly and George E. Foote, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Sacramento county of a felony, to wit, the crime of robbery of the first degree.

The transcript on appeal was filed in this court October 22, 1929. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on December 2, 1929. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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102 Cal. App. 359

PEOPLE v. WEST. (Cr. 1864.)

District Court of Appeal, Second District, Division 1, California. Dec. 5, 1929.

Continuance ⚷17—Court held not to have erred in denying application for continuance to permit third attorney employed by defendant to familiarize himself with case.

Where, on continuance being asked for, defendant's attorney withdrew from case, stating he had been dismissed, whereupon court appointed another attorney and continued case to next day, and on next day attorney so appointed withdrew, saying defendant desired him to do so, *held*, that court did not err in denying defendant's application for continuance, in order that another attorney, whom defendant wished to employ, might familiarize himself with case.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Ralph West was convicted of forgery and grand theft, and he appeals. Affirmed.

E. L. Johnson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

YORK, J. Appellant was charged by an information filed by the district attorney of San Diego county with the crimes of grand theft and forgery, and also with having suffered a prior conviction in the state of Ohio. Appellant admitted the prior conviction, and after trial by jury was found guilty of the crimes of forgery and grand theft, as charged in the information. From the judgment and order denying his motion for a new trial, this appeal is taken by the appellant.

There was sufficient evidence to justify the jury in bringing in its verdict, but the sole questions are whether the court erred in denying defendant's application for a continuance, and whether certain errors were committed by reason of the fact that the defendant appeared as his own counsel at the time of his trial. When a continuance was asked the first time, his then attorney withdrew from the case, stating that he had been dismissed. The court thereupon appointed another attorney as appellant's counsel, and continued the case to the next day. On the next day the attorney so appointed withdrew, saying that the defendant desired him to do so. Appellant then stated that he wished to employ another attorney, Mr. Ludwig, and also stated that Mr. Ludwig would consent to defend him in the matter, but that a continuance was necessary, in order that he might familiarize himself with the case. The court denied the application for continuance, and the trial proceeded forthwith; the defendant acting as his own attorney.

Upon an examination of the entire case, we cannot say that the defendant suffered any prejudicial injury by reason of any ruling of the trial court. No objections were made having relation to certain points that appellant is attempting to raise at this time through his attorney, who is now appearing for him, and we cannot pass upon the objections made herein by reason of the fact that the record is not in such condition, because of appellant's failure to object at the time of the hearing, that such matters can now be considered by this court.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

208 Cal. 532

STANDARD SANITARY MFG. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.★

(S. F. 13449.)

Supreme Court of California. Dec. 3, 1929.

Rehearing Denied Jan. 2, 1930.

Master and servant ⚷416—Industrial Accident Commission denying employee's application for rehearing on misapprehension of facts held justified in setting aside such order of denial and making award (Workmen's Compensation, Insurance and Safety Act 1917, §§ 20(d), 55 (a).

Where order of Industrial Accident Commission denying petition of compensation applicant for rehearing was based on mistake or inadvertence as to the state of the record before it, in that commission mistakenly believed that its medical department had rendered an opinion on the new medical reports attached to petition for rehearing, whereas in fact no opinion of medical department had been filed, *held*, that under Workmen's Compensation, Insurance and Safety Act 1917, §§ 20(d), 55(a), (St. 1917, pp. 850, 868), commission was justified in setting aside its order denying petition for rehearing, and on new hearing award compensation based on report of medical department favorable to employee.

In Bank.

Petition by the Standard Sanitary Manufacturing Company for writ of review to review an award of the Industrial Accident Commission awarding compensation to Pete Sertok for injuries. Award affirmed, and petition discharged.

R. P. Wisecarver and Wm. S. Downing, both of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

RICHARDS, J. The petitioner applied for and was granted a writ of review herein upon its application therefor, wherein it sought to have reviewed and annulled a decision and award of the Industrial Accident Commission wherein it finally granted to one Pete Sertok, an employee, a disability award. The facts upon which the application of the petitioner is predicated are not disputed and may be briefly summarized as follows: Pete Sertok had been in the employ of the petitioner herein for a number of years prior to his illness and application for an award. In July, 1927, he became ill with a disorder which was either due to a rheumatic fever or which was the result of lead poisoning received in and as a consequence of his employment. He lingered along in the employ of the petitioner, doing different and easy jobs until the month of March, 1928, when, upon a physician's report as to his condition, he was obliged to cease work. Thereafter and within the statutory time he filed with the commission his claim for compensation, alleging that he was suffering from lead poisoning, which, it is admitted, was an industrial disorder. A hearing was held, as a result of which the commission on June 22, 1928, made its original findings and decision, wherein it found that the status of employer and employee existed, but that the evidence presented before it was "insufficient to establish that the employee received an injury arising out of and in the course of said employment, or that the disability complained of was caused by said employment." It was therefore ordered that the applicant take nothing. Thereafter and on July 12, 1928, the employee filed a petition for rehearing, based upon certain new and fur-

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★Rehearing denied.

ther medical examinations and reports which were attached to his petition. On August 11, 1928, this petition for rehearing was denied by the commission. On August 25, 1928, the employee filed a further petition before the commission to reopen the case and to set aside not only the original award on June 22, 1928, but also the order denying a rehearing, made on August 11, 1928, basing his application upon the alleged inadvertence and mistake of the commission in denying his said petition for a rehearing, under the mistaken belief that the medical department of the commission had reviewed and rendered an opinion on the new medical reports attached to the petition for rehearing adverse to the petitioner; whereas in truth and fact no opinion of the medical department based upon this new evidence had been up to that time filed. The commission, upon inquiry, discovered that the applicant was correct in the foregoing regard and that the opinion of its medical department, which was for the first time filed upon August 30, 1928, was favorable to the petitioner. Thereupon and on September 6, 1928, a hearing was held before the commission, all parties being present, at which Commissioner Trowbridge stated the conclusion of the commission to the effect that the petition for rehearing had been denied upon the mistaken impression that a report of its medical department had theretofore been filed. Thereupon, and upon a further investigation confirming that situation, the commission on October 24, 1928, made its order reopening the case, which order was made within the period during which the applicant might otherwise have applied for a writ of review, and on the latter date the report of the medical department having been considered by it, the commission made its findings and award granting to the employee compensation for an occupational disease or injury, to wit, lead poisoning sustained by him in the course of his employment. On November 10, 1928, the petitioner herein filed a petition for rehearing with the commission, alleging lack of due process of law, in that it had been given no opportunity to cross-examine the medical referee, which petition the commission found it necessary to grant for the reason stated, and on December 19, 1928, a further hearing was held wherein, all parties being present, the medical referee was cross-examined and other medical testimony was adduced by the employer. On January 11, 1929, the commission filed its final decision, adopting, with certain amendments, its findings of fact and award made and entered on October 24, 1928, but otherwise confirming its said decision and award in the applicant's favor. A petition for rehearing being denied, the petitioner herein on February 9, 1929, first appealed to the District Court of Appeal, First Appellate District, Division 1, for a writ of review, which application was denied without an opinion, and after petition for rehearing therein the petitioner applied for and was granted a hearing in this court, and the matter being thereafter argued herein was submitted for decision.

The fundamental error of the petitioner herein consists in its assertion that the Industrial Accident Commission by its first decision adverse to the applicant, based upon the ground that the evidence thus far presented before it was insufficient to show that the employee was suffering from an occupational disease, had thereby divested itself of jurisdiction over the applicant's case and that it was therefore without power either to entertain a petition of said applicant for a rehearing or to further reopen the matter, under the provisions of section 20(d) of the Compensation Act (St. 1917, p. 850), and that the only remedy of the applicant after this first decision by the commission was that of an application for a writ of review.

The commission upon its first hearing found that the relation of employer and employee existed; that the employment was such as came within the beneficial provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, as amended); that the disorder of the employee was one which had arisen during the course of his employment. The applicant alleged his illness to have been caused by lead poisoning, which was admittedly an industrial disorder. Upon the face of the employee's application, therefore, a perfect case for the exercising of the jurisdiction of the commission attached, under the terms of section 55(a) of the Workmen's Compensation Act. It is true that upon such first hearing the commission found that the evidence which the applicant had thus far introduced was insufficient to show that he was suffering from a compensable injury. Its finding to this effect and its decision based thereon that the applicant was not entitled to an award were thus strictly within the exercise of the commission's jurisdiction. Having made such decision against the applicant, he was entitled under the express terms of the act to apply for a rehearing and by so doing to enable the commission upon the evidence already adduced to change its ruling, or to so far eke out the insufficiency of his former showing by new and additional proofs to make out a sufficient case for a decision in his favor. The applicant tendered such proofs, but through a misapprehension as to the state of the record before it the commission failed to consider these, and consequently denied the petition for a rehearing. Had the applicant upon such denial presented another petition for rehearing, the case of Crowe Glass Co. v. Industrial Accident Commission, 84 Cal. App. 287, 258 P. 130, upon which the petitioner herein relies, would doubtless have had application to the case. The applicant, however, did not so apply; but, as the record discloses, he did make timely application to the commission for an order vacating and setting aside its order denying his petition for a rehearing based expressly upon the provisions of section 20(d) of the Workmen's Compensation Act, under the terms of which the commission is given a continuing jurisdiction "over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor," and which continuing jurisdiction extends over a period of 245 weeks from the date of the injury. In the case of Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 265 P. 195, the scope and intent of the foregoing provisions of the Workmen's Compensation Act were given very full and careful consideration, especially with reference to what, under the terms of said section, would constitute such "good cause" as would call into exercise the powers of the commission thereunder, and it was therein held that the mistake or inadvertence of the commission in giving an injured workman a certain rating, when as a matter of law upon the undisputed facts he was entitled to another and better rating in determining his permanent disability, would constitute "good cause" for the exercise of the continuing jurisdiction of the commission. If a mistake or inadvertence of this character on the part of the commission would suffice to furnish good cause for this exercise of its extended jurisdiction, it would seem to follow inevitably that the mistake and inadvertence of the commission, in overlooking the fact that the applicant upon his petition for rehearing had presented certain cogent evidence upon which the medical department of the commission had not as yet but was about to render a favorable report, would be amply sufficient to justify the commission in setting aside its order denying the petition for rehearing based solely upon its aforesaid misapprehension as to the state of the record before it. Brunski v. Industrial Accident Commission, 203 Cal. 761, 265 P. 918; United States & F. G. v. Industrial Accident Commission (Cal. Sup.) 266 P. 805; Kennedy v. Industrial Accident Commission, 50 Cal. App. 184, 195 P. 267; Colorado F. & I. Co. v. Industrial Comm., 85 Colo. 237, 275 P. 910; Southern Mining Co. v. Collins, 222 Ky. 388, 300 S. W. 896; Hanson v. No. Dakota W. C. Bureau, 56 N. D. 525, 218 N. W. 215. We therefore hold that the commission was justified in the exercise of its aforesaid continuing jurisdiction in setting aside its order denying the applicant's petition for a rehearing, and was also justified upon such new and further hearing in making its order based upon the report of its medical department favorable to the applicant granting him the award which the petitioner herein, after a vain attempt to seek a further hearing before the commission, seeks to have this court set aside.

The foregoing consideration answers, we think, every insistence made by the petitioner herein upon its application for a writ of review, and it therefore follows that the award of the commission should be and is hereby affirmed, and that the petition and order for a writ of review herein should be and the same are hereby discharged.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

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208 Cal. 550

BERGHAUSER v. GOLDEN STATE ORCHARDS (MOORE, Intervener).

(Sac. 4302.)

Supreme Court of California. Dec. 5, 1929.

1. Appeal and error ⚿907(3)—Where appeal is presented on judgment roll alone, finding of trial court must be taken as supported.

Finding of trial court must be taken as supported, where case is presented on appeal on judgment roll alone.

2. Parties ⚿40(5)—In action on notes wherein plaintiff attached moneys and credits due defendant in hands of third person, one claiming such credits under assignment from defendant could intervene (Code Civ. Proc. § 387).

In action on notes in which plaintiff sought to attach moneys and credits due defendant in possession of third party, one claiming such moneys and credits under assignment from defendant had right to intervene to assert claim to property attached under Code Civ. Proc. § 387, though claimant had no interest in notes sued on.

In Bank.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by J. H. Berghauser against the Golden State Orchards, in which a writ of attachment was issued, and Caroline Moore intervened. From a judgment for intervener, plaintiff appeals. Affirmed.

For opinion of District Court of Appeal, see 279 P. 463.

W. F. Williamson, of San Francisco, and R. M. Rankin, of Williams, for appellant.

Ware & Ware, of Chica, for respondent.

PRESTON, J. After a careful reconsideration of this cause, particularly in the light of the authorities especially urged by appellant, we find ourselves wholly in accord with, and are pleased to adopt as the opinion of this court in bank herein, the following opinion written by Mr. Justice Plummer of the Third Appellate District, supplemented, however, by a more extended review of the authority upon which it is based:

[1] This action was brought by the plaintiff to recover judgment against the defendant, Golden State Orchards, a corporation, upon two promissory notes. Upon the filing of the complaint a writ of attachment was issued, by virtue of which the sheriff of the city and county of San Francisco was commanded to attach all moneys and credits due to the defendant, owing from and in the possession of the California Packing Corporation. The defendant Golden State Orchards, a corporation, had sold and delivered to the California Packing Corporation a large quantity of dried prunes, etc., and at the time of the levy of the attachment the California Packing Corporation had not paid the amount of the purchase price of said dried fruit. The record further shows that, after the sale of said prunes and other fruits by the defendant to the California Packing Corporation, and before the beginning of this action and the service of the writ of attachment herein referred to, the defendant had sold and transferred to the intervener its claim against the California Packing Corporation for the moneys due and unpaid on account of the purchase price of said fruit. After the beginning of the action by the plaintiff and the issuance and service of the writ of attachment as just stated, the intervener, Caroline Moore, sought and obtained from the court permission to intervene and set up her claim and right to the money and credits in the possession of the said California Packing Corporation. The court found in favor of the intervener to the extent of her claim, to wit, that said intervener was the owner of all and singular the amount of money owing by the said California Packing Corporation on account of its purchase of dried fruits from the defendant Golden State Orchards Corporation, and that the intervener was entitled to have paid to her the whole amount of said moneys. The plaintiff demurred to the complaint in intervention, and, upon his demurrer being overruled, filed an answer to the complaint in intervention, and raised the question that the assignment had been made to hinder, delay, and defraud creditors. The court found against this contention, and, as the cause is here upon the judgment roll alone, the finding must be taken as supported.

[2] Upon this appeal, the appellant contends that, under the provisions of section 387 of the Code of Civil Procedure, Caroline Moore had no legal right to intervene, and that the court erred in permitting her so to do. In support of this contention, a number of cases bearing upon the right of intervention are cited to the point that the intervener must have some interest in that which is involved in the litigation, and, as the suit is upon two promissory notes, the promissory notes only are involved in this action. We do not need to review the cases cited, for the simple reason that they are not really in point in this controversy. The question presented for us to decide upon this appeal may be stated as follows: Has the claimant to property which has been attached in an action between other parties to recover upon an indebtedness in which such claimant has no interest a right to intervene in defense of his own claim of ownership to the property attached? Or, to state the question as presented by the record in this case—the plaintiff has sued upon two promissory notes executed by the defendant, and has attached moneys and credits in the possession of a third person, claimed by the intervener. Under such circumstances, is intervention permissible, and can the alleged owner of such credits be permitted to come in and set up such ownership? That a claimant to property attached under such circumstances has a right to intervention is no longer an open question in this state. Carter v. Garetson, 56 Cal. App. 241, 204 P. 1090; Bonfiglio v. Bonfiglio, 203 Cal. 409, 264 P. 747; Dennis v. Kolm, 131 Cal. 91, 63 P. 141. It would serve no useful purpose to incumber the record with a review of the cases just cited. We may, however, state that the question raised upon this appeal as to whether an intervention lies under the circumstances involved herein is fully covered and completely answered in the case of Carter v. Garetson, supra. The opinion in that case cites a number of authorities from other states supporting the same rule, and the cases just cited are conclusive of the question raised upon this appeal.

Appellant complains of failure of the court to recognize the distinction sought to be preserved by the parallel line of decisions (Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Davis v. Eppinger, 18 Cal. 379, 79 Am. Dec. 184; Drumhiller v. Wright, 64 Cal. App. 498, 222 P. 166; Elliott v. Superior Court, 168 Cal. 727, 145 P. 101; and Isaacs v. Jones, 121 Cal. 257, 53 P. 793, 1101), which he contends announce an opposite rule to that above set forth, under which the right of this claimant to intervene should be denied. Said distinction is recognized, the doctrine announced by said cases is commented upon at length and properly distinguished in Carter v. Garetson, supra. We therefore set forth as additional authority and further reasoning upon which to base our holding herein, the following quotation from the opinion of Mr. Justice Richards in said case (Carter v. Garetson, supra, at pages 241, 242, of 56 Cal. App., 204 P. 1091):

"The first contention of the appellant here is that the trial court was in error in permitting Josephine Garetson to file her complaint in intervention in this action for the reason that a claimant to property which has been attached in an action between two other persons to recover upon an indebtedness, in which action the claimant of the property attached has no interest, has, under the provisions of the Code of Civil Procedure of this state relating to intervention, no right to intervene. The appellant, with a fairness which is quite unusual, has cited the court to a long line of cases in this and other jurisdictions upholding the right of a third party to intervene in an action wherein the title to property of which he claims to be the owner is in danger of being injuriously affected by the proceedings in said action; the purpose of his intervention being that of preventing a cloud upon his title to said property. The cases referred to and commented upon by the appellant are Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Speyer v. Ihmels, 21 Cal. 281, 81 Am. Dec. 157; Coffey v. Greenfield, 55 Cal. 382; Kimball v. Richardson, 111 Cal. 386, 43 P. 1111; and Dennis v. Kolm, 131 Cal. 91, 63 P. 141. The distinction which the appellant seeks to draw between the foregoing cases and the case at bar is that in each of the earlier of such cases the action was one directly involving the property of which the intervener claimed to be the owner. The language of the court in such earlier cases does not, however, preserve this distinction, while in the last case above cited it would seem to have been entirely lost, since the court in that case held that a claimant of a sum of money which had been attached in an action to which she was not a party had a right to intervene for the purpose of protecting her interest in said fund against attachment. Dennis v. Kolm, supra. In so deciding the court refers to the cases decided by the courts of Louisiana applying the right of intervention as given by the Code of Procedure of that state, from which the provisions of our own Code relating to intervention were substantially taken, in which cases the right of a party whose property has been seized or attached in a suit between other parties to intervene for the protection of his interest in said property as against such attachment has been uniformly upheld. Yale v. Hoopes, 16 La. Ann. 311; Letchford v. Jacobs, 17 La. Ann. 79; Field v. Harrison, 20 La. Ann. 411. In line with these authorities it appears that in those states whose statutes upon the subject of intervention have embodied the provisions of the Code of Civil Procedure of California the same rule has been applied. In the case of Moreland v. Monarch M. & M. Co., 55 Mont. 419, 178 P. 175, it was decided, after a very full review of the decisions of the courts of California and other states upon the subject, that the owner of property attached in an action for debt between two other parties had a right to intervene in defense of his property against such attachment. The same rule has been enunciated by the courts of Idaho, Utah, and Washington. Potlatch L. Co. v. Runkel, 16 Idaho, 192, 18 Ann. Cas. 591, 23 L. R. A. (N. S.) 536, 101 P. 396; Houston, etc., Co. v. Hechler, 44 Utah, 64, 138 P. 1159; Langert v. Brown, 3 Wash. T. 102, 13 P. 704; 2 Ruling Case Law, p. 880, § 94. This being the state of the law, we find no merit in the appellant's said contention.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

208 Cal. 555

In re SADICOFF.★

In re ABRAHAMS.

(L. A. 11434, 11438.)

Supreme Court of California. Dec. 5, 1929.

Rehearing Denied Jan. 2, 1930.

1. Attorney and client ⚷38—Preparing defamatory affidavit, withholding same from filing after ordered sealed, and communicating contents to newspaper, held to warrant suspension (Code Civ. Proc. § 282, subd. 6, and § 287).

Preparing affidavit, in action for breach of contract against actress and others, setting forth defamatory and scandalous matter and containing allegations of scurrilous, immoral, and perhaps fictitious matter prejudicial to honor and character of actress, publication of which would injure her reputation and destroy her earning capacity, and withholding affidavit from filing for five days after court ordered it sealed, and during that time communicating contents to newspaper correspondent and furnishing him with copy thereof, *held* violation of duties as attorneys, as defined by Code Civ. Proc. § 282, subd. 6, and to involve moral turpitude and dishonesty within meaning of section 287, warranting suspension from practice for six months.

2. Attorney and client ⚷58—Suspending attorneys for six months for preparing defamatory affidavit, withholding same from filing after ordered sealed, and communicating contents to newspaper, held not excessive punishment.

Suspension from practice of law for six months for preparing defamatory and scandalous affidavit in action against well-known actress, and withholding same from filing after ordered sealed, and communicating contents to newspaper correspondent, constituting violation of duties as attorneys and involving moral turpitude and dishonesty, *held* not excessive punishment.

In Bank.

Separate applications by Harry G. Sadicoff and by A. L. Abrahams for review of an order of the Board of Governors of the State Bar of

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★Rehearing denied.

California recommending suspension of applicants from practice of law for a period of six months. Affirmed.

Paul Barksdale D'Orr, Minor Moore, and Francis J. Heney, all of Los Angeles, for petitioners.

Julius V. Patrosso, of Los Angeles, for State Bar of California.

PRESTON, J. On December 12, 1927, a member of the Los Angeles County Bar Association addressed a letter to it, in which he complained of misconduct on the part of petitioners, while acting as attorneys for plaintiff, in a case pending in the superior court of that county, wherein he himself represented certain defendants. Under a stipulation that the matter should be heard and determined as though it had been initiated before the State Bar, said letter was treated as a complaint, answers thereto were filed by petitioners, and the case was assigned to Local Administrative Committee No. 4 of the county of Los Angeles, before whom the hearing was conducted.

Said local committee found that petitioners were guilty of violation of their duties as attorneys as defined by section 282, subd. 6, of the Code of Civil Procedure, also that their acts and conduct as disclosed by the evidence involved moral turpitude and dishonesty within the meaning of section 287 of said Code, and recommended their suspension from the practice of law for a period of two years. The Board of Governors thereafter duly approved the findings of said local committee, but modified its recommendation to one that petitioners be suspended for a period of six months only. A review of such action is here sought by petitioners.

Their attack upon the constitutionality of the State Bar of California Act (St. 1927, p. 38) may be dismissed, as this is no longer an open question. State Bar, etc., v. Superior Court, etc. (Cal. Sup.) 278 P. 432; State Bar of California v. Jones (Cal. Sup.) 280 P. 964, and cases there cited.

The other assignments, which in reality amount to a claim that the evidence is insufficient to justify said recommendations of suspension or support the findings and action of the Board of Governors, with an added plea for leniency, we believe should also be disposed of briefly. In our opinion the record, despite some conflict in the evidence, furnishes full support and justification for the action taken.

The reprehensible conduct with which petitioners are charged relates to certain acts done by them upon their substitution as attorneys for plaintiff in an action for breach of contract theretofore instituted in the Los Angeles superior court against a certain publicly known motion picture actress and others. At the time of said substitution of attorneys, proceedings were pending to restrain the taking of a certain deposition upon the ground that the matters there involved were res adjudicata by reason of a judgment entered in the United States District Court of New York in a similar action, to which these same persons were parties, wherein the pleadings contained such scandalous matter that they were ordered sealed by the court and this same plaintiff and his attorneys were enjoined from disclosing their contents. Said Los Angeles counsel for defendant actress, fearing a repetition of these salacious and scandalous statements, to the detriment of her reputation and honor, sought by conference with petitioners to have a certain other deposition taken before a superior judge in such a manner as to avoid publicity. During this period of pendency, petitioner Sadicoff, with the knowledge of petitioner Abrahams, prepared an affidavit setting forth at length said defamatory and scandalous matter, containing allegations of scurrilous, immoral, and perhaps fictitious matters prejudicial to the honor and character of said actress, publication of which would injure her reputation and could even destroy her earning capacity, which affidavit, ordered sealed by the trial court, was served by petitioners upon opposing parties, but, for no good purpose, was withheld by them from filing for five days, and its contents were communicated by petitioner Sadicoff to an Eastern newspaper correspondent, who was thereafter furnished with a copy of it.

Said local committee, with ample evidence to impel such conclusion, was of the opinion that petitioner Sadicoff, during said five-day period between its service and filing, wilfully withheld said affidavit from the court records for the purpose of securing an advantage for his client, either by forcing a compromise or otherwise deliberately intending to harm said actress through the danger incident to possible publication of its contents; that petitioner Abrahams was familiar with all these proceedings; knew of the preparation of said affidavit, its contents, that it had been ordered sealed, and that counsel for said actress were exerting every endeavor to prevent a repetition of what had happened in the New York case; and that he also knew of its intended use, and approved the action of petitioner Sadicoff.

[1] We do not believe an extended résumé of the matters brought out upon the hearing would be of any benefit here. Section 282 of the Code of Civil Procedure enjoins upon attorneys the duty "abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged." Section 287 of said Code authorizes removal or suspension of an attorney for "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he

ought in good faith to do or forbear, * * *" or "for the commission of any act involving moral turpitude, dishonesty or corruption. * * *"

The evidence adduced fully warrants the conclusion that said acts of petitioners and especially their conduct with respect to said affidavit and the motives and purposes which actuated them during said period constituted a violation of their duties as attorneys. In an action of the character established by the complaint in said case, references such as those contained in said affidavit to certain of the parties obviously were not justified, but were inexcusable, vindictive, and deliberately offensive—in fact, clear evidence of bad faith on the part of counsel both toward the parties themselves and the court.

[2] We may further state that the punishment suggested is not excessive or disproportionate to the offense. The facts surrounding the connection of petitioner Abrahams with preparation of said objectionable affidavit, his claims relative thereto, the youth of petitioner Sadicoff, his alleged belief in the propriety of his conduct, and his stated regret therefor, all received due consideration by said local committee, and, considering the seriousness of the offense, were undoubtedly factors which led to the suggestion by the Board of Governors of a suspension of merely six months. We have also given these factors due consideration.

It is therefore ordered that the action and recommendation of the Board of Governors in this matter be, and it is hereby, approved, and that the petitioners herein, Harry G. Sadicoff and A. L. Abrahams, be, and they are hereby, suspended from the practice of the law in this state for the period of six months from and after the date of filing of this order.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

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208 Cal. 537

CONSUMERS' SALT CO. et al. v. RIGGINS.
(L. A. 11592.)★

Supreme Court of California. Dec. 4, 1929.

Rehearing Denied Jan. 2, 1930.

1. Corporations 🔑289—Directors declared elected at annual meeting of stockholders held de facto directors, although legality of election was questioned.

Persons declared elected directors of corporation at annual meeting of stockholders and purporting to act as directors under color of election *held* to be de facto directors if not de jure, and as such their acts in electing new secretary were binding on corporation, although right to vote of party representing majority of stock, certificate of which had been deposited in court pending judgment in certain other case, was disputed.

2. Corporations 🔑289—Acts of de facto officers could not be collaterally attacked by corporation or by third persons (Civ. Code, § 315).

Acts of persons declared elected directors of corporation at annual meeting of stockholders could not be collaterally attacked by corporation or by third parties, since directors were at least de facto officers, and proceeding has been provided by Civ. Code, § 315, whereby right of person claiming to have been elected director of corporation may be inquired into.

3. Mandamus 🔑168(4)—Right of petitioners to performance of acts sought to be compelled must be clear to entitle petitioners to mandate.

To entitle petitioners to writ of mandate, legal right of petitioners to performance of acts sought to be compelled must be clear and complete, and petitioners must prove every fact that forms basis of their claim to issuance of such writ.

4. Mandamus 🔑129—Secretary elected by directors elected by stockholders held entitled to mandate requiring former secretary to deliver corporate seal, books, and records, although legality of election of directors was questioned.

Where secretary was elected at meeting of board of directors of corporation which board had been declared elected at annual meeting of stockholders, secretary and directors *held* entitled to writ of mandate requiring former secretary to deliver corporate seal, books, and records, although right of party representing majority of stock, certificate of which had been filed with clerk of court pending judgment in certain cases, was disputed.

In Bank.

Application by the Consumers' Salt Company and another for writ of mandate requiring J. R. Riggins to deliver corporate seal, books, and records to newly elected secretary of corporation. Writ granted.

Superseding opinion of District Court of Appeal in 277 P. 352.

Harry M. Irwin, of Los Angeles, for petitioners.

Newby & Newby and Dee Holder, all of Los Angeles, for respondent.

CURTIS, J. The facts in this case are not in dispute. Prior to the commencement of this action, one B. D. McAlvay brought an action against B. C. Stockwell and the Consumers' Salt Company for the purpose of quieting the title of the former to 225,000 shares of the capital stock of said Consumers' Salt Company, a corporation. These shares of stock then stood in the name of Stockwell upon the books of said company, and were evidenced by certificate No. 40. That action resulted in a judgment in favor of McAlvay quieting his title to said stock as prayed for. Stockwell appealed from the judgment, and, for the purpose of staying execution and in pursuance of the terms of section 944 of the Code of Civil Procedure, Stock-

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★Rehearing denied.

well surrendered said certificate No. 40 and had issued in the place thereof certificate No. 47 for a like number of shares of the stock of said company. This last-named certificate was issued in the name of B. D. McAlvay and was by Stockwell deposited with the clerk of the court with whom judgment was entered to abide the judgment of the appellate court as provided by said last-mentioned section of the Code. A written statement to this effect was entered upon the stock books of the company and also upon said certificate No. 47. Thereafter and while said appeal was pending, the regular annual meeting of the stockholders of said corporation was held for the purpose of electing a board of directors. The issued capital stock of said corporation at the date of said meeting consisted of 300,010 shares, 75,000 of which were held by C. L. Mullholand, one of the petitioners herein, 225,000 shares were represented by said certificate No. 47, and the remaining 10 shares were held by various other persons for the purpose of qualifying them to act as directors. At this meeting of the stockholders just referred to, McAlvay and Mullholand and three other stockholders attended. Stockwell was not present. Those present, including McAlvay, purported to elect a full board of directors, and later the persons declared elected directors at said stockholders' meeting met and elected Mullholand secretary. The respondent Riggins had, prior to said meeting, been the secretary of said company. Mullholand, after he had been declared elected secretary of said corporation, demanded of Riggins possession of the office, books, records, and other paraphernalia of said company, which demand was refused by Riggins, who now holds the possession of the said office, books, records, and other paraphernalia, claiming that Mullholand was never legally elected secretary of said company, and therefore, has no legal right to any property of the company. This proceeding was therefore instituted in the District Court of Appeal for the purpose of compelling Riggins by writ of mandate to deliver to Mullholand the office and paraphernalia of said company which were then in his possession by virtue of his having been secretary of said company. After decision by the District Court of Appeal (277 P. 352), the proceeding was transferred to this court.

It is conceded that whoever is the legally elected and acting secretary of the company is entitled to the office and records of said company. The case, therefore, hinges upon the question as to who was the legally elected and acting secretary of said company at the time said demand was made upon Riggins for the surrender of the possession of said office and property. It is not questioned but that Riggins, prior to the meeting of the board of directors of said corporation at which Mullholand was declared elected secretary, was the legally elected and acting secretary of said company. If therefore Mullholand was, at said meeting of the board of directors of said company, legally elected secretary, then the term of office of Riggins as secretary terminated at Mullholand's election, and Mullholand would be entitled to exercise from the date of his election all the rights and privileges of said office, including the right to the possession of the office and records of said corporation. On the other hand, if the election of Mullholand was not legal, then the respondent Riggins would continue as such secretary and he would be invested with all the rights, privileges, and responsibilities of said office.

[1] As we have already seen, Mullholand was elected secretary by the same persons who had been declared elected directors of said company at the annual meeting of its stockholders. At the meeting at which Mullholand was elected secretary these persons purported to act as the board of directors of said corporation under color of their election by the stockholders thereof. Even if we assume that their election as directors was illegal, and therefore they were not de jure directors, they were, nevertheless, under the facts just stated, de facto directors of said corporation, and as such their acts were binding upon the corporation in all respects as if they were the de jure directors thereof.

"Where a person not eligible to the office is declared elected, and no stockholder objects or takes legal proceedings to test the right to the office, and such person is allowed to perform the duties of his office, he becomes an officer de facto. As such his acts cannot be objected to on the ground that he was not a legally elected director. Neither corporate creditors, nor the corporation, nor the stockholders, nor the director himself, are allowed to raise this objection in that manner. The remedy is to oust him by quo warranto or to enjoin him as a usurper. But after he is allowed to become a de facto director, his title to office cannot be attacked collaterally, nor can his acts be repudiated on that ground. A director, as a de facto director, may bind the company by his acts, if allowed to continue in his position." Cook on Corporations (7th Ed.) vol. 2, p. 1894. "A de facto officer is one who has the reputation and position of the officer he assumes to be, and yet is not entitled to the office in point of law. A de jure officer is one who has the lawful right to the office, but who has either been ousted from it or has never actually taken possession of it. An officer is de facto when the statute under which he holds office is unconstitutional, or when he was elected but was ineligible, or was irregularly or illegally elected. * * * A director as a de facto director may bind the company by his acts, if allowed to continue in his position. And, in general, the contracts of all officers de facto, acting within the sphere of their office, are binding upon the corporation." Cook on Corporations (7th Ed.) vol. 3, pp.

2442, 2443, 2444. "Persons who hold office as directors, with the consent of the corporation and under color of an election or appointment, are de facto officers, although their election or appointment may have been illegal, and their acts as such in so far as third persons are concerned, are just as valid and binding upon the corporation as if they were directors de jure. * * * Assessments or calls by a de facto board of directors are valid. Appointment of an agent or subordinate officer by a de facto board of directors has the same effect as if made by a de jure board." Clark & Marshall, Private Corporations, vol. 3, § 662, p. 2035.

The courts of this state have consistently held in accordance with the rule enunciated by the authors of these two well-known textbooks. San Jose Savings Bank v. Sierra L. Co., 63 Cal. 179; San Joaquin, etc., Co. v. Beecher, 101 Cal. 70, 35 P. 349; Barrell v. Lake View Land Co., 122 Cal. 133, 54 P. 594; Balfour-Guthrie Co. v. Woodworth, 124 Cal. 169, 56 P. 891; Sherwood v. Wallin, 154 Cal. 735, 99 P. 191; Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094; Hygienic Health Food Co. v. Grant, 187 Cal. 431, 202 P. 653; Jones v. Peck, 63 Cal. App. 397, 218 P. 1030.

In Balfour-Guthrie Co. v. Woodworth, supra, the court, at page 172 of 124 Cal., 56 P. 892, of the opinion, stated the rule of this state in the following language: "The objection of the defendant to the regularity of the stockholders' meeting at which the directors were elected was properly overruled. For the purposes of this action, it was immaterial whether this meeting was properly called or not, or whether the election was by the stockholders in person or by proxy, or whether the proxies were sufficient in form to entitle the holders to vote at the election. The records of the corporation show that five persons were elected at that meeting to serve as its directors, and, whether their election was regular or not, they assumed the trust, and became at least de facto directors. So long as they held this position unchallenged by any member of the corporation, their acts as directors were binding upon the corporation, and upon strangers dealing with it. San Jose Sav. Bank v. Sierra Lumber Co., 63 Cal. 179."

[2] This language is most apt when applied to the facts in this case. For the purpose of this action it is immaterial whether McAlvay had the right to vote at the annual meeting of the stockholders, of said corporation the stock represented by said certificate No. 47 or not. He was present at said meeting with the other stockholders, and they proceeded without objection from any one, so far as the record shows, to elect a board of directors of said corporation. The persons so chosen thereafter organized as the board of directors of said corporation and at a meeting of said board elected the petitioner Mullholand secretary of said company. In acting under their purported election at said stockholders' meeting, they assumed to act as such directors and were at least de facto directors of said corporation. Their acts, as we have seen, cannot be collaterally attacked by the corporation or by third persons.

A summary proceeding has been provided by section 315 of the Civil Code whereby the right of a person claiming to have been elected a director of a corporation existing under the laws of this state can be inquired into, and if found to be illegal, it may be set aside and a new election called. Originally quo warranto proceedings were the sole remedy whereby the right of a person assuming to act as a director might be tested. Whether these are the only proceedings now open to one "grieved by any election held by any corporate body," it is not necessary for us to here decide. These proceedings just mentioned are direct proceedings brought for the purpose of determining the legality of the election of one purporting to be a director. By means of those proceedings, and particularly by that provided by section 315 of the Civil Code, any stockholder dissatisfied with the result of any election may have his grievances inquired into by a court and the validity of the election determined. But this cannot be done by a collateral attack upon the officer's right to hold his office like that now before us. The authorities already mentioned support this statement, especially the case of San Jose Sav. Bank v. Sierra Land Co., supra, where we find the following statement of the law by this court: "It may be that on a direct proceeding to determine Hayward's right to hold the position of director a judgment of ouster would have been entered against him, but his title to the place cannot be tried in this action, or impeached collaterally. Until he was ousted on a direct proceeding he was a director de facto."

[3] It is true that in the proceeding the petitioners are asking for a writ of mandate and that in order to entitle them to this extraordinary remedy the legal right of petitioners to the performance of the act sought to be compelled must be clear and complete. In such a proceeding, the petitioners must prove every fact that forms the basis of their claim to the issuance of the writ. 16 Cal. Jur. p. 869. But this the petitioners have done by showing that Mullholand had been elected secretary at a meeting of the board of directors of the corporation, which board of directors, at the annual meeting of the stockholders, had been declared elected directors.

[4] Under these authorities, we are satisfied that this petition for a writ of mandate must be granted. In arriving at this conclusion, we are aware of the fact that this point was only faintly urged by the petitioner, and that counsel on neither side has appeared to consider this question of controlling importance in the case. Their briefs have been principally devoted to the question as to the right of McAlvay to vote the 225,000 shares of stock represented by certificate No. 47 at the

meeting of the stockholders called for the purpose of electing a board of directors. As already indicated, this question is not before us in the present proceeding.

Let the writ of mandamus issue as prayed for.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

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208 Cal. 544

STOCKWELL et al. v. McALVAY.

(L. A. 11548.)

Supreme Court of California. Dec. 4, 1929.

1. Appeal and error ⚿781(4)—Appeal from action to enjoin voting of certain corporate stock could not be dismissed because annual stockholders' meeting had been held.

Appeal, in action to enjoin voting of certain shares of corporate stock during pendency of appeal of certain action involving such stock, could not be dismissed because annual meeting of stockholders had been held, where appeal in the other case was still pending, since future meeting of stockholders might be held before determination of such appeal.

2. Appeal and error ⚿790(2)—That question presented would be determined by decision in another action pending in Supreme Court furnished no grounds for dismissal of appeal.

Fact that decision in another action pending before Supreme Court would be determinative of question presented on appeal in action to enjoin voting of certain shares of corporate stock furnished no grounds for dismissal of appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by B. C. Stockwell and others against B. D. McAlvay. Judgment for defendant, and plaintiffs appeal. On defendant's motion to dismiss appeal. Motion denied.

Newby & Newby, of Los Angeles, for appellants.

Andrew H. Rose and Harry W. Irwin, both of Los Angeles, for respondent.

CURTIS, J. Motion to dismiss appeal on the ground that the questions involved therein have become moot. There is no merit in the motion and it is denied.

[1] Respondent contends that this action was brought to enjoin the voting of certain shares of stock of the Consumers' Salt Company at the annual meeting of the stockholders of said company and that as the annual meeting of said company was held on July 16, 1928, and said shares of stock were voted at said meeting, the question of respondent's right to vote said stock presents merely an academic question after the election has been held. The action, however, was brought to restrain respondent from voting said shares of stock during the pendency of the appeal of an action entitled B. D. McAlvay, Plaintiff and Respondent, v. Consumers' Salt Company et al., Defendants and Appellants, L. A. No. 10684. Said appeal is still pending, and it does not appear that there may not be meetings of said stockholders held in the future before the determination of said appeal, and that the right to vote said shares of stock at the future meeting of said stockholders may not be determined by the decision of the present appeal.

[2] Respondent advances another ground for the dismissal of said appeal for the reason that the questions involved herein have become moot. This ground is based upon the fact that there is still a third action now pending on appeal in this court, and that the sole question involved in the appeal of this third action is the right of the respondent herein to vote said shares of stock, and that a decision of this question in that action will be determinative of the question presented on the appeal in the present action. Conceding this to be true, it furnishes no ground for the dismissal of the present appeal. We might say at this time that the action to which respondent refers is L. A. No. 11592, and is entitled Consumers' Salt Company et al. v. J. R. Riggins, 204 Cal. —, 282 P. 954. It was instituted for the purpose of obtaining a writ of mandate directed to one J. R. Riggins, commanding and directing him to turn over and deliver, to the secretary of the Consumers' Salt Company the office, records and other property of said company. We have just filed our opinion in said action and have decided the same in favor of the petitioners therein. In doing so, we followed the contention of said petitioners made in their petition for hearing after decision by the District Court of Appeal (277 P. 352), that the right of McAlvay to vote said stock, or the validity of the election of the directors, declared elected at the stockholders' meeting on July 16, 1928, could not be raised in said mandamus proceeding.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

KERR v. MILATOVICH. (Civ. 6879.)★

District Court of Appeal, First District, Division 1, California. Dec. 5, 1929.

Rehearing Denied Jan. 4, 1930. Hearing Granted by Supreme Court Feb. 3, 1930.

1. Quieting title ⚷44(4)—Degree of proof necessary to sustain ownership of plaintiff's transferors, in action to quiet title to gold bullion, was only that which produced conviction in unprejudiced mind.

In action to quiet title to bars of gold bullion, ownership of plaintiff's transferors need not be demonstrated, but only that degree of proof was necessary which produced conviction in an unprejudiced mind.

2. Appeal and error ⚷1012(1)—Whether evidence offered in action to quiet title to gold bullion was convincing was question for trior of fact.

In action to quiet title to bars of gold bullion, whether or not evidence offered in regard to ownership by plaintiff's transferors was convincing was question for jury or trial court sitting as jury.

3. Quieting title ⚷44(4)—Evidence in action to quiet title held to sustain conclusion that gold bullion was stolen from mines and that defendant knew such fact.

In action to quiet title to bars of gold bullion, evidence *held* sufficient to sustain conclusion that bullion was stolen from mines of plaintiff's transferors, and that defendant knew such fact.

4. Evidence ⚷314(1)—Defendant's written statement held admissible, in action to quiet title to gold bullion, though containing hearsay (Code Civ. Proc. § 1870, subd. 2).

In action to quiet title to gold bullion, defendant's written statement, though containing matters of hearsay, *held* properly admitted, in view of Code Civ. Proc. § 1870, subd. 2, providing that act, declaration, or omission of party are admissible as evidence against him.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action to quiet title by Robert I. Kerr against M. Milatovich, alias D. M. Melatovich, also known as Al Muller. Judgment for plaintiff, and defendant appeals. Affirmed.

Hearing granted by Supreme Court; PRESTON, J., not participating in decision.

Robert E. Hatch, of San Francisco, for appellant.

A. H. Ricketts, of San Francisco (G. K. Burgren, of San Francisco, of counsel), for respondent.

PER CURIAM. The above action was brought to quiet plaintiff's title to four bars of gold bullion now in the custody of the United States Branch Mint in San Francisco. The defendant denied the alleged ownership of plaintiff. After a trial, judgment was entered for the plaintiff, and the defendant has appealed therefrom. It is urged as grounds for a reversal of the judgment that the evidence was insufficient to support the finding that plaintiff was the owner of the bullion, and that certain written statements by the defendant were erroneously admitted in evidence over objection.

Certain corporations, namely, Central Eureka Mining Company, Kennedy Mining & Milling Company, and Argonaut Mining Company, before the suit was brought, transferred their interests in the bullion in question to the plaintiff, who sues as their successor in interest. The corporations mentioned own producing gold mines in the vicinity of Jackson, Amador county, Cal., and the bullion was shown to have been deposited in the United States mint by the defendant under the assumed name of Al Muller. The evidence shows that no license to purchase gold or gold ores was ever issued to the defendant by the state of California. According to two witnesses who testified for the plaintiff, the defendant admitted to them that the bullion in question came from Amador county, Cal., and that he had purchased the same from miners who worked in the Argonaut, Kennedy, and Central Eureka mines, situated near Jackson in that county. Subsequently the defendant, in a written statement signed and sworn to by him, stated that he purchased the bullion from miners working in the vicinity of Jackson and shipped the same to the United States Mint at San Francisco. He further stated therein that "affiant has reason to believe that the gold bullion in Jackson, Amador county, California, and which gold bullion represented the bullion made in the above mentioned shipments, came from mines in the vicinity of Jackson, Amador county, California, namely, the Argonaut, Kennedy, and Central Eureka; that affiant is without sufficient information at this time to state definitely and accurately the precise amount of said gold bullion that came from any of the particular mines mentioned, or that it all came from said mines." It was also shown that thefts of ore from the mines mentioned by the miners employed therein had been frequent, and, according to the defendant's testimony as shown by his deposition, which was read at the trial, he purchased the bullion from various miners in California and Nevada. He further testified that he asked no questions as to how the gold was obtained, but assumed that the portion bought in California was produced there and the balance in Nevada.

[1-4] Defendant claims that the foregoing evidence was insufficient to support the finding that plaintiff's transferors owned the bullion. Demonstration was not required, but only that degree of proof which produces conviction in an unprejudiced mind, and whether or not the evidence offered was convincing was a question for the jury or the trial court sitting as a jury. Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092. The

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★Hearing granted. 290 P. 289.

evidence was reasonably sufficient to sustain the conclusion that the bullion was stolen from the mines of plaintiff's transferors and that the defendant knew the fact. It is further claimed that defendant's written statement contained matters of hearsay and was for that reason improperly admitted. The same was clearly admissible under the provisions of subdivision 2 of section 1870 of the Code of Civil Procedure.

We find no merit in the appeal, and the judgment is accordingly affirmed.

102 Cal. App. 277

McCARL et ux. v. KROUPA et al. (Civ. 7023.)

District Court of Appeal, First District, Division 2, California. Dec. 3, 1929.

Brokers ⚷37—Vendors cannot recover money received by broker and retained as commission under agreement to purchase, where not ratifying such agreement.

Under contract to produce purchaser ready, able, and willing to purchase vendors' property, and authorizing broker to retain a commission of $1,000, to be paid out of money received from purchasers, vendors *held* not entitled to recover sum of $1,000 received by broker from purchaser, where there was no allegation that agreement to purchase was ratified by vendors.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by John A. McCarl and wife against R. W. Kroupa and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Kington & Cunningham, of San Francisco, for appellants.

H. S. Craig, of Oakland, for respondent Kroupa.

R. P. Wisecarver, of San Francisco, for respondent National Surety Co. of New York.

STURTEVANT, J. The plaintiffs sued the defendants for moneys received. The defendants filed separate demurrer to plaintiffs' amended complaint, the demurrers were sustained without leave to amend, and judgment was entered in favor of the defendants. The plaintiffs appealed and have brought up the judgment roll. The record does not show that the plaintiffs asked leave to amend, and we may therefore assume that they did not ask leave.

In their amended complaint the plaintiffs allege: That they are husband and wife. That the defendant Kroupa is a licensed real estate broker. That the National Surety Company is a corporation, and is the bondsman of Kroupa. That on November 25, 1925, the plaintiffs, as owners, delivered to Kroupa a writing authorizing him to sell their lands. In that document the lands are described, and Kroupa is authorized to sell the lands for $21,000. It is provided in the writing that the first payment will be not less than $1,000, and to be considered as a deposit on the sale and that the balance of the purchase price of $20,000 will be secured by a first deed of trust on the lands. There is a covenant that the purchaser will give a bond indemnifying the sellers against liens arising for improvements to be made. No time is fixed as to when the plaintiffs will execute their deed, nor when that bond will be given. The buyers are to have 30 days, after the agent notifies the sellers a sale has been made, within which they can examine the title. The writing provides that the broker is entitled to a commission of $1,000, which shall be paid out of the money received from the purchasers. The writing is signed by the sellers. There is appended to it a writing, signed by Margaret Hubbert. That writing is as follows:

"The undersigned, designated as the purchaser, herein agrees to purchase the hereinabove described property under the terms and conditions hereinabove set forth, and has this date deposited with the agent $250.00 as a deposit and part payment of the purchase price of $21,000.00. Should the search of title to the hereinabove described property not prove valid, said deposit shall be returned to the purchaser and this contract become null and void. Should the purchaser not live up to the terms and conditions of this contract as hereinabove set forth, said purchaser shall forfeit said deposit and any and all rights given said purchaser under this contract.

"Margaret Hubbert."

The latter instrument is not signed by the sellers and there is no allegation that it was ratified by the sellers. Notwithstanding the recitals in said writings, the plaintiffs allege that Margaret Hubbert accepted said offer and paid the defendant Kroupa $1,000 as the first payment and deposit; that Margaret Hubbert did not perform, and that she is not ready, able, and willing to purchase; that the defendant Kroupa did not produce a purchaser, and is not ready, able, and willing to produce one; that on March 1, 1926, the plaintiffs demanded of the defendants that they pay the plaintiffs $1,000, but that the defendants have not paid it; that at all times the plaintiffs were ready, able, and willing to perform the contract, but that they have been prevented by defendants from doing so. Bearing in mind that the action is between the sellers and their broker, it will be noticed at once that the complaint of the plaintiffs contains many irrelevant allegations. Assuming, as alleged in the pleading, that the broker found no purchaser, then he is not entitled to make any demand on the plaintiffs. But he is not doing so. The plaintiffs are making a demand on him. But he had made no contract, express or implied, to pay the plaintiffs anything. Under the written authorization he was authorized to collect in cash $1,000—no more and no less. Of that sum he was authorized to retain the whole if he found a purchaser ready, able, and willing to purchase. If he did not find that kind of a purchaser, he was not authorized by the contract to receive anything. If, nevertheless, he did receive certain moneys, and the receipt thereof was not ratified by the plaintiffs, then the plaintiffs were not interested parties and may not recover any part of such moneys.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

102 Cal. App. 144

MEILI et al. v. CRANE et al. (GOODWIN et al., Interveners). (Civ. 3912.)

District Court of Appeal, Third District, California. Nov. 23, 1929.

1. Receivers 🔑200—Neither receiver nor those obtaining his appointment are liable for expenses of receivership when receipts are insufficient to cover disbursements.

It is a general rule that neither receiver nor those obtaining his appointment are personally responsible for expenses of receivership when receipts are insufficient to cover disbursements.

2. Receivers 🔑200—Parties obtaining appointment of receiver may be liable for his expenses and compensation, where proceedings for appointment were irregular or they obtain special benefits.

Where proceedings for appointment of receiver are irregular or where parties who obtained receivership derived special benefits therefrom, receiver may under certain circumstances recover his expenses and compensation from those who obtain his appointment.

3. Mortgages 🔑474—Parties obtaining appointment of receiver held not liable for deficiency, where appointment was regular, and they did not benefit beyond their right.

Parties obtaining appointment of receiver on foreclosure of mortgage *held* not liable for deficiency found to exist where receiver was regularly appointed, and those obtaining his appointment did not benefit beyond their right.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by J. J. Meili and another against J. A. Crane, Grace E. Tooker, and others, wherein certain defendants filed a cross-complaint, and Timothy Goodwin and others intervened. From the judgment, the interveners appeal. Affirmed.

J. Vincent Hannon, of Los Angeles, for appellants.

Harry Lyons, Edward T. Sherer, and Welburn Mayock, all of Los Angeles, for respondents.

PULLEN, Justice pro tem. To secure the repayment of a promissory note to J. J. Meili and O. W. Fry, respondents, J. A. Crane and Evangelyn Crane executed two mortgages, one a second mortgage on a piece of orchard land in the county of Los Angeles and the other a chattel mortgage on certain furniture and equipment in an apartment house in the city of Los Angeles, together with their leasehold interest therein. Upon default on the note, respondents brought this action, praying, among other things, that the mortgages be foreclosed, and that a receiver be appointed pendente lite to take over the leasehold interest and the furniture and equipment therein, and that the receiver be empowered to enter said premises, operate and manage the same, collect the rents therefrom, and hold the proceeds for the benefit of all parties interested. A receiver was appointed and took charge of the apartment house and furniture, entering into possession in December, 1925, and remaining in possession until dispossessed under an unlawful detainer action brought by the interveners herein, as owners of the apartment house referred to, who recovered judgment against the receiver, as such, for rentals and penalty amounting to $4,810.20. Pending the unlawful detainer action, the receiver, under order of the court, sold the furniture for $1,000. The net result of the operations by the receiver of the apartment house was a balance in his hands of $21.90 realized from rentals which, with the sum of $1,000 realized on the sale of the furniture and equipment, was applied by the court as a credit upon interveners' judgment, leaving a substantial amount of the judgment in favor of interveners unpaid.

While the action in intervention was pending, the real property referred to herein was sold under a decree of foreclosure of the prior mortgage, which sale realized a surplus of $3,992.45 over and above the amount necessary to satisfy such prior mortgage, which sum was paid into court subject to the outcome of this litigation. Thereupon interveners herein sought to recover the sum of $1,000 in the hands of the receiver and to be awarded a lien prior to plaintiffs herein on the real property in question, and that, out of the proceeds of the sale thereof, there be paid to interveners the balance remaining on their judgment against the receiver.

The trial court allowed the interveners the sum of $1,000, being the proceeds of the sale of the furniture by the receiver, and the net balance of $21.94 in the hands of the receiver, but refused to allow the interveners anything out of the proceeds from the foreclosure of the real property. From such order and judgment the interveners prosecute this appeal.

[1] Appellants' contention is not supported by the law. It is the general rule that neither the receiver nor those who obtained his appointment are personally responsible for the expenses of the receivership, when the receipts are insufficient to cover the disbursements.

[2, 3] If the proceedings for the appointment of the receiver are irregular, he may under certain circumstances recover his expenses and compensation from those who obtained his appointment, and also, where the parties who obtained the receivership have obtained special benefits, they may in equity be required to satisfy the expenses of the receiver, but neither of these special situations are applicable to the facts here. Ephraim v. Pacific Bank, 129 Cal. 589, 62 P. 177. The receiver was regularly appointed, and those who obtained his appointment have not benefited beyond their right.

The rule is well stated in the case of Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 S. Ct. 406, 408, 52 L. Ed. 528, 13 Ann. Cas. 1155, appealed from the Ninth Circuit to the Supreme Court of the United States, where Mr. Justice Harlan, speaking for the court, said:

"We are of opinion that the court of appeals erred in holding that the trust company was liable for the deficiency found to exist. No such liability could arise from the simple fact that it was on plaintiff's motion that a receiver was appointed to take charge of the property pending the litigation. The motion for a receiver was to the end that the property might be cared for and preserved for all who had or might have an interest in the proceeds of its sale. The circumstances seemed to have justified the motion, but whether a receiver should have been appointed or not was in the sound discretion of the court. Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver. In Booth v. Clark, 17 How. 322, 331, 15 L. Ed. 164, 167, it was said: 'A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt, Practical Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. Delany v. Mansfield, 1 Hogan (Ir.) 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. Verplanck v. Mercantile Ins. Co., 2 Paige [N. Y.] 452.' In Porter v. Sabin, 149 U. S. 473, 479, 37 L. Ed. 815, 818, 13 S. Ct. 1008, 1010, the court said: 'When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it' "—citing cases.

Without further elaboration or further citation of authorities, we are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

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102 Cal. App. 260

CROCKETT v. DOWLING. (Civ. 6893.)

District Court of Appeal, First District, Division 1, California. Dec. 2, 1929.

1. Appeal and error ⚷237(2)—Plaintiff's immaterial testimony relative to insurance held not to require reversal, where defendant failed to request that testimony be stricken or that jury be cautioned.

Plaintiff's testimony as to conversation on part of defendant relative to his carrying insurance *held* not to require reversal in action for injuries based on defendant's negligent operation of automobile, where plaintiff testified as to this matter after plaintiff's counsel had indicated readiness to permit cross-examination, and where defendant failed to request that testimony be stricken and failed to request that court instruct the jury to disregard it.

2. Appeal and error ⚷1170(9)—Instruction requiring defendant to prove plaintiff's negligence "directly" or proximately contributed to injury held not reversible error (Const. art. 6, § 4½).

Instruction, in action for injuries, requiring defendant to show affirmatively that negligence of plaintiff directly or proximately contributed to the cause of the injury, *held* not to require reversal because of addition of word "directly," in view of Const. art. 6, § 4½, relative to harmless error, and in view of fact that another instruction given at defendant's request directed jury that plaintiff could not recover if his negligence contributed to accident.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by William Crockett against S. W. Dowling. Judgment for plaintiff, and defendant appeals. Affirmed.

Griffith R. Williams, of San Francisco (George Allan Smith, of Monterey, of counsel), for appellant.

Rittenhouse & Snyder, of Santa Cruz, for respondent.

PER CURIAM. An appeal by the defendant from a judgment entered against him in an action to recover damages for personal injuries alleged to have been caused by his negligence. The injuries followed a collision in the city of Santa Cruz between two automobiles driven by the respective parties to the action. The defendant denied that the injuries and damage complained of were due to his negligence, and pleaded contributory negligence on the part of plaintiff. The action was tried before a jury, which rendered a verdict for the plaintiff. As grounds for reversal it is contended that the conduct of plaintiff's counsel in connection with the giving of certain testimony by the plaintiff constituted prejudicial misconduct, and that the court instructed the jury erroneously.

In the course of the direct examination of plaintiff the following occurred:

"(Direct Examination by Mr. Snyder): Q. Mr. Crockett, following this collision which you testified to yesterday, was there any conversation had between you and Dr. Dowling at the time of the accident or afterwards? In referring to this conversation I will ask you to first specify, as nearly as you can, where it was had, and also whether any persons were present besides yourself and Dr. Dowling? A. Well, he came to the house that evening four days after.

"Q. That would be February 8, 1927? A. Yes, I believe it was about—I think it was about four days—I wouldn't say positively, but around about that time; and he asked me there in the house—there were Mrs. Crockett and the doctor and myself—he asked me if I put on my brake, and I told him no, and he said he was thinking about running in front of me, and then he thought he might get rammed in the center.

"Mr. Snyder: I think that is all. The witness (continuing): And he said further he would write to his company and tell them that it was an unavoidable accident, and he said 'I have paid out thousands of dollars for insurance to be protected.'

"Mr. Wyckoff: I assign counsel's bringing that out as misconduct, and prejudicial error.

"Mr. Snyder: May it please your Honor, your Honor will notice that I said 'that is all' and was waiting for the cross-examination. There is no misconduct there.

"Mr. Wyckoff: I will assign it anyway."

[1] The record discloses no evidence that plaintiff's counsel suggested or intended to elicit the immaterial portions of plaintiff's testimony. No request that the same be stricken out was made by the defendant, nor did he request the court then or thereafter to instruct the jury to disregard it. Under similar circumstances, it has been held that alleged misconduct was not ground for reversal, if an admonition to the jury would have removed the effect thereof. Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672, 12 A. L. R. 1007; Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393. We cannot say that such an admonition would have been ignored by the jury, nor was the question of negligence so close or the amount of the verdict such as would raise the presumption that the verdict was influenced by this testimony or based upon prejudice or passion.

[2] The following instruction was given at plaintiff's request: "You are instructed that it is sufficient for the plaintiff to show by the evidence in the first instance that the injury resulted from the negligence of the defendant, and the plaintiff need not show a want of contributory negligence on his part; contributory negligence is an affirmative defense to be established by the defendant, unless the evidence on the part of the plaintiff shows contributory negligence on his part; and in order to defeat a recovery by the plaintiff where the evidence shows that the injuries complained of by plaintiff were proximately caused by the negligence of the defendant, the defendant must affirmatively show that the negligence of the plaintiff directly or proximately contributed to the cause of the injury." Defendant contends that in order to defeat a recovery by the plaintiff he was not required to prove that the plaintiff's negligence directly and proximately contributed to cause the injury, but that it was sufficient to show that his negligence proximately contributed thereto. While such is the rule (Merrill v. Los Angeles Gas, etc., Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Dowd v. Atlas Taxicab Co., 69 Cal. App. 9, 15, 230 P. 958), it has nevertheless been held that an instruction that contributory negligence was not a defense unless it also appeared from the evidence that such negligence of the plaintiff, if any, directly and proximately contributed to the accident, was not a sufficient ground for a reversal of the judgment in view of section 4½ of article 6 of the Constitution, even if the instruction failed by the addition of the word "directly" to the word "proximately" to state precisely the causal relation between the negligent act and the injury (Olsen v. Standard Oil Co., supra).

Moreover, the misleading effect of the instruction, if any, was overcome by the following instruction which was given at the request of the defendant: "As to the defense of the contributory negligence of the plaintiff, I instruct you that if you believe from the evidence that the plaintiff was negligent in the operation of his car and that his negligence was a contributing cause of the collision and consequent injury, he cannot recover. It is not necessary to this defense that the negligence of plaintiff should be the sole cause of the accident. It is sufficient if it was a contributing cause. So that if you find that the defendant was negligent, and plaintiff was also negligent, and that plaintiff's negligence was one of the contributing causes of the collision, then plaintiff cannot recover. Neither are you permitted, if you find both parties were negligent, to base your decision upon which was the more negligent. If you find that the plaintiff was negligent in the operation of his car and that his negligence contributed to the accident in however small a degree, he cannot recover."

After an examination of the entire record, including the evidence, we are satisfied that the verdict of the jury was fully sustained and that no error appears which would justify a reversal of the judgment. The judgment is affirmed.

Mr. Justice KNIGHT, deeming himself disqualified, did not participate in the decision this day rendered in the above-entitled cause.

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102 Cal. App. 286

WELK v. CONNER et al. (Civ. 7117.)

District Court of Appeal, First District, Division 2, California. Dec. 3, 1929.

1. Execution 🔑75—Mere lapse of time after entry of judgment does not deprive trial court of power to order issuance of execution (Code Civ. Proc. § 685).

Under Code Civ. Proc. § 685, mere lapse of time after entry of judgment does not deprive trial court of power to order issuance of execution on such judgment.

2. Judgment 🔑897—Court may not declare judgment satisfied on uncontradicted affidavit of judgment debtor that judgment which had been assigned was paid.

Court may not vacate writ of execution and declare judgment satisfied on uncorroborated affidavit of judgment debtor that judgment was included in assignment of another judgment, and that such judgment had been paid, though not satisfied of record although affidavit was uncontradicted by testimony of other witnesses.

3. Affidavits 🔑18—On motion to declare judgment satisfied, court cannot consider affidavit of deceased creditor's administrator setting out deceased's statements tending to show that judgment was unsatisfied.

On motion to vacate writ of execution and to declare judgment satisfied, court cannot consider affidavit of administrator of judgment creditor setting out statements by judgment creditor tending to show that judgment was unsatisfied, since such statements are self-serving.

4. Judgment 🔑839—Presumption that instrument correctly expresses parties' intention held to support implied finding that assignment did not include judgment in question (Code Civ. Proc. § 675).

On motion to vacate execution and declare judgment satisfied under Code Civ. Proc. § 675, presumption that written instrument deliberately executed correctly expresses intention of parties *held* sufficient to support implied finding that assignment of another judgment did not include judgment under which execution was issued.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Theodore J. Welk against W. J. Conner and Newton J. Skinner. From orders denying motions to recall and vacate writ of execution procured by plaintiff's administrator and to declare judgment satisfied, the last named defendant appeals. Affirmed.

A. C. Routhe, of Los Angeles, for appellant.

Parker, Moote & Longcroft, of Los Angeles, for respondent.

DOOLING, Justice pro tem. On November 13, 1913, Theodore J. Welk recovered two judgments in the superior court in separate actions in each of which the appellant Newton J. Skinner was a defendant. On March 14, 1927, Welk having died, his administrator procured from the superior court an order for the issuance of a writ of execution in one of these actions, No. B3694. Thereafter appellant moved the court for an order recalling and vacating said writ of execution and also for an order declaring such judgment satisfied under section 675, Code of Civil Procedure. These motions were denied, and from the orders denying them this appeal is taken.

While fourteen separate grounds were stated in support of the motion, they are but different ways of stating two grounds: (1) That the trial court committed an abuse of discretion in ordering execution to issue after a lapse of thirteen years from the entry of judgment, and (2) that by agreement of the parties the judgment had been satisfied, though not of record, shortly after its entry.

[1] The first of these grounds may be briefly disposed of by reference to the following decisions: Harlan v. Harlan, 154 Cal. 341, 98 P. 32; Weldon v. Rogers, 151 Cal. 432, 90 P. 1062; Doehla v. Phillips, 151 Cal. 488, 91 P. 330; Demens v. Huene, 89 Cal. App. 748, 265 P. 389. These cases clearly settle the rule that under section 685, Code of Civil Procedure, the mere lapse of time after entry of judgment does not deprive the trial court of the power to order the issuance of execution.

[2, 3] The second ground requires an examination of the evidence before the trial court on the motions. In support of his motions appellant filed two affidavits, both made by

himself. From these and the documentary evidence introduced it appears that in action No. B3694 judgment was entered in favor of plaintiff for $1,760, together with $10.50 costs and $75 attorney's fees. In the other action, No. B3693, judgment was entered for the foreclosure of a chattel mortgage in the amount of $7,406.20, together with $11.25 costs and $350 attorney's fees. On March 14, 1916, the sheriff returned a decree of foreclosure partially satisfying the judgment in the foreclosure proceeding. Thereafter, and on October 27, 1917, Welk executed an assignment of judgment to a corporation, the Foundation Company which assigned "a certain judgment recovered by the party of the first part (Welk) on the 13th day of November 1913 * * * against Newton J. Skinner and W. J. Conner, for the sum of Seven Thousand Four Hundred Six and 20/100 Dollars ($7406.20) Eleven and 25/100 Dollars ($11.25) costs, and Three Hundred Fifty ($350.00) Dollars attorney's fees." It will be observed that these are the exact amounts for which judgment was entered in the foreclosure proceeding, No. B3693.

Subsequently, and on April 12, 1927, the Foundation Company assigned in writing to appellant all its interest in both judgments, Nos. B3693 and B3694.

Appellant in his affidavit stated that the true intention of the parties when the assignment was made to the Foundation Company in 1917 was that both judgments should be assigned; both judgments, so he claims, having been actually paid to Welk and satisfied on that date. This contention is supported in appellant's affidavits by a long, circumstantial recital of fact which, if believed, would support appellant's contention. The only real contradiction of the facts recited in these affidavits is found in the terms of the assignment from Welk to the Foundation Company and the fact that no effort was made to reform that assignment for a period of ten years after its execution. We disregard an affidavit of Welk's administrator setting out certain statements made by Welk before his death tending to show that the judgment in this action was never satisfied, because those statements are clearly self-serving declarations of the decedent.

In this state of the evidence appellant claims that it was an abuse of discretion for the court to disregard his evidence given by affidavit which, according to his contention, was absolutely uncontradicted. With this we cannot agree. There would be no security in any written document if after the death of one party to it the other party, by his own uncorroborated testimony, could compel a court to reform it, unless that testimony was contradicted by the testimony of other witnesses. If this were the law, the very purpose of reducing agreements to writing would frequently be thwarted. Welk, the owner of the judgment, has been removed by death beyond reach of the process of any earthly court. He has left, however, his own written assignment to the Foundation Company, which very clearly operates to assign one judgment, and just as clearly, on its face, does not operate to assign the other. The reference in the assignment to the exact amounts of the judgment in the foreclosure action makes this unmistakable.

While the precise question raised in this case has not been presented to the appellate courts of this state, authority is not wanting from other jurisdictions. In Moore v. Crawford, 130 U. S. 122, 9 S. Ct. 447, 450, 32 L. Ed. 878, the Supreme Court of the United States, quoting with approval from Kent v. Lasley, 24 Wis. 654, said: "It is only when an oral agreement is clearly and satisfactorily proven by testimony above suspicion and beyond reasonable doubt that it will be enforced to establish rights in land at variance with the muniments of title, and it is open to question 'whether, in any case, after the decease of the grantee, the unaided testimony of the grantor alone, however intelligible and credible he may be as a witness, should be held sufficient to set aside and invalidate the title claimed under it.' "

In Harter v. Christoph, 32 Wis. 245, the court said that "it would be an extreme case which would justify the court in reforming or defeating a written instrument for a mistake therein, upon the uncorroborated testimony of a party to it, although such testimony was uncontradicted."

In Zeilda Forsee Inv. Co. v. Ozenberger, 132 Mo. App. 409, 112 S. W. 22, 23, the Missouri Court of Appeals made the following statement: "We are not called upon and do not hold that the testimony of single witness might not be sufficient to support a decree for reformation of a written instrument. But we do hold that, in an instance of that kind, the court should proceed with great care and caution, and, unless the testimony of the witness be very clear and positive and consistent with all the other facts and circumstances, to refuse reformation."

To similar effect see Crilly v. Board of Education of Chicago, 54 Ill. App. 371; 34 Cyc. p. 989.

[4] There is a presumption of law that a written instrument, deliberately executed, correctly expresses the intention of the parties. 22 Cal. Jur. pp. 739, 740, § 22; Penney v. Simmons, 99 Cal. 380, 382, 33 P. 1121; Mahoney v. Bostwick, 96 Cal. 53, 58, 30 P. 1020, 31 Am. St. Rep. 175; Burt v. Los Angeles Olive Growers Ass'n, 175 Cal. 668, 675, 166 P. 993. This presumption, while disputable, is itself evidence sufficient to support the implied finding of the court in this case (10 Cal. Jur., pp. 744–745, § 64; Estate of Wiechers, 199 Cal. 523, 530, 250 P. 397), even though contradicted by the appellant's testimony.

"The courts have frequently held the testimony of a single witness not to be such clear and convincing proof as is required to sustain a verdict or finding where it was offered for the purpose of varying or contradicting a writing, or was opposed by a strong presumption of law, as, for instance, the presumption that a written instrument expresses the real intention of the parties." 23 C. J., pp. 54, 55.

It follows that the trial court was not bound to decide that the assignment from Welk to the Foundation Company did not correctly state the intention of the parties.

The orders appealed from are accordingly affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

102 Cal. App. 232

WORK v. ASSOCIATED ALMOND GROWERS OF PASO ROBLES. (Civ. 3914.)

District Court of Appeal, Third District, California. Nov. 29, 1929.

1. Contracts 🔑170(1)—Where language of contract raises question of doubtful construction, courts will follow practical construction of parties.

Where terms of contract or language raises question of doubtful construction, and it appears that parties themselves have practically interpreted their contract, courts will follow that practical construction.

2. Vendor and purchaser 🔑61—Purchaser's acts as to possession, payment of taxes, etc., held to estop purchaser from claiming option agreement dealt only with land then owned by vendors, where, before tender, vendors acquired other land within boundaries of ranch.

Acts of purchaser as to possession, payment of taxes, removal of buildings, and preparation of map and retention of additional land *held* to estop purchaser from claiming that option agreement giving purchaser option on land described, and all that portion of tract of 6,000 acres remaining after selection of described parcels, dealt only with land then owned by vendors, where, before tender, they acquired additional land embraced within exterior boundary fences of vendors' ranch.

3. Accord and satisfaction 🔑11(1)—Compromise and settlement 🔑5(2)—Essential element in accord and satisfaction by tender of check is that tender is subject to condition that acceptance is satisfaction in full.

It is an essential element in accord and satisfaction by tender of check that tender is subject to condition that acceptance of check is satisfaction in full.

4. Accord and satisfaction 🔑26(3)—Compromise and settlement 🔑23(3)—Correspondence did not establish accord and satisfaction of purchase price of land.

Correspondence between vendors and a trust company acting for the parties, showing there was uncertainty as to exact acreage upon which price per acre was to be computed, and stating that, if figures submitted did not agree, statement of amount claimed be sent, so that difference might be checked, did not establish an accord and satisfaction of purchase price of land.

Appeal from Superior Court, Santa Barbara County; C. P. Vicini, Judge.

Action to recover the unpaid balance of the purchase price of real property by John Work and another against the Associated Almond Growers of Paso Robles. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wm. G. Griffith and Griffith & Thornburgh, all of Santa Barbara, for appellant.

C. F. Lacey, of Salinas, for respondents.

PULLEN, Justice pro tem. The defendant appeals from a judgment in favor of plaintiffs who sued for a balance on the purchase price of real property. Negotiations were carried on in behalf of the parties to this appeal, which culminated in an option agreement, the portion which is essential to a determination of this appeal being as follows:

"Whereas, the sellers are owners of certain lands in San Luis Obispo and Monterey counties, California, containing approximately six thousand (6000) acres, more particularly described in parcels as follows:

"Parcel No. 1. All that portion of said tract of 6000 acres of land lying south of the county road in sections 27, 33 and 34, and the land in San Luis Obispo county joining said section 33 on the south.

"Parcel No. 2. All of said tract of 6000 acres lying north of the south line of sections 15 and 16 in said township 24 south of range 13 east, M. D. M.

"Parcel No. 3. All that part of said tract of 6000 acres lying south of the north line of section twenty-nine, in township 24 south of range 13 east, M. D. M., and including all lands in township 25 south, in San Luis Obispo county, and that part of section thirty-three lying north of the county road running through said section thirty-three, excepting however all of section 34 embraced in the foregoing description.

"Parcel No. 4. All that part of said tract of 6000 acres lying east of the north and south line between sections 21 and 22 and sections 27 and 28 in said township 24 south of range 13 east, M. D. M.

"Parcel No. 5. All that part of said tract of 6000 acres remaining after the selection of the foregoing described parcels.

"And the said buyer desires an option upon said lands in order that he may be able to sell the same, and have said land planted to fruit and nut trees."

At the time of the execution of this agreement the acreage owned in fee by respondents, as ascertained by surveys subsequent to the execution of the option, was considerably less than 6,000 acres, but after the execution of the option, and before tender thereunder, respondents had acquired title to 6,028.15 acres, and claim that was the acreage contemplated, whereas appellant urges that only the land to which respondents had title in fee, together with a portion owned by a son of the respondents, was included in the option, and amounted to 5,708.01 acres. It is true that at the time of the execution of the option respondents had record title to less than 6,000 acres, but embraced within the exterior boundary fences of respondents' ranch, and in his possession for many years, were parcels of land standing in the names of —Pence 160 acres, Colyer 80 acres, 80 acres of unpatented government land, and 597.68 acres in the name of Robert Work, already referred to as a son of respondents. Appellant contends that the option agreement clearly shows on its face that the parties dealt only with the land then owned by respondents, approximating 6,000 acres in extent, situate in the counties named.

The descriptive clause, such as "all lands and real estate belonging to the said party of the first part, wherever the same may be situated," etc., has been held sufficient, in a number of California cases, starting with Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383, but here, neither the respondents nor appellant ask that the option be given its literal construction, for, as to the 597.68 acres belonging to Robert Work, appellant concedes that title to that did not stand in the name of respondents at the date of the option, but, nevertheless, they claim it was conveyed by the option. Just how appellant differentiates the Robert Work land from the Pence or Colyer land we fail to see.

An examination of the record shows that, when the appellant's representatives went upon the land, they were taken to an elevated point near the center of the ranch, and the fence lines were pointed out, but declined to make a more detailed tour, although urged to do so by respondents; that they had maps prepared for subdivision purposes embracing the entire ranch, which included the Pence, Colyer, and Robert Work tracts; that they paid taxes on the entire 6,028.15 acres for the first two years of their occupancy; that they removed buildings from the Colyer property and planted a considerable portion of the Robert Work tract to almonds and leased a part of the land in dispute to others.

In the particular descriptions included in the parcels 1, 2, 3 and 4, the boundaries are given with reference to roads or section lines, paragraph 5 using the language, "all that part of said tract of 6000 acres remaining after the selection of the foregoing described parcels," which clearly indicates some physical external boundaries within which the approximate 6,000 acres lay, and undoubtedly that boundary was the exterior fence seen by the parties at the time the ranch was viewed. It also appears in evidence that the appellant, in its maps and correspondence, referred to the tract as the "Independence Ranch," which was the familiar neighborhood name given to the entire tract occupied by respondents, and within their exterior fence lines.

[1, 2] In determining the meaning of a written agreement, the courts have always given the utmost consideration to the interpretation which the parties themselves have placed upon it, as evidence of their acts, "and in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. * * * In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty." Mitau v. Roddan, 149 Cal. 14, 84 P. 145, 150, 6 L. R. A. (N. S.) 275. In the case just cited it is also said: "Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions." The unequivocal acts on the part of the appellant, as to the possession, payment of taxes, removal of buildings, and preparation of maps, and the retention of the Robert Work land, are sufficient in themselves to defeat the contention it now advances, and to estop the defendant from insisting upon its present interpretation of the option.

[3, 4] Appellant also contends that, based upon certain correspondence and payments between respondents and a trust company acting for the parties herein, an accord and satisfaction has been established, but an examination of the correspondence does not justify such conclusion. "It is an essential element in accord and satisfaction by tender of a check, that the tender is subject to the condition that the acceptance of the check is satisfaction in full. This condition is not shown by the mere fact that the debtor accompanies the check with an account showing a balance equal to the amount of the check, and it is disproved where the giving

and acceptance of the check is followed by such conduct of both parties as clearly shows that they did not consider the check a final settlement of the debt." 1 Cal. Jur., par. 10; Lapp v. Muscoy, 166 Cal. 27, 134 P. 989; Duncan v. F. A. Hihn Co., 27 Cal. App. 155, 148 P. 971; 1 Cor. Jur., p. 558. An examination of the correspondence between the parties shows that there was still an uncertainty as to the exact acreage upon which the price per acre was to be computed, and, in substance, practically all the letters from the trust company addressed to the bank acting for respondents stated that, if the figures submitted by the trust company did not agree with the figures of respondents, a statement of the amount claimed be sent, so that the difference might be checked. This falls considerably short of the requirement to establish an accord and satisfaction.

The court below computed the balance due upon an exact acreage of 6,000 acres, rather than upon the acreage determined by the survey, to wit, 6,028.15, but, inasmuch as no objection has been urged to the findings in this particular, we adopt the same as a basis of computation, although it is not perhaps strictly in accordance with the testimony or the evidence adduced.

The judgment of the trial court is affirmed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

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102 Cal. App. 380

ROACH et ux. v. WELLS FARGO BANK & UNION TRUST COMPANY. (Civ. 7059.)★

District Court of Appeal, First District, Division 2, California. Dec. 6, 1929.

Rehearing Denied Jan. 2, 1930. Hearing Denied by Supreme Court Feb. 3, 1930.

1. Negligence ⟹136(22)—Negligence in constructing step immediately inside doorway of restroom, door swinging inward, held for jury.

Negligence of defendant owner of office building in maintaining step about 5 inches in height immediately inside threshold of doorway leading into restroom, the door swinging inward, *held* question for jury.

2. Negligence ⟹136(27)—Contributory negligence of plaintiff injured on falling down step immediately inside doorway to restroom, door swinging inward, held for jury.

Contributory negligence of plaintiff injured on falling while stepping into restroom of office building *held* question for jury, under evidence that step was constructed immediately inside doorway and door swung inward.

3. Negligence ⟹67—One entering restroom could assume that change of levels, of which door might be warning was properly constructed.

Though door leading into restroom of office building was warning of change of levels, person entering restroom could assume change was properly constructed.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Raymond Roach and wife against the Wells Fargo Bank & Union Trust Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs are husband and wife. The wife joined her husband and commenced an action to recover damages for personal injuries. The defendant answered, and a trial was had before the court sitting with a jury. The jury returned a verdict in favor of the plaintiffs, and, from the judgment entered thereon, the defendant has appealed.

In the complaint it is alleged: That the defendant is a corporation and that it owns and operates an office building at the corner of Montgomery and Market streets in San Francisco. That on the 19th day of March, 1926, it maintained on the tenth floor of said building a restroom for the general use and benefit of women who had occasion to use the facilities of said building. "* * * That on said date said defendant Wells Fargo Bank & Union Trust Company, a corporation, negligently and carelessly maintained the entrance to said rest room in this: that entrance to said rest room was gained from the hallway on said tenth floor of said office building through a doorway in which said doorway was hung a solid panel door, which said door opened inwards from said hallway into said rest room; that immediately inside of the threshold of said doorway was a step about five inches in height down which all persons entering said rest room from said hallway would be compelled to step; that by reason of the construction of said doorway and said step it was impossible for any person, not familiar with said construction of said doorway and said step, to know of the existence of said step located immediately inside of the threshold of said doorway and immediately inside of said door as aforesaid;" that on the 19th day of March, 1926, Clara J. Roach had occasion to call on one of the tenants in said building and while in said building to visit said restroom; that she did not know of the construction nor of the existence of said step; that she attempted to pass through the doorway into said restroom, and in so attempting she fell to the floor inside of said restroom and suffered the injuries for which she asked damages. The defendant answered, and, among

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★Rehearing denied. Hearing denied by Supreme Court.

other things, pleaded the contributory negligence of the said Clara J. Roach.

[1] Both parties agree that under the facts the defendant owed to the plaintiffs the duty to exercise reasonable care to keep its premises safe, but the defendant asserts that the plaintiffs failed to prove any negligence on the part of the defendant, that is, that the defendant omitted to exercise reasonable care. In making this assertion the defendant fails to appreciate the force and effect of the evidence produced by the plaintiffs. To prove their case the plaintiffs called witnesses and elicited such evidence as showed the accident. They also introduced evidence which showed the exact manner in which the door, the step, and the surroundings were constructed. Having done so, they called Wallace H. Hubbert, an architect. They proved his experience in building and his familiarity with the construction of a great many office buildings in and about San Francisco, and they also proved that he had made an examination of the identical door and step that is involved in this litigation. That witness testified that the customary method of construction under the circumstances involved in this case was to construct a platform on the inside of the door; that it is customary to have a platform at least the width of the stairway; that a platform 7½ inches wide would not be good construction, but would be very poor construction; it would not be the customary and usual construction, and the construction of this particular door and step is not customary. After this testimony had been given, there was sufficient evidence to warrant the trial court in submitting the question of negligence to the jury. Long v. John Breuner Co., 36 Cal. App. 630, 172 P. 1132.

[2] The defendant claims that the plaintiff Clara J. Roach was guilty of contributory negligence. This attack rests upon the contention that Mrs. Roach was looking directly ahead and did not look down at the floor, and, if she had looked down, she would have been able to see that there was a variation in levels between the outside room and the inside room. All of these matters in the instant case presented questions of fact which were properly left to the jury. Long v. John Breuner Co., supra; Siegman v. Fetters, 59 Cal. App. 114, 210 P. 49.

[3] In short, Long v. John Breuner Co., supra, is determinative of both questions presented in this case. In so holding we have not overlooked the fact that it has been held that a door between two apartments is a warning to those entering, who were not acquainted, to ascertain whether the floors of the two adjoining apartments are on the same level. Hertz v. Advertiser Co., 201 Ala. 416, 78 So. 794, L. R. A. 1918F, 137, and cases there cited; Main v. Lehman, 294 Mo. 579, 243 S. W. 91. Assuming, without deciding, that the door was a warning of change of levels, the plaintiff could assume the change was properly constructed. Madigan v. O. A. Hale & Co., 90 Cal. App. 151, 265 P. 574.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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102 Cal. App. 205

MARYLAND CASUALTY CO. v. LITTLE et al. (Civ. 43.)

District Court of Appeal, Fourth District, California. Nov. 27, 1929.

1. Partnership ⇨259½, 262—Partnership having no fixed term may be dissolved by agreement or by will of one of partners.

Where there is no fixed term for the existence of the partnership, it may be dissolved by the agreement of the partners or by will of one of them.

2. Partnership ⇨296(3)—Agreement of partners or decision of one partner to dissolve firm may be proved by circumstances.

Agreement of partners for dissolution of partnership or will of one partner to dissolve firm may be proved by circumstances as well as direct evidence.

3. Partnership ⇨296(3)—Uncontradicted evidence of complete cessation of partnership business and division of assets without objection forces conclusion of dissolution of partnership by agreement.

Complete cessation of partnership business and division of all or major portion of its assets, without any objection, is sufficient to force conclusion of dissolution of partnership by agreement, if not explained or refuted.

4. Partnership ⇨296(3)—That affairs of partnership are not entirely liquidated cannot overcome satisfactory evidence of dissolution.

Fact that affairs of partnership are not entirely liquidated, and that some bills remain unpaid and some property remains undivided, cannot overcome satisfactory evidence of dissolution, since liquidation generally follows dissolution; dissolution representing demise of partnership, and liquidation the settlement of the estate.

5. Evidence ⇨53—Presumption is dispelled when facts contrary to presumption are proved.

Presumptions are allowed to stand merely in lieu of proof of facts, and, when fact is proved contrary to presumption, presumption no longer exists.

6. Partnership ⇨296(3)—In suit against members of partnership on note given by one partner, evidence required finding of dissolution of partnership prior to execution of note (Civ. Code, §§ 2449, 2450, 2458, 2462).

In suit against members of partnership on note given by one of partners for unpaid premiums on policies written for benefit of partnership, evidence of prior liquidation of partnership *held* to require finding that on date of execution of note partnership has been dissolved, under Civ. Code, §§ 2449, 2450, so that the note was not binding on the other partner, because not a partnership obligation under sections 2458 and 2462.

7. Partnership 🔑285—Dissolution of partnership terminates authority of one of partners to create new partnership obligation.

When partnership is dissolved, authority of one partner to create new obligation for partnership is revoked, and his agency for his copartner ends.

8. Partnership 🔑286—Silent partner held not estopped from denying liability on note executed by copartner because of prior dissolution of firm, where note was given for premiums charged to copartner, and copartner informed creditor of suit between partners (Civ. Code, §§ 2449, 2450, 2458, 2462).

Silent partner in firm of grading contractors *held* not estopped to deny authority of copartner to execute partnership note on ground of prior dissolution of partnership under Civ. Code, §§ 2449, 2450, 2458, 2462, where premiums for which note was given had been charged to his copartner, and where copartner informed creditor of pendency of suit between the partners which would determine who would pay for the premiums.

9. Partnership 🔑296(1)—Insurance company suing on note given by one partner for premiums after partnership's dissolution could not recover against remaining partner as on book account by remitting interest and attorney's fees (Civ. Code, §§ 2458, 2462).

Where insurance company, instead of suing members of partnership on book account for premiums, sued on note executed by one partner after dissolution of partnership, no recovery could be had on the note, though insurance company remitted all claim to accrued interest and attorney's fees, since note did not bind remaining partner under Civ. Code, §§ 2458, 2462.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by the Maryland Casualty Company against Leroy Little and Walter K. Bowker, Sr., copartners doing business under the name of Leroy Little Wo. Judgment for plaintiff, and defendant last named appeals. Reversed as to last-named defendant.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant.

Utley & Nuffer, of El Centro, for respondent.

MARKS, J. Respondent instituted this action against defendants to recover judgment upon a promissory note dated August 6, 1923, given by Leroy Little, and signed by him "Leroy Little Wo," by the terms of which the maker promised to pay respondent $2,412.13, with interest at 6 per cent. per annum, together with attorney's fees in the sum of 10 per cent. of the principal and accrued interest, in case suit was instituted to collect such note. A second cause of action was abandoned by respondent at the time of trial. Judgment was rendered in favor of respondent for the principal sum of the note only, as it waived interest and attorney's fees.

The complaint alleged that the defendant Leroy Little Wo was a copartnership consisting of Leroy Little and Walter K. Bowker, Sr., and as such executed the note in question. The defendant Leroy Little did not appear, and judgment went against him by default. Appellant, in his answer, alleged that the partnership between himself and Little had been dissolved and ceased to exist long prior to the date of the note, and denied that it was a partnership obligation, and that anything was owed to respondent by him. The trial court found that the partnership had not been dissolved at the date of the note, and that it was a partnership obligation, and rendered judgment accordingly.

The appellant presents numerous assignments of error upon which he relies for a reversal of the judgment, but, as they largely center around the question of the date of the dissolution of the partnership, it will be necessary to consider but three of them, namely: (1) When was the partnership dissolved? (2) Had Leroy Little any authority to sign the partnership name to this note on August 6, 1923? (3) Are there any facts in the record which would estop appellant from asserting the dissolution of the partnership, and the lack of authority on the part of Leroy Little to sign the partnership name to the note?

There was very little conflict in the evidence before the trial court. It was not disputed that in the year 1919 Leroy Little and Walter K. Bowker, Sr., entered into a partnership under the name of Leroy Little Wo for the purpose of conducting business as grading contractors operating in the Imperial Valley and Mexico; that the property of the partnership consisted principally of horses, mules, harness, grading machinery, tools, and other such equipment incident to the partnership business; that all the contracts were taken in the name of Leroy Little, who had active charge and management of the business; that the partnership carried workmen's compensation insurance in large amounts with respondent as insurance carrier; that the policies were written through H. H. Griswold, deceased, at the time of the trial, with Leroy Little named as the sole beneficiary in all of them; that the premiums were all charged on Griswold's books to Little individually; that during the life of the partnership Little carried on farming operations of his own, and also did some grading independent of the partnership work; that the insurance policies covered three classes of work, namely, farm labor, grading, and irrigation work; that the principal sum of the promissory note was computed from the unpaid portions of insurance premiums issued to Leroy Little by the respondent as insurance carrier as follows: Policy No. 150217, term January 24, 1920, to January 24, 1921, balance unpaid, $2,353.75; policy No. 199904, term January 24, 1921, to January 24, 1922, balance unpaid, $152.60; total $2,506.35, less $94.22 unearned portion of the advance premium paid on policy No. 223931, term January 24, 1922, to January 24, 1923, leaving a net balance of $2,412.13 unpaid at the date of the note. The last contract of the partnership was for grading and ditch work in Mexico. The partners evidently had trouble of some kind which resulted in personal feeling between them, and during December, 1920, they commenced to divide their assets. Appellant sent a Mr. Irwin down to represent him in the settlement of the partnership affairs and the division of its property. The last contract was fully performed in February or March, 1921, and none other was taken, and no more work was done by it. Each partner took for himself part of the property belonging to the partnership, and the major part of its assets were divided at the completion of the contract in Mexico. Some litigation, probably a suit for an accounting, was instituted between Little and Bowker which was pending on August 6, 1923, and was apparently compromised in 1926. All of the partnership property had not been fully and finally divided, either on the date of the note or at the time of the trial of this action on March 28, 1927; the amount jointly held not appearing. Little and Bowker were each owners of the capital stock in the Circle Bar Cattle Company, a corporation, but this partnership did not hold any of that stock.

Leroy Little was called as a witness for respondent, and testified in substance to the circumstances under which he gave the note as follows: "I had a conversation with Mr. Wankowski, head of the Maryland Casualty Company, who came over to get a settlement of the insurance. I made arrangements with Mr. Griswold to execute the note. I told them that there was a case in court, and I did not feel like I wanted to settle the bill because it was—Mr. Bowker owed half of it, and when the case would be settled then it would be determined who had to pay this bill. I told Mr. Griswold and Mr. Wankowski that the partnership had quit work."

It appears that in January, 1923, an attorney representing appellant, and W. A. Roberts, who had been bookkeeper for the partnership, called upon Mr. Griswold concerning insurance written by him for Leroy Little, and in substance the following conversation was had: "Mr. Griswold asked Mr. Roberts if, as near as I can recollect it, if this Bowker and Little business, if it hadn't been—if that wasn't all closed up yet, stating that he thought that it had all been closed up and forgotten about long ago." Another witness testified that in this conversation Mr. Griswold asked some other questions about the affairs of Leroy Little Wo, to which Mr. Roberts replied that, of course, they had long ago divided up the property, but that the accounts as between them had not been finally settled.

The trial court found that the entire principal sum of the note was composed of the unpaid premiums on policies written for the benefit of the partnership. A careful reading of the transcript throws serious doubt on the correctness of this finding. Little was engaged in farming and grading operations of his own, and seemed to have no policies of insurance other than the ones in question here covering his personal undertakings. According to the testimony of W. A. Roberts, it would seem that a part of the insurance premiums represented by the note were earned under charges for the private operations of Little. However, there is some testimony in the record supporting the finding, so we will not disturb it here. The action was upon a promissory note, and neither party was prepared with evidence of the exact source of the debt, as this was not one of the issues raised by the pleadings. The action was not one for an accounting between the partners.

Under the law as it existed at the time of the transactions in question, where no general term is prescribed by agreement for the duration of a general partnership, it may be dissolved by a partner or by operation of law. Section 2449, Civ. Code; Ross et al. v. Cornell, 45 Cal. 133; Wagner v. Wagner, 50 Cal. 76. If there is no time prescribed by agreement for the duration of a general partnership, it may be totally dissolved by the expressed will of any partner. Section 2450, Civ. Code; Shuken v. Cohen, 179 Cal. 279, 176 P. 447; McCauley v. Eyraud, 87 Cal. App. 121, 261 P. 760; Wilson v. Brown (Cal. App.) 273 P. 847. After the dissolution of a partnership, one partner cannot create any new obligation in the name of the partnership. Sections 2458, 2462, Civ. Code.

[1-4] Throughout this case respondent has confused the dissolution of a partnership with the liquidation of its affairs. The partnership may be dissolved by agreement of the partners, or the will of one of them, where there is no fixed term of its existence. Such agreement, or the will of one, may be proven by all the circumstances of the case as well as by direct evidence. Complete cessation of partnership business and a division of all, or a major portion of its assets without any objection, express or implied, is strong evidence of an agreement to dissolve. If not explained or refuted, it is sufficient to force the conclusion of a dissolution by agreement. Nielson v. Gross, 17 Cal. App. 74, 118 P. 725. After dissolution, liquidation of the partnership follows. It does not usually precede dissolution, and, because the affairs of the

partnership are not entirely liquidated, and some bills remain unpaid, and some property is not divided, cannot overcome satisfactory evidence of dissolution. Dissolution represents the demise of a partnership, and liquidation the settlement of the estate.

[5, 6] Respondent contends that, because the partnership was proven to have once existed, there was a presumption that it continued, sufficient to support the findings of the trial court that it had not been dissolved on August 6, 1923. The law is to the contrary as announced in Maupin v. Solomon, 41 Cal. App. 323, 183 P. 198, as follows: " 'Presumptions,' such as the one relied on here, 'are allowed to stand not against the facts they represent but in lieu of proof of facts, and when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled.' (Savings & Loan Soc. v. Burnett, 106 Cal. 514, [39 P. 922]). The authorities in this state abundantly support this view."

[7] The authority of a partner to bind his copartner in the creation of an indebtedness finds its source in the doctrine of agency. When the partnership is dissolved, the authority to create a new obligation is revoked and the agency ends. Steinbach v. Smith, 34 Cal. App. 223, 167 P. 189.

In Rassaert v. Mensch, 17 Cal. App. 637, 120 P. 1072, 1075, it was held as follows: "A mere dissolution has no effect whatever on the property of the partners, or their interest in the joint stock or joint rights, or their power over old existing debts due to them or due from them; excepting always that they all entirely lost the power of acting for each other, any further than all joint debtors or joint creditors may do."

[8] There is nothing in the record upon which to base the argument that appellant was estopped from denying the authority of Little to execute a partnership note on August 6, 1923. The insurance policies were all written in the name of Leroy Little and the premiums charged to him. Appellant was a silent partner, and it does not definitely appear that respondent or its agents knew that he was a member of the firm. It does appear that before the note was executed Little told both Wankowski and Griswold that a suit was pending between himself and appellant which would determine who would pay it, and that the partnership, Leroy Little Wo, had ceased operating. This was sufficient to put respondent upon its notice.

[9] During the trial respondent remitted all claim to accrued interest and attorney's fees. This was evidently an attempt to reduce the judgment to an amount it might have recovered had the action been brought on the book account and to attempt to avoid the effect of Steinbach v. Smith, supra. The vice of this action at the trial was that it did not change the condition created by the giving of the note. The waiver of a legal right by respondent still left the contract in its original form. Respondent had its choice of remedies when the action was instituted. If it had been based on the book account different issues would have been joined, and appellant would have had the opportunity to present evidence that he clearly did not have at hand during the trial. We do not believe that remitting the interest and attorney's fees cured the mistake of bringing the action upon the note. Respondent's counsel at the trial, and before this court, did not represent it at the time the suit was filed.

The judgment against appellant is reversed.

We concur: SLOANE, P. J.; BARNARD, J.

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102 Cal. App. 353

PEOPLE v. BALL. (Cr. 1861.)

District Court of Appeal, Second District, Division 1, California. Dec. 5, 1929.

1. Forgery 🔑44(½)—Evidence held sufficient to sustain conviction of forgery.

Evidence tending to identify defendant as person passing bogus check to merchant *held* sufficient to sustain conviction for forgery.

2. Criminal law 🔑1159(2)—Reviewing court is bound by verdict of guilty based on sufficient evidence, in absence of prejudicial error affecting defendant's substantial rights.

Reviewing court is bound by jury's verdict of guilty based on sufficient evidence, in absence of prejudicial error occurring at trial affecting substantial rights of defendant.

3. Forgery 🔑34(1)—Proof of corporate existence of corporation named in information for forgery as having been defrauded was unnecessary, where existence of individual named therein was sufficiently shown.

In prosecution for forgery in which information charged defendant's commission of crime with intent to cheat and defraud certain individual and each of two corporations specified, it was unnecessary to prove the corporate existence of either of the corporations named in the information when the individual named was shown to exist.

4. Forgery 🔑44(1)—Proof of forgery sufficiently established intent to cheat or defraud person whose name was forged (Pen. Code, § 21; Code Civ. Proc. § 1962, subd. 1).

Defendant's intent to cheat or defraud person whose name was forged on check was sufficiently shown by defendant's commission of crime of forgery under Pen. Code, § 21, providing that intent with which act is done is manifested by circumstances surrounding its commission, and Code Civ. Proc. § 1962, subd. 1, by which conclusive presumption of malicious and guilty intent follows deliberate commission of unlawful act.

5. Criminal law 🔑369(4)—Evidence that witness' place of business was burglarized and certain blank checks stolen was material in forgery prosecution, where some of such checks were filled out and passed by defendant.

Evidence that place of business of witness had been burglarized and that certain blank checks had been stolen *held* material to issue in forgery prosecution, where defendant subsequently forged, uttered, and passed several checks executed on the stolen blanks and one of the checks was found on defendant's person.

6. Criminal law 🔑369(4)—Evidence of burglarizing of witness' place of business and theft of blank checks subsequently forged by defendant need not be excluded, in forgery prosecution, as proving another crime.

In prosecution for forgery, evidence that witness' place of business had been burglarized and certain blank checks had been stolen was not required to be excluded as tending to prove defendant guilty of another offense, where it appeared that some of the stolen checks had been filled out and passed by defendant and that one was found on defendant's person.

7. Criminal law 🔑1035(3)—Comment of trial judge on facts shown by undisputed evidence held not to require reversal, where there was no objection.

In forgery prosecution, remarks made by judge of trial court that "the check is a forgery and it was passed on a shoe store; the man received a pair shoes and money," *held* not to require reversal, where such statement was based on uncontradicted evidence, and judge instructed jury that they were the sole judges of the facts, and there was no objection made by defendant or assignment of misconduct or motion to strike or for instructions.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Bernard Ball was convicted of forgery, and of a prior conviction for forgery, and he appeals. Affirmed.

Irvin C. Taplin and Harry M. Hunt, both of Los Angeles, and Will R. King, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted on each of two counts in an information wherein he was charged with the commission of the crime of forgery and a prior conviction of a charge of forgery, a felony. He appeals from the judgment and an order denying his motion for a new trial. Other than as to the second count in the information, no serious effort is made by appellant to show that prejudicial error was committed by the trial court on the trial of the action.

[1, 2] Appellant's first contention is that the evidence adduced on the trial was insufficient to support the verdict. The evidence showed that the defendant Ball operated in company with his codefendant Welch, who confessed his own guilt, but asserted the innocence of defendant Ball. That the check was a forgery and that it was actually passed by some one, if not undisputed, is at least satisfactorily established by the evidence. The only question raised by appellant in that connection is whether the evidence sufficiently identified defendant Ball as the guilty person. The plan pursued by the defendant Welch, as well as by the individual who either accompanied him in his felonious work, or who operated on his own account in the transaction or transactions which were involved in the several charges against the defendant Welch and defendant Ball, was that the purchase of a pair of shoes was made by one of them and an indorsed check purporting to have been executed by Spencer & Morris and G. B. Morris in favor of one W. H. Johnson, for an amount approximating $35, was tendered in payment. In exchange for the check the purchaser obtained from the shoe merchant a pair of shoes and cash representing the difference between the price of the shoes and the face of the check. The evidence which tended to establish the identity of defendant as the passer of the check consisted of the following facts: The clerk in the shoe store to whom the bogus check was tendered testified that Welch was *not* the man with whom he dealt on the occasion in question, but that defendant Ball "appears to be the same man that gave me the check, but I don't think I am sure; * * * not quite sure. * * * He has a slight resemblance to the man that gave me the check." A police officer, who qualified as a handwriting expert, testified that in his opinion defendant Ball "wrote the face of the check." Three days after the forgery was committed the two defendants were arrested in each other's company. At that time one of the defendants was carrying a pair of shoes either in his hand or under his arm, and on the person of defendant Ball was found approximately $134 in cash and another check identical in form with the check which is the subject-matter of the second count of the information on which defendant Ball was convicted. With relation to the check found in the possession of defendant Ball, the arresting officer testified that at the time he took such check from defendant Ball, he (the officer) said to defendant Ball, "You didn't get this one passed yet, eh? to which defendant Ball replied, "No, we didn't get that one passed." That such evidence, together with the inferences properly deducible therefrom, was sufficient to support the verdict, this court entertains no doubt. The fact that the defendant Welch testified that he alone was the guilty person was not conclusive. The ultimate question of the guilt of defendant Ball

was to be determined by the jury from all the evidence in the case, and since the jury by its verdict, based upon sufficient evidence, has declared that Ball was guilty of the offense of which he was accused, in the absence of prejudicial error occurring on the trial of the action affecting the substantial rights of the defendant, this court is bound by the verdict. The contention by appellant that the verdict could be reached only by basing one inference upon another inference is without merit.

[3] Appellant complains that, although by the information he was charged with the commission of the crime of forgery with the intent to cheat and defraud a certain individual and each of two corporations therein specified, no evidence was offered on the trial which either proved or tended to prove the corporate existence of such alleged corporations. However, it is not claimed that the evidence failed to show the existence of the named individual. That in such circumstances it became and was unnecessary to prove the corporate existence of either of the corporations named in the information is settled by the case of People v. Frank, 28 Cal. 507, 519, 520. See, also, People v. Hughes, 29 Cal. 257; People v. Barric, 49 Cal. 342; People v. Ah Sam, 41 Cal. 645, 652; People v. Patterson, 42 Cal. App. 37, 183 P. 209; People v. Nelson, 90 Cal. App. 27, 35, 265 P. 366.

[4] It is also urged that no intent on the part of defendant Ball was shown to cheat or defraud either of the persons whose name was forged by said defendant. In that regard, the substance of section 21 of the Penal Code is that the intent or intention with which an act is done or performed is manifested by the circumstances surrounding the commission of such act; and the effect of the provisions of subdivision 1 of section 1962 of the Code of Civil Procedure is that a conclusive presumption of a malicious and guilty intent follows from the deliberate commission of an unlawful act—from which it results that the point presented by appellant is not well taken.

[5, 6] Prejudicial error is predicated upon the action of the trial court in overruling the objection interposed by defendant Ball to a line of questions propounded by the people to a witness regarding the loss by such witness of certain blank checks which included the particular check which was the subject-matter of the second count of the information in the action against said defendant. The evidence showed that the place of business of the witness and his partner had been burglarized and that certain blank checks of the partnership had been stolen. Other than that the defendants subsequently forged, uttered, and passed several checks which were executed on some of the blanks which had been stolen, together with the fact that one of the stolen checks purportedly executed by the partnership in favor of the same individual as was the questioned check was found on the person of defendant Ball, no evidence was introduced which in any way tended to connect defendant Ball with the crime of burglary. It is plain that the evidence to which objection is made, although not essential, nevertheless was material to the issue of the particular forgery for which crime defendant Ball was on trial; and the mere fact that such evidence had a tendency to prove that defendant Ball was also guilty of some other criminal offense presents no sufficient reason for its exclusion. 8 Cal. Jur. 71, and cases there cited.

[7] Finally it is contended by appellant that he was substantially prejudiced in the course of the trial by a remark made by the judge of the trial court that "the check is a forgery and it was passed on a shoe store; the man received a pair of shoes and some money." At the time such remark was made, evidence had been introduced relating to each of its several elements, to wit, that the check in question was a forgery; that it was "passed on a shoe store"; and that *a* man (not necessarily defendant Ball) "received a pair of shoes and some money." At no time during the course of the trial was any evidence introduced by either of the defendants which in any way contradicted either or any of such facts. Indeed, the defendant Welch, called as a witness in behalf of his codefendant Ball, gave testimony directly in substantiation thereof. In addition thereto, the judge of the trial court expressly instructed the jury in substance that it was the sole judge of the facts in the case and that it should disregard the expression of any opinion by the judge with reference to such facts. Moreover, although not necessarily conclusive against the position now assumed by appellant herein, it appears that neither at the time the remark in question was made, nor at any time thereafter, was any objection made by either of the defendants thereto; nor in that connection was any assignment made of misconduct of the court; nor was any motion made by either of the defendants to strike the remark from the record, or that the jury be either specifically or generally instructed to disregard it. It thus is apparent that appellant has no just cause for complaint.

No prejudicial error appearing in the record herein, it is ordered that the judgment and the order denying the motion for a new trial be and they are affirmed.

We concur: CONREY, P. J.; YORK, J.

102 Cal. App. 192

LASKY et ux. v. AMERICAN INDEMNITY CO. (Civ. 6775.)★

District Court of Appeal, First District, Division 1, California. Nov. 27, 1929.

Rehearing Denied Dec. 27, 1929. Hearing Denied by Supreme Court Jan. 23, 1930.

1. Appeal and error 🔑1010(1)—Appellate court cannot disturb trial court's finding, if supported by any substantial evidence.

Weight of evidence being for trial court to determine, the court of appeal's review is limited to ascertaining whether there is any substantial evidence to support finding, which cannot be disturbed in such case.

2. Mechanics' liens 🔑317—Owner's testimony held sufficient to support finding that owners did not falsely represent to surety on contractor's bond that exchange contract with contractor was no longer in effect (Code Civ. Proc. § 1183).

In owner's action against surety on building contractor's bond, given under Code Civ. Proc. § 1183, plaintiff's testimony *held* sufficient to support trial court's finding that plaintiffs did not falsely represent to defendant, several days after execution and delivery of bond, that their contract to convey their equity in certain flats to contractor in part consideration of his conveyance of vacant lot and construction of apartment house thereon was no longer in effect.

3. Mechanics' liens 🔑317—Evidence warranted inference that owners informed surety on contractor's bond that exchange contract with contractor was still effective.

In owners' action against surety on contractor's bond, evidence of parties' acts and conduct *held* to warrant inference that plaintiffs informed defendant that contract to convey their equity in certain flats to contractor in part consideration of his conveyance of vacant lots to them and construction of apartment house thereon was still effective, as found by trial court, though there was no direct evidence to such effect.

4. Mechanics' liens 🔑315—Owners' failure to make cash payment, required by exchange contract with building contractor, held not to defeat nor induce recovery from surety on contractor's bond.

Owners' recovery from surety on contractor's bond after abandonment of work *held* not barred because of their failure to make first payment in cash, as provided by exchange contract with contractor, nor subject to reduction by such sum, in view of findings, supported by evidence, that surety knew of exchange contract, and that contractor realized more than such amount from incumbrances placed on property received in exchange.

5. Appeal and error 🔑877(2)—Surety liable for entire penal sum of contractor's bond cannot complain of judgment ordering payment thereof to clerk for distribution among owners and subcontractors as stipulated because some subcontractors sought no recovery on bond.

Surety liable for entire penal sum of building contractor's bond cannot complain of judgment ordering payment thereof to clerk of court for distribution among owners and subcontractors, as provided in stipulation between them, because some subcontractors sought no recovery on bond, as such arrangement did not increase amount of surety's liability, but merely increased number of persons participating in distribution.

6. Appeal and error 🔑877(2)—Owners could not object to modification of judgment against surety on contractor's bond so far as awarding costs to subcontractors not suing surety or seeking recovery on bond because they filed no cost bills.

Owners not being affected by modification of judgment against surety on contractor's bond so far as awarding costs to five of eleven subcontractors, whose actions to enforce liens were consolidated for trial with owners' action on bond, because four of such five did not sue surety, and the other sought no recovery on bond, were in no position to object on ground that none of the five filed cost bills.

7. Appeal and error 🔑873(1)—Portion of judgment as to costs is reviewable on appeal from entire judgment, though parties awarded costs filed no cost bills.

On appeal from entire judgment, the portion as to costs is subject to review, even if there is no showing that parties awarded costs filed cost bills.

8. Mechanics' liens 🔑310(1)—In equity action, such as suit to foreclose mechanics' liens, court may apportion costs between necessary parties.

In equity action, such as suit to foreclose mechanics' liens, the court, in its discretion, may apportion costs between the necessary parties.

9. Appeal and error 🔑882(1)—Surety moving to consolidate subcontractors' actions to enforce liens with owners' action on contractor's bond for trial invited error in awarding costs to subcontractors not suing surety or seeking recovery on bond.

Surety on contractor's bond invited error, if any, in awarding costs to subcontractors not suing surety or seeking recovery on bond, by moving for consolidation of their actions to enforce liens with owners' action on bond for trial, and hence cannot complain thereof on appeal, though not a necessary party to such subcontractors' actions.

10. Mechanics' liens 🔑310(1)—Award of costs to subcontractors, not suing surety on contractor's bond or seeking recovery thereon, did not deny substantial justice to surety, at whose instance their actions to enforce liens were consolidated with owners' action on bond.

Where subcontractors admittedly had cause of action on subcontractor's bond, and hence might have joined surety thereon as defendant in their actions to enforce liens by appropriate amendments, had they not been misled by consolidation of such actions with owners' action on bond at surety's instance and trial of case on such theory, award of costs to subcontractors not suing surety or seeking recovery on bond did not deprive surety of substantial justice.

★Rehearing denied. Hearing denied by Supreme Court.

11. Appeal and error ⇨768—Appellate court may assume as correct assertion in reply brief that certain fact was not disputed, where no testimony showing dispute was printed in appellant's brief.

Where surety, appealing from judgment on building contractor's bond, failed to print in its brief any portion of testimony showing that costs of completing building after contractor abandoned work was disputed by surety at trial, appellate court may assume as correct owners' assertion in their reply brief that no such dispute occurred, and that case was tried on theory that such cost was certain.

12. Interest ⇨47(1)—Interest was properly allowed from date of filing complaint in owners' action on contractor's bond, where parties treated cost of completing building abandoned by contractor as certain.

Where parties to owners' action against surety on building contractor's bond treated cost of completing building after contractor abandoned work as certain, court properly allowed interest from date of filing complaint rather than from date of judgment.

13. Appeal and error ⇨763—Contention, first urged in appellant's supplemental brief, filed after oral argument, that judgment was erroneous in allowing interest from filing of complaint, held too late for consideration.

Surety's contention, first urged in supplemental brief, filed after oral argument on appeal from judgment for owners on building contractor's bond, that judgment was erroneous in allowing interest from date of filing complaint rather than date of judgment, *held* too late for consideration, where no excuse was offered for delay.

Appeal from Superior Court, City and County of San Francisco; Percy S. King, Judge.

Action by Ben Lasky and wife against the American Indemnity Company, which filed a cross-complaint. Judgment for plaintiffs, and defendant appeals. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Brownstone & Goodman and Goldman & Altman, all of San Francisco, for respondents.

GRAY, Justice pro tem. Defendant, the surety on a bond, given under the terms of section 1183 of the Code of Civil Procedure, appeals, under the alternative method, from a judgment ordering payment of the full penal sum to the clerk of the court, for distribution between the owners of the building and various lien claimants whose respective suits had been consolidated for trial on defendant's motion. But a brief statement of fact is necessary for an adequate consideration of defendant's contentions. Contemporaneously, the owners, hereinafter referred to as the plaintiffs, and a building contractor entered into two written contracts, the first, for the exchange of properties, and the second, for the construction of an apartment house. In the exchange contract plaintiffs agreed to convey to the contractor their equity in certain flats, at an agreed valuation of $10,000, and the contractor agreed to convey to plaintiffs a vacant lot and construct thereon, in accordance with the terms of the building contract, an apartment house at a total cost, for land and building, of $22,300, payable by a credit thereon, of said sum of $10,000, and balance as specified in building contract. It is undisputed that the parties, verbally, segregated the sum of $10,000 into two items; $3,500 for the price of the vacant lot, and $6,500 as the first payment on the cost of the apartment house. The building contract, in the ordinary terms usually used in such contracts, provided that the contractor would construct, according to plans and specifications, an apartment house, and that plaintiffs would pay therefor a total of $18,800, payable $6,500 forthwith, and the balance in four installments as the work progressed. On the next day defendant executed and delivered to plaintiffs its bond in the penal sum of $10,000. The contractor abandoned the work after receiving the second and third installment payments, amounting to $5,100. After notice and demand, defendant refused to complete the building contract, and the plaintiffs finished the building at a cost of $7,857.84 in excess of the contract price. The foregoing facts are undisputed.

[1-3] By way of cross-complaint, defendant sought a cancellation of its bond, alleging, briefly stated, that plaintiffs several days after the execution and delivery of the bond, falsely represented to it that the exchange contract was no longer in effect. The undisputed evidence discloses that, at such time, the plaintiff husband and a companion called at the office of defendant's general agent, at the latter's request, and there delivered to him copies of both contracts, that the agent retired to his private office for fifteen minutes, and, upon returning, conversed with the husband and his companion. What was said and done in this conversation is disputed by the parties. A stenographer of the agent, who died before trial, testified that, in response to the agent's inquiry, the companion said the exchange was no longer in effect, and that the husband concurred therein. Both these gentlemen denied that either made such statement, and both testified that the agent said that the contracts were all right. Upon this conflict the court found that the alleged misrepresentation had not been made. Urging that, as the stenographer's testimony is the more probable, it is entitled to the greater weight, defendant requests that we hold, upon a review of the evidence, that this finding is unsupported. Since the weight of evidence is for the trial court's determination, our review is limited to ascertaining whether there is any substantial evidence to support a find-

ing, and, if there is, we cannot disturb it. 2 Cal. Jur. 935. It is apparent that plaintiff's testimony adequately supports this finding. Defendant further criticizes the court's additional finding that plaintiffs informed it that the exchange contract was still effective, on the ground that there is no direct evidence to that effect. While there is no such direct testimony, yet the trial court might well, as it impliedly did, infer such statement from the acts and conduct of the parties. Ryder v. Bamberger, 172 Cal. 791, 158 P. 753.

[4] In several different ways defendant argues that no recovery can be had on the bond, because plaintiffs did not pay in cash the sum of $6,500 as the first payment or that, if any recovery is had, the amount thereof should be reduced by such sum. This argument entirely ignores the above finding that it knew of the existence of the exchange contract, and, inferentially, contracted on the basis of its continued existence. It also overlooks another finding, not questioned by it, that the contractor, as part of the same transaction in which the two contracts were executed, realized from incumbrances placed by him on the flats money in excess of $6,500. Therefore, indirectly, the contractor did receive from plaintiffs the first payment, and defendant was not injured by the existence of the exchange contract.

[5] Eleven subcontractors sued to foreclose their liens. In six of these actions a cause of action upon the bond was stated, and in four of the six defendant was named as a party. The court found that the claims of plaintiffs in these four actions amounted to $4,559.93, that plaintiffs in the instant case were entitled to recover $7,857.48, and that the aggregate of these two sums exceeded the penal sum of $10,000 named in the bond. Upon defendant's motion these eleven actions were consolidated for trial with the instant case. Pursuant to stipulation between plaintiffs and the eleven subcontractors, the judgment ordered defendant to pay to the clerk of the court the sum of $10,000, and authorized the latter to distribute this sum as provided in the stipulation. Half-heartedly, defendant, ignoring their literal wording, attempts to misconstrue the findings as authorizing judgment against it and in favor of subcontractors who sought no recovery on the bond. By stipulation those entitled to judgment under their pleadings permitted others not so entitled to participate in their judgments. This arrangement followed in the judgment did not increase the amount for which defendant was legally liable, but merely, by way of assignment, increased the number of persons participating in the distribution of the sums legally recoverable. As defendant was not injured thereby, it has no cause of complaint. Robinson v. Western States Gas, etc., Co., 184 Cal. 401, 194 P. 39.

[6-10] Defendant requests a modification of that portion of the judgment awarding costs to all plaintiffs in the consolidated actions, in so far as it awards such costs to five of such plaintiffs, because four of such five did not sue defendant, and the other sought no recovery on the bond. Plaintiffs Lasky, there being no briefs on behalf of any of the subcontractors, object to a consideration of this request on the ground that the record does not show that any of such five plaintiffs filed cost bills. Obviously, since such modification does not affect the objecting plaintiffs, they are not in a position to object. But, as the appeal has been taken from the entire judgment, the portion as to costs is subject to review, even if there is no showing of such filing. White v. Gaffney, 1 Cal. App. 715, 82 P. 1088. In an equity action in which class such consolidated actions to foreclose mechanics' liens fall, the court, in its discretion, may apportion costs between the necessary parties. Clark v. Brown, 141 Cal. 93, 74 P. 548. Technically, defendant was not a necessary party in those actions in which it was not named or in which no recovery was sought, but practically, it was, as it stated in its motion for such consolidation and as the cases were tried after such consolidation. The error, if any, was invited by its own request for such consolidation, and therefore it cannot now complain. McCabe v. Goodwin, 106 Cal. 486, 39 P. 941. As such five plaintiffs admittedly had a cause of action on the bond, they might, had they not been misled by the consolidation and the theory upon which the cases were actually tried, by appropriate amendments, have joined the defendant. Therefore it cannot be said that defendant failed to receive substantial justice as to the awarding of costs. Dunlap v. Commercial Nat. Bank, 50 Cal. App. 476, 195 P. 688.

[11-13] Defendant, for the first time in its supplemental brief, filed after oral argument, urges, upon the authority of Perry v. Magneson (Cal. Sup.) 279 P. 650, that the judgment is erroneous in allowing interest from date of filing the complaint. The cited case holds that, in an action by an owner to recover the cost of completion of building abandoned by the contractors, from the surety on a bond to save such owner harmless from loss resulting from a breach of the building contract, interest from the commencement of the action should not be allowed, where the evidence is conflicting as to such cost and the amount thereof is uncertain, till determined by the judgment. Since defendant has utterly failed to print in its brief any portion of the testimony showing that the cost of completion was disputed by it at the trial, we may assume as correct plaintiffs' assertion, in their reply brief, that no such dispute occurred, and that the case was tried upon the theory that such cost was certain. Firpo v. Pacific Mut. Life Ins. Co., 80 Cal. App. 122, 251 P. 657. If the parties treated such cost as certain, the court properly allowed interest from date of filing the complaint. There

is also merit in plaintiffs' objection to consideration of this contention because of its lateness without any excuse offered for the delay. 2 Cal. Jur. 734.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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102 Cal. App. 166

HAMILTON v. HOLLMAN. (Civ. 6114.)

District Court of Appeal, First District, Division 1, California. Nov. 26, 1929.

Husband and wife 🔑279(6)—Judgment obtained by wife against husband held not "payment" of amount sued for terminating husband's obligation to make monthly payments pursuant to contract.

Where contract between husband and wife fixing property settlement provided that monthly payments should entirely cease when sum of $8,500, for which husband had given promissory note, was fully paid, husband's obligation to make monthly payments did not terminate on wife obtaining judgment for the $8,500, since such judgment did not have legal effect of constituting a payment of said sum; "payment" being that which parties to contract agree shall be accepted as such.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Payment.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Eleanore E. Hamilton against F. W. Hollman. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Charles W. Byrnes and Robert L. McWilliams, both of San Francisco, for appellant.

Harry I. Stafford and Edward A. Cunha, both of San Francisco, for respondent.

PER CURIAM. The parties to the above action, who were formerly husband and wife, made a property settlement on July 14, 1921. The material parts of the agreement in which the defendant is named as the first party and the plaintiff as the second party are as follows: "The parties hereto have agreed and do hereby agree as follows, to wit: 1. That said first party hereby agrees to pay said second party the sum of Fifteen hundred dollars ($1,500) upon the execution of this agreement, and the additional sum of Eight thousand five hundred dollars ($8,500) within three years from the date hereof. Said sum of $8,500 to be evidenced by a promissory note a copy of which is hereto annexed and made a part hereof. * * * 2. That said party of the first part further agrees to pay said party of the second part the sum of $150 per month, in advance, beginning with the date hereof, until the remarriage or death of said second party, or payment of said sum of $8,500. It is further understood and agreed that said payments of $150 per month shall be reduced pro rata with the reduction by payments of the sum of $8,500, and entirely cease when said sum of $8,500 has been fully paid. In the event that said first party fails to pay said monthly payments for three months, said party of the second part may, at her option, declare said sum of $8,500 immediately due and payable."

On March 14, 1925, the plaintiff remarried, thus terminating the defendant's obligation to make further payments. The complaint averred that the defendant during the period between May, 1924, and March 14, 1925, failed to make the monthly payments provided by the contract, amounting to $1,575. Among other defenses to the action the defendant alleged that under the terms of the contract it was agreed that the monthly payments should be applied to and credited toward the payment of the $8,500 evidenced by the note; that so applied $5,300 had been paid on May 1, 1924; and that on June 1, 1924, the defendant tendered to plaintiff the balance of $3,150, thereby terminating his obligations under the contract, and also that previous to the commencement of the present suit the plaintiff recovered a judgment against the defendant for the above sum of $8,500. The trial court adopted the construction of the contract contended for by the defendant, and found that the plaintiff refused to accept the tender of $3,150 made by the defendant on June 1, 1924. It was found that, by reason of the judgment entered in the action to recover the $8,500, the obligation of the defendant to make the monthly payments terminated on July 17, 1924. From the above the court concluded that the plaintiff was not entitled to recover. Judgment was entered accordingly, and the plaintiff has appealed therefrom.

In the action referred to in the findings an appeal was taken from the judgment by the defendant, who contended, as in the case at bar, that the parties to the contract intended the monthly payments to apply on the sum evidenced by the note, and that the trial court erred by failing to allow the same as a credit thereon. The Appellate Court, in affirming the judgment, held that the trial court had correctly interpreted the language of the contract; that it was not the intention of the parties that the monthly payments should be credited on the note, but that the latter was an additional and separate obligation. Hollman v. Hollman, 88 Cal. App. 748, 264 P. 289. Respondent concedes that as regards the interpretation of the contract he is concluded by the above decision, but contends that the effect of the judgment in that action was to terminate the plaintiff's right to further monthly payments. The contract provided that the monthly payments should "entirely cease when said sum of $8,500 has been fully paid." Payment is that which the parties to the contract agree shall be accepted as such. Watkins v. Sims, 81 Fla. 730, 88 So. 764. The contract contains no suggestion that the parties intended a judgment for this amount to be equivalent for any purpose to its payment, and such was not its legal effect. Lord v. Bigelow, 124 Mass. 185.

In view of the above construction of the contract and the undisputed facts of the case, the findings of the trial court should have been in accordance with the allegations of the complaint as amended, and judgment entered accordingly. We are authorized to make findings contrary to or in addition to those made by the trial court (Const., art. 6, § 4¾; Code Civ. Proc. § 956a; Kirk v. Culley, 202 Cal. 501, 261 P. 994); and the present is a proper case for the exercise of the power. We therefore find that all the allegations contained in plaintiff's complaint as amended are true, and as a conclusion of law therefrom that she is entitled to judgment against the defendant for the sum of $1,575, with interest thereon from March 14, 1925, at the rate of 7 per cent. per annum, together with her costs and disbursements in the action.

The judgment is reversed, with directions to the trial court to enter judgment for the plaintiff in accordance with the views expressed above.

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102 Cal. App. 141

LAUCHERE v. LAMBERT et al. (Civ. 6909.)

District Court of Appeal, First District, Division 2, California. Nov. 23, 1929.

1. Appeal and error 🔑494—Trial court's order, although erroneous or void, is to be considered so far as completing record on appeal is concerned.

So far as perfecting and completing record on appeal is concerned, an order of trial court is to be considered, although order be erroneous or void.

2. Appeal and error 🔑715(2)—That corrected order showing new trial was granted for insufficiency of evidence was made ex parte and out of time could not be considered by reviewing court, where appearing only by affidavits.

That corrected or changed order to show that new trial was granted because of insufficiency of evidence to sustain verdict was made ex parte, and that it was made more than six months after the original was made, could not be considered by reviewing court, where such facts appeared only by affidavits filed in reviewing court upon motion for diminution of the record, since power of reviewing court to review orders and judgments of the trial court does not include affidavits.

3. Appeal and error 🔑609—Order correcting original order to show new trial was granted for insufficiency of evidence should be put into supplemental transcript and filed with reviewing court (Code Civ. Proc. § 657).

Order correcting or changing original order granting new trial to show that new trial was granted because of insufficiency of evidence to sustain verdict, under Code Civ. Proc. § 657, made after clerk's transcript was filed in reviewing court, should be put in supplemental clerk's transcript and filed in reviewing court.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Jules Lauchere against Charles G. Lambert and another doing business under the name and style of Lambert & Walter. Judgment for plaintiff, and, from an order granting a new trial, plaintiff appeals. On defendants' motion for diminution of record on appeal. Motion granted.

Jackson & Peterson and Clell H. McCredie, all of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondents.

KOFORD, P. J. Respondents have made a motion in this court for an order for diminution of the record directing the clerk of the trial court to add to the clerk's transcript filed herein on April 5, 1929, a certain order of the trial court made on September 20, 1929, which order the clerk of said court, pursuant to the order of the trial judge, entered nunc pro tunc as of February 21, 1929. The original order made on February 21, 1929, read: "It is ordered that said motion (for new trial) be and the same is hereby granted as prayed for." The nunc pro tunc order of September 20, 1929, which respondents desire incorporated in the clerk's transcript reads:

"* * * The court in open court stated its views in said matter and particularly stated that the evidence introduced was insufficient to justify the verdict and granting said motion upon that ground,

"It is ordered that said motion for a new trial be and the same is hereby granted as prayed for, and particularly upon the ground of the insufficiency of the evidence to sustain the verdict."

The order granting a new trial was attacked by appellant in his opening brief filed herein on July 31, 1929. Respondents are now awaiting our ruling upon this motion before filing their brief. The difference in wording between the original and the changed order granting a new trial is important on account of the following requirement of Code of Civil Procedure, § 657: "When a new trial is granted * * * upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order it will be presumed that the order was not based upon that ground." Obviously the order of September 20 must be considered upon this appeal or not at all.

Appellant contends that, because the order of September 20, 1929, was made ex parte, without notice, and more than six months after the original order, it is void. Appellant also states that the trial court itself cannot now, after the lapse of six months, change the record on appeal. The trial court has not changed the record on appeal. It has changed its own record. The question before us is whether we should have the record on this appeal show the proceedings which have taken place since the appeal was perfected. Appellant concedes that, under the authority of McMahon v. Hamilton, 202 Cal. 319, 323, 260 P. 793, the appellate court may itself correct a record on appeal by directing the clerk having custody of the requested record to add it to the transcript or otherwise certify it up. He nevertheless contends that the appellate court will not exercise its power to have the said order incorporated into the record on appeal because void for the reasons above stated.

[1, 2] So far as perfecting and completing a record upon appeal is concerned, an order of the trial court is an order, even though it be erroneous or void. To refuse to put an order in the record on appeal because it is void is to first decide the point on appeal and then refuse to consider the appeal because not meritorious or well taken in point of law. The asserted fact that the said corrected or changed order was made ex parte and that it was made more than six months after the original was made, appears to us only by the affidavits filed in this court upon this motion. The power of this court to review the orders and judgments of the trial court is to be exercised in accordance with the prescribed law of procedure for appeal. This does not include affidavits. Hayne on New Trial and Appeal, vol. 2, §§ 283 and 271, and cases cited.

An affidavit filed herein upon this motion is said by appellant to contain statements which show that the order of September 20, 1929, was not one which corrected minutes which through inadvertence did not speak the truth, but that it was an order which made a new and different order out of the real order originally entered. The affidavit, if closely scrutinized, may not have such a sweeping effect. However this may be, this part of the affidavit is not different in principle than the part which purports to show that the order is void for the other reasons already discussed. Such additional alleged ground of invalidity of the order should not cause us to refuse to have the order incorporated into the record upon this appeal.

[3] The order of September 20, 1929, is an order either correcting or changing the original order granting a new trial which is directly attacked upon this appeal. For that reason it should be put into the record upon appeal. Having been made after the clerk's transcript was filed in this court, it did not belong in that transcript at the time that transcript was certified and filed. It should be put into a supplementary clerk's transcript and filed herein so that it may be considered upon the appeal pending in this court.

It is ordered that the clerk of the trial court prepare, certify, and file herein a supplementary clerk's transcript of the record of this case showing all minutes and documents appertaining to this cause coming into her custody subsequent to the certification of the original clerk's transcript herein.

We concur: NOURSE, J.; STURTEVANT, J.

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102 Cal. App. 384

JACK E. CLOYD CO. v. TABER et al.

(Civ. 5675.)

District Court of Appeal, Second District, Division 1, California. Dec. 6, 1929.

1. Brokers 🔑69—Broker bringing parties together held entitled to commission based on rentals as provided in final enforceable lease entered into between parties.

In action by real estate broker for commission for services rendered in negotiating a lease of building to be constructed on property of defendants, facts *held* to show that plaintiff brought parties together and is entitled to commission based on lease as finally executed, which provided for material increase in cost of building and resulting increase in amount of rentals over original agreement to build and lease.

2. Brokers 🔑87—Broker held entitled to interest on judgment for commission, where amount of claim was capable of computation.

Though claim by real estate broker for commission in procuring lease of property of defendants is being disputed, where it is capable of computation in that lease specifically sets forth amount of rentals to be paid, which rentals are basis of amount of commission, broker is entitled to recover interest on judgment obtained.

3. Brokers 🔑74—Defendant who constructed building for lease of which commission is sought, and who was vitally interested in cost of building which served as basis for computing rentals, held properly adjudged personally liable for commission.

In action by real estate broker for commission for procuring lease of building to be constructed on property of defendants, defendant who was shown to be the builder employed by owners on cost plus basis, and who was vitally interested in cost of building which served as basis for computation of rentals constituting basis of commission and who in contract referred to "he and his associates," *held* properly adjudged personally liable on account of commissions.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by the Jack E. Cloyd Company against Fred J. Taber, Emma E. Taber, and L. J. Smith, sometimes known as Lewelleyn J. Smith. Judgment for plaintiff, and two last named defendants appeal. Affirmed.

Frank F. Oster, of Los Angeles, for appellants.

Jones, Hoyt & Rifkind, of Los Angeles, for respondent.

YORK, J. This is an appeal from a judgment in favor of the plaintiff. In the month of May, 1924, a representative of plaintiff company observed a "Will-build-to-suit-tenant" sign upon a lot at Temple street and Burton Way in the city of Los Angeles, owned by defendant Emma E. Taber, which sign directed all inquiries regarding said lot to be addressed to Lewelleyn J. Smith. On May 28, as a culmination of discussion between plaintiff company and defendant Smith, an agreement was executed by them authorizing plaintiff to negotiate a lease for ten years upon a proposed theater building to be erected by Smith upon said lot, on a rental basis satisfactory to said Smith and the lessee. This agreement provided: "And for and in consideration of services which the Jack E. Cloyd Company may render in the negotiation of said lease or upon our closing the aforesaid lease with party or parties with whom the Jack E. Cloyd Company have had negotiations, we agree to pay the regular Realty Board commission at the time the plans and specifications are approved and accepted by the Lessee."

Thereafter, on June 4, 1924, an agreement to build and lease was executed by said Smith, as builder, and Messrs. Sobelman and Balk, as lessees, in which it was agreed that a theater building to cost $50,000 should be erected upon the lot in question, and that the lessees would execute a least for ten years at an aggregate rental of $142,800 for said term. It appears that the regular realty board commission at the time this agreement was executed was 3 per cent. upon the sum of $64,800, the amount of rental payable for the first five years of the term, or the sum of $1,944, and 2 per cent. upon the sum of $78,000, the aggregate amount of rental payable during the second five years, or $1,560, making a total of $3,504 commission, which amount subsequently, to wit, during the months of July, August, and September, 1924, was paid to the plaintiff company by defendant Smith, who was given a receipt in full payment of all commissions due to said plaintiff under the agreement to lease.

It also appears that, unknown to the plaintiff, defendant Smith entered into an agreement with the lessees, Sobelman and Balk, whereby the latter agreed to a material increase in the cost of the building, resulting in an increase in the amount of rental payable during the term of the lease.

On November 10, 1924, the lessees Sobelman and Balk and Emma E. Taber, as owner and lessor, entered into a lease of the said theater building, the same to run for ten years at an aggregate rental of $171,600, of which amount $75,600 covered the first five years and $96,000 the last five years of the term. Some six months thereafter, the matter of the increase in cost of the building and the consequent increase in the amount of rentals was brought to the attention of the plaintiff company. The company thereupon made demand upon Smith for commission upon the difference between the amounts shown by the agreement to build and lease and those shown to be payable under the lease of November 10, 1924, and, payment thereof being refused, action was brought to recover the sum of $756. Judgment was rendered in favor of plaintiff company for this amount, but, upon hearing of motion for a new trial, which was denied as to the appellants here, the court reduced the judgment to $684, an error in computation having been made in arriving at the amount sued for. Interest from November 10, 1924, was also included in the judgment as modified.

Appellants now contend that under the contract of employment upon which plaintiff bases its action it has earned only the sum of $3,504, which has been fully paid, and that it is not entitled to any further compensation; that, the plaintiff's claim being disputed and unliquidated, plaintiff is not entitled to recover any interest; and that defendant Smith acted as agent only for Taber, the owner, and no personal liability attached to him on account of commissions.

It is conceded by appellants that the amount of a broker's commission is determined by the terms of his contract of employment. Here the contract of employment provided that the broker should receive the regular realty board commission for services rendered in *negotiating a lease* or *upon the closing of a lease* with parties with whom the broker had negotiations.

[1, 2] Upon a careful examination of the record, we are convinced that the document of November 10, 1924, was the only binding and enforceable lease that was executed between the owner and lessor of the building and the lessees thereof, and that the plaintiff, having brought the parties together, is entitled to the regular realty board commission based upon the rentals as provided for in the lease. While plaintiff's claim is being disputed, it is not incapable of computation, for the lease specifically sets forth the amount of

rental to be paid during the entire term, and it was upon the basis of such rentals that the commission was to be paid according to the schedule of the realty board. Therefore plaintiff is also entitled to interest as found by the trial court.

[3] As to the third point, the trial court found that defendant Smith was at all times the duly appointed, authorized, and acting agent of his codefendants Fred J. Taber and Emma E. Taber, and as such agent, as well as in his own behalf, entered into a written contract under date of May 28, 1924, whereby the said defendants employed the plaintiff as a broker, etc. As to the appellants, there is sufficient evidence in the record to support this finding. The contract referred to is signed by Smith, and in it he refers to the fact that *he and his associates* contemplated the erection of a theater building. The evidence conclusively shows that he was the builder, that he was employed by the owners, but upon a cost plus basis, and that he was vitally interested in the cost of the building, which served as a basis for the computation of rentals payable during the term of the lease.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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102 Cal. App. 160

WOOD v. GIROT. (Civ. 3798.)

District Court of Appeal, Third District, California. Nov. 25, 1929.

1. **Master and servant ⇨39(1)—Allegation in action for breach of employment contract that plaintiff was discharged without any cause whatsoever held sufficient allegation of wrongful discharge, in absence of demurrer.**

In action for damages for breach of contract of employment, allegation in complaint that defendant without any cause whatsoever informed plaintiff that his services were no longer desired *held* sufficient allegation of wrongful discharge, in absence of demurrer.

2. **Master and servant ⇨40(3)—Evidence in action for breach of employment contract showing defendant repudiated contract because he had no work held to show wrongful discharge.**

In action for damages for breach of employment contract, evidence showing no criticism of character of plaintiff's services, and that defendant repudiated contract merely because there was nothing more for plaintiff to do, *held* to show plaintiff was wrongfully discharged.

3. **Master and servant ⇨38—Suit for damages for breach of employment contract may be brought any time after breach within period of limitation.**

Suit for damages for breach of employment contract for specific term may be brought any time after breach, so long as it is instituted within statutory period of limitation; it not being necessary to wait until end of term of employment.

4. **Master and servant ⇨41(1)—Measure of damages for breach of employment contract is unpaid contract price less sum actually earned and which could have been earned by exercise of reasonable diligence.**

Measure of damages for breach of employment contract is entire unpaid contract price of services less whatever sum employee actually earned during specified term, together with any further sum which he might have been able to earn by exercise of reasonable diligence to procure other employment.

5. **Master and servant ⇨41(3)—Judgment in action for breach of employment contract, if recovery is allowed, should include entire damages up to expiration of agreement.**

In action for damages for breach of employment contract, judgment, if recovery is allowed, is not confined to installments actually accrued prior to commencement of action, but should include entire damages which will have accrued at time of expiration of agreement, since contract is entire and not severable.

6. **Contracts ⇨10(2)—Employment contract requiring employee to give good and sufficient service and employer to take over services on sale of business held not lacking in mutuality.**

Employment contract providing that employee agrees to give good and sufficient service, and, in event of sale of business, if purchaser does not wish to take over employee's services, then employee will work as truck driver and utility man for employer until expiration of contract, *held* not lacking in mutuality of obligation, especially where employer recognized obligation on his part.

7. **Trial ⇨404(4)—General finding that allegations of answer in conflict with plaintiff's first cause of action were untrue held ineffectual as finding upon necessary issue.**

General finding that all allegations of defendant's answer in conflict with plaintiff's first cause of action were untrue *held* ineffectual as finding upon a necessary issue.

8. **Trial ⇨404(1)—Finding that defendant breached employment contract on December 24 held tantamount to finding that contract was not terminated on December 10 previous.**

Finding, in action for breach of employment contract, that defendant breached contract on December 24, *held* tantamount to finding that contract was not terminated on December 10 previous, by mutual consent of parties, as alleged in defendant's answer.

9. **Trial ⇨395(3)—Specific findings upon subject are unnecessary, where finding adopted is equivalent to adverse finding upon issue involved.**

Where finding adopted is equivalent to an adverse finding upon an issue involved, more specific findings upon subject are unnecessary.

10. Appeal and error ⟹1071(6)—Judgment may not be reversed for failure to adopt findings unless omission prejudices appellant's substantial rights.

Unless omission to adopt findings prejudices substantial rights of appellant, judgment may not be reversed on that account.

11. Trial ⟹397(4)—Failure to find that employee was not discharged because of inefficiency or negligence held not error, where evidence was insufficient to support such finding.

In action for breach of employment contract, omission to find that plaintiff was not discharged by purchaser of defendant's business because of his inefficiency or negligence with respect to duties *held* not error, where evidence was insufficient to support any such finding.

Appeal from Superior Court, Sacramento County; Raglan Tuttle, Judge.

Action by Frank M. Wood against Leo A. Girot. Judgment for plaintiff, and defendant appeals. Affirmed.

Clifford Russell and George E. McCutchen, both of Sacramento, for appellant.

James F. Gaffney, of Sacramento, for respondent.

THOMPSON, J. This is an appeal from a judgment for damages for the breach of a contract of employment.

The defendant was the owner of a garage in Sacramento. July 16, 1927, the parties to this action executed a written contract for the employment of plaintiff as manager of the garage for "a period of not less than one year," at a salary of $50 per week. This contract provided that: "In the event the party of the first part (defendant) disposes of his interests in the said garage, and the purchaser does not wish to take over the services of the party of the second part, then the said party of the second part will work as truck driver and utility man for the said party of the first part at the said fifty dollars each week until such time as the unexpired portion of the said year shall have been completed."

Pursuant to this contract the plaintiff took charge of the garage and performed the services of manager thereof for a period of about five months. The garage was then sold and transferred to one Polley, who retained the services of plaintiff for one week's time in order to familiarize himself with the business, paying him wages at the rate specified in the contract. The purchaser of the garage assumed no legal obligation to fulfill the defendant's contract of employment. Having completed his temporary services for Polley, the plaintiff returned and was set to work by the defendant driving a truck. On December 24th the defendant finally discharged him without cause, except that the defendant said there was not sufficient work to keep the plaintiff employed. Mr. Wood testified in this regard: "He told me that he was all through with the contract and there was nothing for me to do, and that he did not intend to carry out his part of the contract." The plaintiff then industriously sought for other employment, but found no regular work until March, at which time he was hired by the Shell Oil Company at a salary of $125 a month. The difference between the salary of $50 per week for the period of 52 weeks, which was assured by the contract, and the total amount which he actually did earn, together with the sum he would be able to earn if he retained his employment with the Shell Oil Company, was $847.05.

The plaintiff did not wait until the term of employment which was specified in the contract had expired, but brought suit for damages for the breach of the contract immediately after his discharge. The complaint contained two counts. Judgment was rendered for the plaintiff on both counts. A new trial was, however, granted as to the second cause of action. The judgment for $847.05, which was awarded the plaintiff on the first count as damages for a breach of the contract, is all that we are required to consider.

The appellant asserts that neither the complaint nor the evidence justifies a judgment for damages for breach of the contract of employment for the reason that no sufficient allegation or proof of a wrongful discharge of the servant appears. He relies upon the case of Palmer v. Harlow, 52 Cal. App. 758, 199 P. 844, 845, in which it is said that the mere recital in the complaint, to the effect that "the defendant has refused to permit the plaintiff to proceed with the performance of the services," is an insufficient allegation to support an action for damages for the wrongful discharge of an employee.

[1, 2] In the present case, however, it was alleged that "said defendant, *without any cause whatsoever*, informed the plaintiff" that his services were no longer desired. In the absence of a demurrer this was a sufficient allegation of a wrongful discharge of the employee. The evidence is also adequate in this regard. The record discloses no criticism of the character of the plaintiff's services. The only reason assigned by the defendant for the plaintiff's dismissal was that he had no work for him to perform, and that he repudiated the contract. Mr. Wood testified in this regard: "He (Mr. Girot) told me * * * there was nothing for me to do, and that he did not intend to carry out his part of the contract."

[3-5] This action is not in the nature of a suit for wages. Upon the contrary, it is a claim for damages for the breach of a contract employing the plaintiff for the specific term of 52 weeks at a compensation of $50

per week. It was not necessary to wait until the end of the term of employment before commencing the action. A suit for damages for the violation of the terms of a contract may be brought at any time after the breach thereof so long as it is instituted within the statutory limitation of time. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154. The rule of law is well established that the measure of damages in a suit of this nature consists of the entire unpaid contract price of the services, less whatever sum the employee actually earned during the specified term of the contract, together with any further sum which he might have been able to earn by the exercise of reasonable diligence to procure other employment. The judgment is not confined to the installments which have actually accrued prior to the commencement of the action, but should include the entire damages which will have accrued at the time of the expiration of the agreement, for the contract is entire and not severable. Seymour v. Oelrichs, supra. This measure is precisely the basis upon which the judgment in the present case was rendered.

[6] It is claimed by the appellant that the contract of employment was void for lack of mutuality in this, that it authorized the plaintiff, in the event of a sale of the garage, to terminate the contract with the defendant at his option and accept employment with the purchaser of the garage. The clear inference from the language of the contract, however, was that, if the purchaser consented to employ the plaintiff, the defendant would agree to such arrangement, but that, if the purchaser did not employ the plaintiff, he was still bound to continue his services for the defendant in the capacity of a truck driver and general utility man. The contract provided that "the party of the second part agrees to give (the defendant) good and sufficient service, * * *" and in the event of a sale of the garage, if "the purchaser does not wish to take over the services of the party of the second part, then the said party of the second part will work as truck driver and utility man for the said party of the first part at the said fifty dollars each week until such time as the unexpired portion of the said year shall have been completed." The defendant recognized this mutuality of contract and his obligation to continue the employment of the plaintiff. The plaintiff testified in this regard: "I asked Mr. Girot (when the garage was sold) what he wanted me to do and he said, 'Stay right on, Frank, until you hear from me. Mr. Polley wants to get acquainted with the trade.'" In fact, the defendant actually did give the plaintiff employment as a truck driver for a brief period after this temporary employment with Polley. Mr. Wood testified in this regard: "I continued my employment in the garage until the 21st of December *at Mr. Girot's request*. The three days following I worked for Mr. Girot trucking. * * * After that (temporary service for Polley) I worked on one of Mr. Girot's trucks up to and including the 24th of December." This shows not only a mutuality of contract for the continuation of the employment of the plaintiff, but also a recognition of the obligation on the part of the defendant.

[7-11] The appellant contends that the court failed to adopt specific findings with relation to his affirmative defense, to the effect that the contract of employment was voluntarily abandoned by mutual consent of the parties on December 10, 1927, and that the plaintiff was discharged by the purchaser of the garage because of his inefficiency and the willful neglect of his duties. The answer did contain these allegations. It is true that the court merely adopted a general finding that all of the allegations of the defendant's answer in conflict with the plaintiff's first cause of action were untrue. This was ineffectual as a finding upon a necessary issue. But the affirmative finding that the defendant breached the contract on December 24, 1927, was tantamount to a finding to the effect that the contract was not terminated on December 10th, by mutual consent. Paragraph 3 of the complaint alleged that defendant breached the contract on December 24, 1927, by dismissing the plaintiff "without any cause whatsoever." The court specifically found this to be true. Where the finding which is adopted is equivalent to an adverse finding upon an issue which is involved, more specific findings upon the subject are unnecessary. Eastman v. Piper, 68 Cal. App. 554, 569, 229 P. 1002. Unless the omission to adopt findings prejudices the substantial rights of the appellant, a judgment may not be reversed on that account. 2 Cal. Jur. 1032, § 614; Beggs v. Smith, 26 Cal. App. 532, 147 P. 585; Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750, 754. In the Hulen Case last cited it is said that, when it appears from the record that "if more complete findings had been made they would have been adverse to the contentions of the appellant, * * * the failure to find further is not a ground for the reversal of the judgment. Krasky v. Wollpert, 134 Cal. 338, 342, 66 P. 309." The same comment is applicable to the omission to find that the plaintiff was not discharged by the purchaser of the garage because of his inefficiency or negligence with respect to his duties. This finding was immaterial. A finding that he was discharged on that account is not supported by any evidence. Indeed, the evidence upon this subject is just the contrary. Mr. Polley testified: "I did not let Mr. Wood go because his work was not efficient. His work was entirely satisfactory to me." Where there is no evidence to support the appellant's alle-

gations, the omission to find upon such an issue is not error. Himmelman v. Henry, 84 Cal. 104, 23 P. 1098. In 2 California Jurisprudence, 1034, § 614, it is said: "Not only must it appear that evidence was introduced upon such omitted issue, but it must appear also that the evidence was sufficient to warrant a finding for the appellant."

The judgment is affirmed.

We concur: FINCH, P. J.; JAMISON, Justice pro tem.

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102 Cal. App. 172

BLENKIRON et al. v. BIRKHAUSER et al. (Civ. 61.)

District Court of Appeal, Fourth District, California. Nov. 26, 1929.

1. Judgment 🔑526—Recital in execution issued on judgment cannot extend scope of judgment to parties not named therein.

Scope of judgment cannot be extended to parties not actually named therein by recital in execution issued on judgment and naming additional parties.

2. Judgment 🔑700—Failure to show that judgment, later reversed as to copartnership, included members thereof individually, precluded judgment holders from withholding money taken under execution.

In action to recover value of property taken on execution issued on judgment later reversed against copartnership, where defense was that judgment was against copartnership and against members thereof individually, and that judgment had not been reversed as to individuals, failure of record to disclose that judgment included members of copartnership as individuals precluded judgment holders' right to withhold from copartnership any money taken under such execution.

3. Execution 🔑338—In action to recover amount taken on execution issued on judgment, later reversed, permitting amendment of sheriff's return to show levy on assets of copartnership, held proper.

In action to recover amount taken on execution issued on judgment, later reversed, permitting amendment of sheriff's return on execution to show that judgment was satisfied by levy on assets of copartnership *held* proper.

4. Judgment 🔑890—Default judgment against third party held not subject to satisfaction under execution on judgment against copartnership.

Default judgment against third party was not subject to satisfaction under an execution on judgment against copartnership, although rendered in same proceedings.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Paul Blenkiron and another, partners doing business as Blenkiron-Doddridge Company, against Eleanor S. Birkhauser and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Frank Birkhauser, of El Centro, for appellants.

James W. Glassford, of El Centro, for respondents.

SLOANE, P. J. This appeal was taken from the superior court of Imperial county from a judgment for plaintiff in the sum of $294.

The history of the case is somewhat complicated, and the record on appeal by no means clear in its details.

Suit was originally brought in the justice's court of El Centro township, county of Imperial, by the appellants here against W. Maloof and Paul Blenkiron and John S. Doddridge, copartners doing business under the firm name of Blenkiron & Doddridge Company, and Paul Blenkiron and John S. Doddridge, as parties defendants. The original cause of action arose out of a transaction in which defendant Maloof sold an automobile to the plaintiffs Eleanor S. Birkhauser and Frank Birkhauser, her husband, under a conditional sales contract, calling for certain installment payments and an interest payment of $90, which plaintiffs claimed to be usurious. This contract was assigned by Maloof to Blenkiron & Doddridge, copartners, the firm consisting of defendants Paul Blenkiron and John S. Doddridge. A several judgment by default was taken in the justice's court against Maloof, and later, on the trial of the case, judgment was given for plaintiffs for the sum of $294, and against the Blenkiron-Doddridge copartnership, and, according to the contention of appellants here, also against Paul Blenkiron and John S. Doddridge individually. An appeal from this judgment was taken to the superior court of Imperial county, where a demurrer to the complaint in justice's court was filed, the demurrer sustained without leave to amend, and a judgment of dismissal of the action rendered. In the meantime, however, execution had been levied on property of the Blenkiron-Doddridge copartnership, and the amount of the judgment and costs collected thereunder.

The action here appealed from was brought in the superior court of Imperial county by Paul Blenkiron and John S. Doddridge, copartners doing business as Blenkiron-Doddridge Company against Eleanor S. Birkhauser and Frank Birkhauser, defendants, to recover the amount so collected under execution on the justice's court judgment, which was subsequently reversed. It is from this judgment that the pending appeal was taken. The superior court on the trial found that Paul Blenkiron and John S. Doddridge are, and at all times mentioned were, copartners doing business under the name of Blenkiron-Doddridge Company; that they had duly filed a certificate of copartnership, giving the names of the copartners; that on the 21st day of January, 1927, the defendants herein had recovered the judgment for $294 in the justice's court of said El Centro township; that on the 6th of March, 1927, the plaintiffs herein were compelled to pay, and did pay, to the defendants, in satisfaction of said judgment, $301.13; that thereafter plaintiffs duly and regularly appealed from said judgment to the superior court of the state of California, in and for the county of Imperial, and that thereafter on the 31st day of May, 1927, the above-named justice's court judgment was duly reversed; and that the defendants have never repaid the amount collected on said judgment, though plaintiffs have made demand therefor. And as conclusions of law the trial court found that plaintiffs were entitled to recover from the defendants the sum of $301.13, and interest thereon at 7 per cent. per annum from the 8th day of March, 1927, and their costs and disbursements.

The points in controversy on this appeal arise on the contention of appellants that the judgment of the justice's court was not only a judgment against the copartnership, but an individual judgment against Paul Blenkiron and John S. Doddridge, and that the appeal taken to the superior court was taken by the copartnership alone, and that the judgment of reversal did not affect the personal liability of Blenkiron & Doddridge, and that appellants were entitled to the satisfaction of these individual judgments, under the execution issued, out of the assets of the copartnership.

As heretofore stated, the record is in a very unsatisfactory state regarding the parties to the justice's court judgment, and as to the parties to the appeal to the superior court therefrom. The judgment of the justice's court, as read into the record, recites: "After due and careful consideration upon the evidence adduced and the law in such case made and provided, the Court finds for the plaintiffs and against the said defendants Blenkiron and Doddridge, the principal sum of $270.00 as prayed for in plaintiffs' complaint filed herein, $6.00, costs of suit and $18.00 interest thereon, total $294.00. Judgment is hereby entered accordingly."

An abstract of the justice's court judgment filed in Imperial county February 26, 1927, and upon which the execution in question was issued, after giving the title of the court and cause, recites:

"Eleanor S. Birkhauser and Frank Birkhauser, her husband, plaintiffs, vs. W. Maloof and Paul Blenkiron and John S. Doddridge, copartners doing business under the firm name of Blenkiron and Doddridge Company, and Paul Blenkiron and John S. Doddridge, defendants.

"In Justice's Court before I. Mayfield, Justice of the Peace in and for El Centro township, February 26, 1927; judgment entered for plaintiffs for $294.00 on the 31st day of January, 1927.

"I certify that the foregoing is a correct abstract of judgment rendered in said action in my court, as appears by my docket in my possession. I. Mayfield, Justice of the Peace in and for El Centro Township, County of Imperial, State of California."

[1] It will be noticed that neither the judgment as recited from the justice's docket nor the foregoing abstract of judgment includes Paul Blenkiron and John S. Doddridge individually, as parties to the judgment. The execution issued on the justice court judgment recites: "Whereas on the 31st day of January, A. D. 1927, Eleanor S. Birkhauser and Frank Birkhauser, her husband, recovered a judgment in the Justice's Court of El Centro township in and for the County of Imperial, State of California, against W. Maloof and Paul Blenkiron and John S. Doddridge, copartners doing business under the firm name of Blenkiron and Doddrige Co. and Paul Blenkiron and John S. Doddridge," etc. This recital, however, cannot extend the scope of the judgment to parties not actually named therein.

Under the foregoing state of facts, the finding of the trial court in the instant case "that on the 21st day of January, 1927, the defendants herein recovered a judgment against the plaintiff herein in the Justice's Court of El Centro township, Imperial County, California, in the amount of $294.00, which said judgment is docketed at page 26, docket 16 and Justice's Court 3056," cannot be held inaccurate in not including the individual members of the copartnership, as parties to the judgment; the words "plaintiff herein," confining the judgment to Paul Blenkiron and John S. Doddridge as partners under the firm name of Blenkiron-Doddridge Company, the sole plaintiffs in the action.

[2] Moreover, if it appeared that the justice's court judgment included Blenkiron & Doddridge individually as judgment debtors, appellants' contention that this judgment was not reversed as to said defendants cannot be affirmatively maintained from the record. Appellants dispute that these parties individually joined in the appeal from the judgment of the justice's court. The notice of appeal from that judgment does not appear in the record. It is alleged, however, by respondent, and denied by appellants, that the individual members of the partnership did join in the appeal, and the order sustaining demurrer without leave to amend to the justice's court complaint, which was the basis for the reversal and dismissal of the judgment of the justice's court, recites: "This action having been brought on to trial on the 31st day of May, 1927, on the issues of law joined herein, and after hearing James W. Glassford in support of the demurrer of the defendants Paul

Blenkiron and John S. Doddridge, copartners doing business under the firm name and style of Blenkiron-Doddridge Company and Paul Blenkiron and John S. Doddridge; and Frank Birkhauser in opposition thereto it is ordered that said demurrer be sustained without leave to amend."

The judgment for dismissal of the action, as rendered by the superior court, recites: "An order having been entered in this action on the 31st day of May, 1927, sustaining the demurrer of Blenkiron-Doddridge Company to the complaint herein, and denying the plaintiffs' right to amend their complaint; now on motion of James W. Glassford, attorney for the defendants Blenkiron-Doddridge Company, it is ordered and adjudged that the complaint herein be and the same is hereby dismissed, and that said defendants last above mentioned have and recover their costs from said plaintiff taxed at $18.00."

While the judgment for costs runs only in favor of the copartnership, the order of dismissal covers the entire cause of action, as to all parties defendant participating in the appeal, and operated as a reversal of the justice's court judgment as to the individual members of the copartnership as well as the firm liability, if they were joined as appellants. In any event, the failure of the record to disclose with any degree of definiteness that the justice's court judgment included the members of the copartnership as individuals precludes the right of appellants to withhold from the copartnership, the respondents herein, any part of the money taken under execution on the justice's court judgment.

[3] The judgment of the justice's court involved in this appeal was satisfied from a levy upon the assets of the Blenkiron-Doddridge Company partnership, as shown by the amended return of the sheriff. There was no error in permitting the amendment of the sheriff's return on execution to show that fact.

[4] Whether or not the justice's court judgment against Maloof continued in force during the foregoing proceedings is immaterial to this case. It was not subject to satisfaction under an execution against the Blenkiron-Doddridge people.

The judgment appealed from is affirmed.

We concur: BARNARD, J.; MARKS, J.

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102 Cal. App. 152

BARNES v. MORRISON et al. (Civ. 3489.)

District Court of Appeal, Third District, California. Nov. 25, 1929.

1. Executors and administrators 🔑371—Statute relating to resale does not furnish exclusive remedy (Code Civ. Proc. § 1554).

Code Civ. Proc. § 1554, providing for resale where purchaser does not comply with terms of sale, does not furnish exclusive remedy for damages sustained by an estate for failure of purchaser of real property at probate sale to fulfill conditions of sale.

2. Executors and administrators 🔑366—Written bid for purchase of real property at probate sale with deposit required is acceptance of offer, and constitutes contract to purchase property.

Formal written bid for purchase of real property at probate sale which is conducted pursuant to law, together with deposit of 10 per cent. of purchase price as required by law, is an acceptance of offer to sell, and constitutes contract to purchase property upon terms specified in petition for confirmation.

3. Executors and administrators 🔑373—Specific performance or other appropriate equitable proceeding will lie for breach of terms of probate sale.

Specific performance, ejectment, or any other appropriate equitable proceeding will lie for breach of terms of probate sale of real estate.

4. Executors and administrators 🔑372—Failure of proposed purchaser at probate sale to perform conditions constitutes breach creating liability for damages.

Order confirming probate sale of real estate does not convey title, but merely authorizes conveyance upon specified terms and conditions, and failure of proposed purchaser to perform conditions constitutes breach which creates liability for damages sustained.

5. Executors and administrators 🔑370—Purchaser breaching agreement to purchase property sold at probate sale waived title and claim thereto.

Purchaser having breached his agreement to purchase real estate sold at probate sale thereby waived his title and claim thereto.

6. Executors and administrators 🔑370—After notice to probate sale purchaser of his acknowledgment of inability to pay price or fulfill conditions of sale, his equity ceased, and his pretended lease was void.

After notice to purchaser of real estate at probate sale of his breach and his acknowledgment that he was unable to pay agreed price or fulfill conditions of sale, his equity in property ceased, and he possessed no title, and his subsequent pretended lease was void.

7. Executors and administrators 🔑370—Where purchaser at probate sale did not perform, administrator could maintain action to recover possession of real estate and declare forfeiture of deposit.

Where purchaser of real estate at probate sale failed to fulfill conditions of sale, administrator was entitled to maintain an action to recover possession of property and relieve estate from burden of any claim of title on part of purchaser or his lessee and to declare a forfeiture of money which was paid on account of the purchase price.

8. Executors and administrators ⚷370—After breach by purchaser at probate sale of conditions of sale, administrator could retain deposit although conditions contained no express provision on matter.

After breach by purchaser at probate sale of conditions of sale, administrator had right to retain deposit made on account of purchase price although conditions of sale contained no express provision to that effect.

9. Executors and administrators ⚷370—Purchaser at probate sale not fulfilling conditions was trespasser after administrator's notice, and acquired no title to crops planted by his tenant.

Where purchaser of real estate at probate sale took possession and assumed to lease premises after he had acknowledged his inability to pay purchase price and had been notified of termination of sale and forfeiture of deposit, he was a trespasser and subject to eviction, and he acquired no title to crops which were subsequently planted by tenant to whom he wrongfully assumed to lease premises on shares.

10. Landlord and tenant ⚷330(1)—If lessee had actual or constructive knowledge of landlord's default in purchase contract and notice of termination of his rights, he acquired no better title to crops than lessor had.

If lessee had knowledge or was possessed of facts which charged him with constructive knowledge of landlord's default in contract for purchase of real property and notice of termination of his rights under executory sale, lessee acquired no better title to crops he planted than lessor possessed.

11. Receivers ⚷14—Where crops are planted by trespasser who threatens to harvest and market crop, appointment of receiver is authorized (Code Civ. Proc. § 564, subd. 1).

Where crops are planted by trespasser who wrongfully assumes to hold possession and threatens to harvest and market crops for his own benefit, appointment of receiver is authorized in appropriate proceeding, under Code Civ. Proc. § 564, subd. 1.

12. Executors and administrators ⚷370—Complaint praying for decree forfeiting probate sale purchaser's deposit, terminating right to property and crops thereon, and for receiver to harvest and market crops, stated facts constituting cause of action.

Complaint by administrator, alleging in effect that one of defendants made bid on real estate at probate sale and paid deposit, but thereafter failed to perform conditions, and administrator notified him of breach, and that purchaser thereafter purported to lease property to the other defendant who planted crop, and that they were threatening to harvest and market crop and praying for decree forfeiting deposit, terminating defendants' claim to real property and crop growing thereon, and that they be enjoined from interfering with plaintiff's right of possession and title, and that receiver be appointed to harvest and market crops and take charge of proceeds thereof pending litigation, *held* to state facts sufficient to constitute cause of action warranting relief prayed for.

Appeal from Superior Court, Yuba County; K. S. Mahon and Eugene P. McDaniel, Judges.

Action for equitable relief by M. P. Barnes, as administrator with the will annexed of the estate of Amelia Disch, deceased, against Arch Morrison and another. From the judgment of dismissal, and from an order revoking the appointment of a receiver, plaintiff appeals. Order revoking appointment of a receiver reversed, and judgment reversed, with directions.

W. P. Rich, of Marysville, and Busick & Leeper, of Sacramento, for appellant.

Frank A. Duryea, of Marysville, for respondents.

R. L. THOMPSON, J. This is an appeal from a judgment of dismissal in an action for equitable relief. The judgment was rendered after separate demurrers to the complaint had been sustained without leave to amend. The action involves a claim to growing crops, on the part of a purchaser of real property at a probate sale, after he had failed to fulfill the conditions specified and notice of the termination of sale had been given.

The complaint alleges that the plaintiff is the duly appointed administrator of the estate of Amelia Disch, deceased; that the estate was possessed of farm land in Yuba county; that, upon proceedings duly had, this land was sold by the administrator for $40,000, and a return of said sale was regularly made to the probate court pursuant to the provisions of section 1552 of the Code of Civil Procedure; that, upon the hearing of said return of sale, the defendant F. E. Johnson increased the bid for the farm to $44,000, depositing on account of the purchase price the sum of $4,400; thereupon the court confirmed the sale to Johnson and directed the execution of the deed of conveyance upon payment of the balance of the purchase price; that for more than two months thereafter the purchaser failed to make the final payment of the purchase price and otherwise failed to conform to the conditions of sale; thereupon the administrator duly tendered to said purchaser a good and sufficient deed of conveyance to said land free from incumbrance and demanded payment of the balance of the purchase price, which the purchaser then and ever since has failed and refused to pay, declaring that he was financially unable to procure the money; thereupon the administrator duly notified the purchaser of his breach of the terms and conditions of sale and that the administrator for that reason elected to rescind the sale and thereupon declared a forfeiture of the $4,400 deposit; that thereafter, without the knowledge or authority of the plaintiff, the defendant Johnson wrongfully purported to lease said property to the defendant Morrison upon terms entitling him to share in the hay and bean crops which were to be produced thereon; that, pursuant to said pretended lease, the defendant Morrison took immediate possession of the premises and planted thereon 70 acres of beans and several acres of alfalfa hay, which crops at the time of filing this complaint were ready for harvesting and were of the value of $10,000; that the defendants are without any title or interest in said premises or the growing crops thereon, but that they claim a landlord's and tenant's interest therein, respectively, and threaten to harvest and market the same for their own benefit; that the plaintiff demanded possession of the premises and crops, which was refused; that the defendants are insolvent; and that the plaintiff has no speedy or adequate remedy at law.

The complaint prayed for a decree forfeiting said $4,400 deposit, terminating the defendants' claim to said real property and the crops growing thereon, and that they be enjoined from interfering with plaintiff's right of possession and title thereto, and that a receiver be appointed to harvest and market the crops and to take charge of the proceeds thereof pending the litigation.

Upon application therefor, a receiver was duly appointed, but subsequently this order was rescinded and the appointment was revoked. From this last-mentioned order, the plaintiff has also appealed.

Separate demurrers were filed by each defendant on the ground of uncertainty and for failure to state facts sufficient to constitute a cause of action. These demurrers were sustained, and the plaintiff was denied the privilege of amending his complaint. Thereupon a judgment of dismissal was entered, from which this appeal was perfected.

We are not informed of the theory upon which the defendants support this judgment and proceeding, for they have filed no points and authorities. It appears to have been assumed that equity had no jurisdiction to afford a remedy for the failure of a purchaser of real property at a probate sale to comply with the conditions of sale, and that the exclusive redress was found in the necessity of petitioning the court for a resale of the property pursuant to section 1554 of the Code of Civil Procedure, which provides in part: "* * * If, after the confirmation, the purchaser neglects or refuses to comply with the terms of the sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate."

[1-4] Section 1554, supra, does not furnish the exclusive remedy for damages sustained by an estate for failure on the part of a purchaser of real property at a probate sale to fulfill the conditions of sale. The remedy provided by that section may be neither speedy nor adequate. While that section provides that, in the event that a purchaser fails or refuses to comply with the conditions of sale, the court *may* order a resale of the property. This is not mandatory. Obviously, the authorization for a sale or resale of the property of an estate depends upon the needs and best interest of the estate as provided by section 1536 of the Code of Civil Procedure. The formal written bid for the purchase of real property at a probate sale which is conducted pursuant to law, together with the deposit of 10 per cent. of the purchase price as required by law, is an acceptance of the offer to sell, and constitutes a contract to purchase the property upon the terms specified in the petition for confirmation. Specific performance, ejectment, or any other appropriate equitable proceeding will lie for a breach of the terms of sale. The order confirming the sale does not convey the title, but merely authorizes the conveyance upon specified terms and conditions. The failure on the part of the proposed purchaser to perform the conditions constitutes a breach, which creates a liability for damages sustained.

It has been definitely held that section 1554 of the Code of Civil Procedure is not the exclusive remedy for a breach of conditions for the purchase of real property at a probate sale. Under such circumstances the personal representative of the estate may maintain an action to recover the balance of the purchase price or for specific performance. Crouse v. Peterson, 130 Cal. 169, 62 P. 475, 615, 80 Am. St. Rep. 89; McCarty v. Wilson, 184 Cal. 194, 200, 193 P. 578, 580. In the case last cited it is said: "By virtue of the right conferred by section 1554 of the Code of Civil Procedure, the property might have been resold and the present purchaser held responsible if, on the second sale, enough was not realized to pay costs and the amount of the present bid, but that remedy is not exclusive, and does not prevent a resort by the executor to a suit for specific performance."

[5] The defendant, having breached his agreement to purchase the property, thereby waived his title and claim thereto. As the court said in Tuso v. Green, 194 Cal. 574, at page 583, 229 P. 327, 330: "Defendant had breached his contract, and plaintiffs thereafter held the land freed from any claim or right of defendant thereto or therein."

[6-8] After notice to the purchaser of his breach and his acknowledgment that he was unable to pay the agreed purchase price or fulfill the conditions of sale, his equity in the property ceased, and he possessed no title, equitable or otherwise, which he had a right to lease or convey. Hicks v. Lovell, 64 Cal. 14, 27 P. 942, 49 Am. Rep. 679; Flint v. Conner, 53 Cal. App. 279, 200 P. 37; Andrews v. Karl, 42 Cal. App. 513, 519, 183 P. 838. His

subsequent pretended lease to the defendant Morrison was therefore void. The administrator was entitled to maintain an action to recover possession of the property of the estate and to relieve the estate from the burden of any claim of title on the part of the purchaser or his lessee, and to declare a forfeiture of the money which was paid on account of the purchase price. After the breach, the administrator had a right to retain this deposit, although the conditions of sale contained no express provision to that effect. Glock v. Howard, 123 Cal. 1, 20, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Tuso v. Green, 194 Cal. 574, 229 P. 327; Mulcahy v. Gagliardo, 39 Cal. App. 458, 179 P. 445; Francis v. Shrader, 38 Cal. App. 592, 177 P. 168.

[9] The defendant Johnson took possession and assumed to lease the premises after he had acknowledged his inability to pay the purchase price and had been notified of the termination of the sale and forfeiture of the deposit. He had abandoned his effort to buy the property. He was therefore a trespasser and subject to eviction. Under such circumstances, he acquired no title to the crops which were subsequently planted by a tenant to whom he wrongfully assumed to lease the premises on shares. In 27 Ruling Case Law, 621, § 375, it is said: "The possession (of a purchaser who has taken possession under an executory contract before the execution of the deed) * * * becomes tortious at the option of the vendor, when the purchaser disaffirms the contract, disavows the title under which he has entered, or refuses payment of the purchase money, and he then becomes liable to eviction as a trespasser." Hicks v. Lovell, supra; Flint v. Conner, supra.

[10] Where a purchaser under an executory contract takes possession of the premises with the consent of the vendor, he has an equitable title, but, where he wrongfully enters without the knowledge or consent of the vendor, he acquires no right or title thereby. The purchaser under an executory contract is the owner of crops grown upon land during the time he is rightfully in possession, but he has no title to crops which are planted after his rights have been terminated by reason of his own wrongful acts or default. 39 Cyc. 1627, § 8. If, as the complaint indicates the facts to be in the present case, the defendant Johnson attempted to assume control of the premises and wrongfully lease the property to a stranger on crop shares, after his default and due notice of the termination of sale and forfeiture had been given, he was a mere trespasser, and acquired no right, title, or interest in any share of the crops. In a proper proceeding the estate was entitled to recover possession and control of the real property and the growing crops, together with the proceeds of the sale thereof. If the lessee, Morrison, had previous knowledge or was possessed of facts which charged him with constructive knowledge of the purchaser's default and notice of termination of his rights under the executory sale, Morrison could acquire no better title to the crops than his lessor possessed. Under such circumstances his occupancy would be unlawful and his lease invalid. In 2 Underhill on Landlord and Tenant, 1322, § 776, it is said: "If a subtenant knows that the lessor has no title or that his title will be terminated before the crops mature, he sows the crop at his own risk."

If the lessee planted the crops in good faith, without either actual or constructive notice of the lessor's wrongful conveyance, he would have his remedy against the lessor.

[11, 12] Where crops are planted by a trespasser who wrongfully assumes to hold possession and threatens to harvest and market the crops for his own benefit, the appointment of a receiver is authorized in an appropriate proceeding. Section 564, Code Civ. Proc. subd. 1; 22 Cal. Jur. 444, § 24; Borges v. Dunham, 169 Cal. 83, 145 P. 1011. The ground upon which the trial court vacated the order appointing the receiver was that the complaint failed to state a cause of action. We are of the opinion that the complaint stated sufficient facts to constitute a valid cause of action warranting the equitable relief prayed for.

The order revoking the appointment of the receiver was erroneous, and is therefore reversed. The judgment of dismissal is also reversed, and the trial court is directed to overrule the demurrers and permit the defendants to answer.

We concur: FINCH, P. J.; JAMISON, J. pro tem.

102 Cal. App. 280

HOFFMAN v. McNAMARA. (Civ. 7115.)

District Court of Appeal, First District, Division 2, California. Dec. 3, 1929.

1. Trial 🔑417—Plaintiff's failure of proof held cured, where supplied by defendant's testimony, which by stipulation was to be considered as part of plaintiff's case.

Failure of plaintiff to prove that defendant was person driving automobile colliding with plaintiff's truck was cured, where by stipulation evidence given by defendant was to be considered as part of plaintiff's case, and defendant testified she was driving automobile at time of collision.

2. Automobiles 🔑244(11)—Evidence held to sustain finding of negligence of defendant in cutting corner in making left turn at intersection and colliding with plaintiff's automobile.

In action for injuries from collision of automobiles at highway intersection, evidence *held* to support finding of negligence on part of defendant automobilist in cutting corner instead of turning to right of center of intersection as law required in making left turn.

3. Automobiles 🔑245(80)—Evidence held not to establish plaintiff's contributory negligence in collision as matter of law by failing to look to left for approaching automobiles.

In action for injuries from collision of automobiles at intersection, evidence *held* not to establish that plaintiff was contributorily negligent as matter of law in failing to look to his left for approaching vehicles, in that jury was entitled under evidence to conclude that plaintiff's failure to observe approach of defendant's automobile was not proximate cause of collision.

4. Appeal and error 🔑930(1)—On appeal, evidence must be viewed in its most favorable light in support of verdict.

Appellate court must view evidence in its most favorable light in support of the verdict.

5. Automobiles 🔑246(9)—Instruction that automobile first entering intersection has right of way over one which has not entered held properly refused; "approximately" (Motor Vehicle Act, § 131, as amended by St. 1925, p. 412, § 15).

Under Motor Vehicle Act (St. 1923, p. 560) § 131, as amended by St. 1925, p. 412, § 15, instruction that first automobile to enter intersection has right of way over automobile which has not yet entered intersection, *held* properly refused, since it cannot be said that, because vehicle from left reaches intersection first, the one from the right has not approached it at approximately the same time, inasmuch as vehicle may approach an intersection at approximately the same time as another if it approaches slightly before or after the other; "approximately" meaning about or nearly as it is the opposite of precisely or exactly.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Approximate; Approximately.]

6. Statutes 🔑230—Legislature is presumed to have decisions of appellate courts in mind when adopting amendments to statutes which courts have construed.

Legislature is presumed to know decisions of appellate courts and to have them in mind when adopting amendments to statutes which courts have construed.

7. Statutes 🔑230—Substantial change in language of statute presumptively indicates change in meaning.

A substantial change in language of statute is presumed to indicate change in its meaning.

Appeal from Superior Court, Santa Barbara County; J. B. Landis, Judge.

Action by Harry L. Hoffman against Merle A. McNamara. Judgment for plaintiff, and defendant appeals. Affirmed.

Coleman E. Stewart, of Santa Barbara, for appellant.

Mygatt, Robertson & Crawford, of Santa Barbara, for respondent.

DOOLING, Justice pro tem. Appeal from a judgment for plaintiff against appellant, entered pursuant to the verdict of a jury, for damages received by plaintiff in a collision between a laundry truck driven by him, and an automobile driven by appellant.

At the place of collision, the main coast highway between Los Angeles and Santa Barbara runs approximately east and west, and is crossed practically at a right angle by another public highway called Butterfly Lane.

Plaintiff and respondent, on the morning of the collision, was driving westerly on the coast highway, and defendant and appellant drove northerly on Butterfly Lane and made a left-hand turn onto the coast highway. The two machines collided at a point on the coast highway about 30 feet westerly from the westerly line of Butterfly Lane projected across the coast highway.

Appellant contends: (1) That the trial court erred in denying her motion for a nonsuit; (2) that the trial court erred in denying her motion for a directed verdict; (3) that the verdict of the jury is not supported by the evidence and is against law; and (4) that the trial court erred in refusing to give two instructions proposed by appellant.

The first three points may be conveniently considered together, since they all rest upon the contentions that the evidence fails to show any negligence of appellant and affirmatively shows contributory negligence on the part of respondent.

[1] Preliminarily we may dispose of the claim of appellant that a nonsuit should have been granted because of plaintiff's failure to prove that appellant was the person driving the automobile which collided with his truck. The failure of proof in this regard, if any theretofore existed, was cured by a stipulation between counsel that the evidence given

by appellant in support of her cross-complaint should be considered as a part of plaintiff's case. Appellant herself testified that she was driving the automobile at the time of the collision.

[2] We think the evidence was ample to support the finding that appellant was negligent. According to her own testimony, appellant turned left from Butterfly Lane onto the coast highway by a course which took her considerably to the left of the center of the intersection of the two. Respondent testified that he crossed the intersection at about 15 miles per hour and was struck from the side and behind after he had completely passed the intersection. While appellant testified that she was only going 5 or 6 miles per hour at the moment of collision, the jury were not compelled to believe this, since it would be manifestly impossible for her to overtake and strike respondent at that rate of speed. From the evidence, the jury may well have believed that the proximate cause of the collision was appellant's cutting the corner instead of turning to the right of the center of the intersection as the law required. This is clearly sufficient to support a finding that the collision was proximately caused by appellant's negligence. Pope v. Halpern, 193 Cal. 168, 173, 223 P. 470.

[3, 4] The claim that respondent was guilty of contributory negligence as a matter of law is based upon his testimony that, as he approached and crossed the intersection of Butterfly Lane, he did not look down Butterfly Lane to his left for approaching vehicles, but only looked the width of the coast highway. The court instructed the jury in this regard "that it was the duty of the plaintiff and cross-defendant as he approached the intersection of Butterfly Lane with the coast highway, to look both to the right and to the left to observe the presence of other automobiles approaching said intersection on Butterfly Lane and if you find that plaintiff and cross-defendant did not look to the left to observe the approach of defendant's car as it approached said intersection and that it was possible for him to have looked and to have seen defendant's car approaching said intersection, then you must find as a matter of law that plaintiff and cross-defendant was negligent, and if you further find that such negligence in any degree contributed to the cause of the accident in this case, your verdict must be for the defendant, Merle A. McNamara."

This instruction stated the law as strongly in favor of appellant on this point as she was entitled to have it stated, and we must assume on appeal that the jury followed it and determined that the failure of respondent Hoffman to observe the approach of appellant's automobile was not a proximate cause of the collision. This, in our judgment, they were entitled to do under the evidence.

From the evidence, the jury may have concluded that, even if respondent had seen appellant's car at or approaching the intersection, he would have been justified in proceeding across the intersection nevertheless, on the assumption that she would not turn to the left of the center of the intersection and thereby bring her car across the path of his. If his evidence is believed—and it is axiomatic that we must on appeal view the evidence in its most favorable light in support of the verdict—after respondent was completely across the intersection, appellant struck him from the side and rear. If this is true, as we are bound to assume in support of the verdict, he was far beyond the point where the paths of the two machines would have crossed if appellant had taken the course enjoined on her by law.

[5-7] The court gave an instruction in the language of section 131 of the Motor Vehicle Act, as amended by St. 1925, p. 412, § 15, which read at that time: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed."

Appellant proposed two instructions on this subject, of which the following is the more elaborate: "You are instructed that as an exception to the rule 'that when two vehicles approach an intersection of public highways at approximately the same time the vehicle approaching from the right shall have the right of way providing such vehicle is traveling at a lawful speed', the law provides that of two vehicles approaching an intersection at a lawful rate of speed, the first automobile to enter the intersection has the right of way over the automobile which has not yet entered said intersection and which is at a distance greater than the approximate distance of the projected course of intersection of said automobiles." The other instruction was identical except for the omission of the last clause.

These instructions were properly refused. They are based on the decision of this court in Vickerson v. Standard Auto Sales Co., 64 Cal. App. 287, 221 P. 392. But, after the decision in the Vickerson Case, section 131 of the Motor Vehicle Act was amended in 1925 to the form set out above. The rule is well settled that the Legislature is presumed to know the decisions of appellate courts and to have them in mind when adopting amendments to statutes which the courts have construed. It is equally well settled that a substantial change in the language of a statute is presumed to indicate a change in its meaning. By providing that, "when two vehicles approach an intersection * * * at *approximately* the same time," the one to the right shall have the right of way, the Legislature used language deliberately calculated to change the rule announced in the Vickerson Case. "Approximately" means about or nearly; it is the opposite of precisely or exactly. A vehicle may approach an intersection at "approximately the same time" as another if it approaches slightly before or slightly after the other. It cannot be said that, because the vehicle from the left reaches the intersection first, the one from the right has not approached it at approximately the same time. Whatever criticism might conceivably be directed at the Legislature for introducing this element of possible uncertainty into a rule of the road—and that is a matter with which we cannot be concerned—it would be an act of judicial legislation for us to sanction a construction of this plain language out of its clear and natural meaning. It may be noted in this connection that in 1929 this section was again amended to return substantially to the rule in effect before the amendment here in question (St. 1929, p. 541, § 55).

We conclude that there is nothing presented in this case which justifies a reversal.

Judgment affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

DAVIS v. CHIPMAN. (Civ. 6876.)★

District Court of Appeal, First District, Division 1, California. Nov. 27, 1929.

Rehearing Granted Dec. 27, 1929.

1. Contracts 🔑161—All sentences in agreement must be considered together, and attention cannot be confined solely to last sentence.

In construing agreement containing only three sentences, all three must be considered, and attention cannot be confined solely to last sentence as if it were detached and unconnected with first two.

2. Brokers 🔑40—Real estate broker's past services held sufficient consideration to support promise to pay commission.

Services rendered by real estate broker prior to agreement to pay commission if designated party exercised option to purchase *held* sufficient consideration to support promise to pay.

3. Brokers 🔑42—Agreement relating to commissions for sale of realty secured through agent's "efforts" held to contemplate "negotiation" of sale of property to recover compensation for which agent was required to have license (St. 1919, pp. 1252, 1259, §§ 2 and 20).

Agreement, stating that option to purchase realty was secured through agent's "efforts" and that agent "interested" optionee, and containing promise to pay commission if sale was effected with party whose name and address had been furnished as one with whom agent had been dealing for sale of property, *held* to contemplate negotiation of sale of property to recover compensation for which agent was required to have license under St. 1919, pp. 1252, 1259, §§ 2 and 20; word "efforts" meaning the same as word "negotiations."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Negotiation; First and Third Series, Effort.]

4. Brokers 🔑75—Commission for securing sale of realty being payable ratably when purchase price was received, agent held only entitled to commission on each installment as collected.

Under agreement providing that commission for procuring sale of realty was to be due and payable ratably and proportionately if, as, and when such purchase price is received by owner, agent *held* only entitled to commission on each installment as collected.

5. Brokers 🔑42—Real estate broker can recover commissions if he possesses license when commission is earned and payable.

Real estate broker, though not possessing license at time of employment and rendition of services, can recover commission if he possesses such license when his commission is earned and payable.

6. Brokers 🔑86(1)—Facts showing negotiations with prospective purchaser held insufficient to support finding that prospect's name and address with whom agent had been dealing for sale of property was furnished as required.

In action to recover real estate broker's commission, where agreement required agent to furnish owner name and address of purchaser with whom they had been dealing for sale of property, facts showing agent attempted to interest purchaser in syndicate and disinterest him in obtaining property for himself *held* insufficient to support finding that prospect's name and address had been furnished as required by agreement.

7. Brokers 🔑53—Agent introducing prospective purchaser at latter's request, whereupon purchaser and owner without agent's assistance negotiated sale, held not procuring cause.

Where, after expiration of option to procure purchaser, agent introduced purchaser at latter's request to owner, and purchaser and owner without aid or assistance of agent negotiated terms of sale, agent's efforts *held* not procuring cause of sale so as to entitle him to commission.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Harry F. Davis against W. F. Chipman, as trustee of the estate of Josephine A. Phelps, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

W. C. Sharpsteen, Cushing & Cushing, and William H. Gorrill, all of San Francisco, for appellant.

Fred L. Berry and Dozier & Kimball, all of San Francisco, for respondent.

GRAY, Justice pro tem. Challenging the sufficiency of the evidence to support certain findings, defendant appeals from a judgment awarding plaintiff one half of the unpaid balance of an agreed compensation (the other

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★Hearing granted 293 P. 40.

half having been assigned to Thomas B. Dozier, Jr., plaintiff in the companion case) for services, which the complaint, in the form of a common count, alleges, and the answer denies, were rendered to defendant, and for which the answer affirmatively alleges plaintiff cannot recover because he was not a licensed real estate broker.

The unquestioned findings picture the transaction between the parties, out of which the present dispute arose, as follows: Simultaneously, defendant executed and delivered to Thomas B. Dozier, Jr., his written option to purchase certain property therein described, within three months, for $250,000, and to plaintiff, his written agreement, containing the following pertinent terms: "Thomas B. Dozier, Jr., has requested me to send you this copy of the above Option to Purchase, as he states that such Option to Purchase was secured through your efforts, and that you interested him in the property from a purchase standpoint. I hereby agree, if Thomas B. Dozier, Jr., * * * exercise the above option to purchase * * * to pay you a commission on the sale of the property of ten per cent. (10%) of the purchase price of the same, such commission to be due and payable ratably and proportionately, if, as and when such purchase price is received by me. * * * It is further understood and agreed that, on or before the expiration of said Option to Purchase, both Mr. Dozier and yourself are to furnish me with the complete names and addresses of all parties with whom you are or have been dealing for the sale of said property under said Option to Purchase and that no commission will be due and payable to you except it is effected within one (1) year of said expiration of said Option to Purchase and with one of the parties whose name and address has been previously furnished by one or both of you, and it is further understood that any party to whom a sale of the property is effected through your efforts must be a party with whom there have been no negotiations heretofore in connection with said property." Within the time limited, plaintiff and Dozier, jointly, furnished to plaintiff the names and addresses of persons, including the subsequent purchaser. Plaintiff also, after the expiration of the option, personally introduced to defendant this purchaser and the last two "directly and together conferred respecting the purchase of said property, the conditions and terms of sale of said property and negotiated solely and alone therefor * * * without the interposition or acts of plaintiff. * * * " While these negotiations were pending, plaintiff and Dozier wrote defendant "that we are willing to accept a commission of ten per cent. (10%) of each payment on the purchase price * * * such commission to be payable to us out of and from each payment on the purchase price, if, as and when received by yourself, without interest." Defendant has received the total purchase price of $250,000 in unequal installments over a period of eighteen months. Plaintiff was a licensed real estate broker only during the time when installments totaling $191,506.50 were received. Defendant paid commissions on the first three installments in accordance with the letter, without interest, although plaintiff did not then have a license.

The court further found that plaintiff rendered services to defendant, at his request, for an agreed compensation of $25,000, which is due, owing, and unpaid; that plaintiff and Dozier furnished to defendant, in writing, the name and address of the purchaser, as required by the agreement; that plaintiff did not negotiate the terms of the sale or do other than introduce the purchaser to defendant, as a result of which the sale was effected; that a cause of action for the services accrued as each installment was paid; and that such services were rendered, not as a real estate broker, but consisted merely of finding and introducing a purchaser who was ready, able, and willing to purchase. By his claim that the evidence is insufficient to support these findings, defendant squarely presents for decision the question: What services were to be rendered under the agreement? He argues that the agreement employed plaintiff, as a real estate broker, to produce a purchaser, and that, as plaintiff's services were not the procuring cause of the sale, and as he did not have a license as a real estate broker at the time of sale, he cannot recover. In reply, plaintiff takes two somewhat inconsistent positions: (1) That the services to be rendered under the agreement consisted merely of furnishing names and addresses according to its terms and were not such as are performed by a real estate broker; and (2) if such services required a license, he can recover on those installments which were paid when he had such license.

[1-3] The nature and extent of the services for which plaintiff was to be compensated are to be determined solely by an examination of the above-mentioned agreement because a comparison of its terms with those in the letter of Dozier and the plaintiff, acceded to by defendant, when he mailed the first check for commission, clearly shows a modification solely as to interest. In construing that agreement all three sentences must be considered and attention cannot be confined solely to the last sentence, as if it were detached and unconnected with the first two sentences. Cole v. Low, 81 Cal. App. 633, 254 P. 676. The first sentence states that Dozier's option was *secured* through plaintiff's *efforts* and that plaintiff *interested* Dozier in the purchase of the property. The italicized words aptly and appropriately described services to be performed by a real estate broker. Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Ross v. Major, 178 Mo. App. 431, 163 S. W. 880. It is apparent that such services

were rendered prior to the agreement. However, such past services were a sufficient consideration to support the promise to pay, if Dozier exercised his option, as contained in the second sentence. Cole v. Low, supra. In the last sentence, defendant promised to pay the commission, if a sale was effected with a party whose name and address had been furnished as one with whom plaintiff had been dealing for the sale of the property under the option and with whom there had been no previous negotiations. The effect of this sentence was not to create a new and independent obligation, separate and distinct from the obligation created by the second sentence, but was intended "to protect plaintiff for his efforts during the life of the contract resulting in a sale not consummated until after the termination of the contract." Wright & Kimbrough v. Dewees, 52 Cal. App. 42, 46, 197 P. 957, 958, Hobson v. Hunt, 59 Cal. App. 679, 211 P. 242. The word "efforts," in the clause "it is further understood that any party to whom a sale of the property is effected through your *efforts* must be a party with whom there have been no negotiations heretofore," means the same as the word "negotiations." Sessions v. Pacific Improvement Co., supra. The services contemplated by the agreement, therefore, were the negotiation of the sale of the property to recover compensation for which plaintiff was required to have a license. St. 1919, pp. 1252, 1259, §§ 2 and 20; Kornman v. Nelson, 83 Cal. App. 616, 257 P. 150. The case of Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, cited by plaintiff, is not in point, because the court was there not discussing a question of fact, but merely passing upon the sufficiency of a complaint, which contained an allegation expressly negativing the statutory definition of a real estate broker.

[4, 5] Since the agreement provided "such commission to be due and payable ratably and proportionately if, as and when such purchase price is received by me" (the defendant), plaintiff was only entitled to a commission on each installment as collected. Arnold v. La Belle Oil Co., 47 Cal. App. 290, 109 P. 815; Miller v. Lerdo Land Co., 52 Cal. App. 662, 199 P. 1073. A real estate broker, although he possessed no license at time of employment and rendition of services, can recover his commission if he possesses such license when his commission is earned and payable. Houston v. Williams, 53 Cal. App. 267, 200 P. 55; Wise v. Radis, 74 Cal. App. 765, 242 P. 90. Were it not for the matters to be next discussed, plaintiff would therefore be entitled to a commission on the installments paid while he had such license.

"'The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commissions does not accrue.' Sibbald v. [Bethlehem] Iron Co., 83 N. Y. 382 [38 Am. Rep. 441]. * * * If he failed to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called to it the attention of the party who subsequently made the purchase. * * * Zeimer v. Antisell, 75 Cal. 509, 512, 17 P. 642, 643. "It is not enough that he contribute indirectly or incidentally to the sale by imparting information which tends to arouse interest, but it is sufficient if it be established that he set in motion a chain of events which without break in their continuity caused the buyer and seller to come to terms, that his efforts constituted the proximate cause of the meeting of the minds of the principals. * * * Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Sargent v. Ullsperger, 54 Cal. App. 384, 201 P. 934. It is necessary for the broker to prove therefore that he was the efficient or procuring cause of the sale; in other words, it must appear that his efforts had to do with the meeting of the minds of the seller and buyer. Webster v. Parra, 72 Cal. App. 639, 237 P. 804. * * * 'The expression "procuring and inducing cause," as used in the books, refers to the cause originating from a series of events that without break in their continuity results in the prime object of the employment of the agent.' Roth v. Thomson, 40 Cal. App. 208, 180 P. 656, quoting approvingly the rule stated in Smith v. Preiss, 117 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 820. In any event the question of whether or not the sale is primarily the result of the broker's efforts is one of fact, and the trial court's conclusions thereon will not be disturbed on appeal if there be substantial evidence to sustain them. Sessions v. Pacific Improvement Co., supra." Bail v. Glantz, 78 Cal. App. 49, 53, 248 P. 258, 259.

[6, 7] The following facts appear, without conflict, in the transcript of evidence: The purchaser had previously attempted to buy the property from a prior optionee. Dozier and plaintiff, within the life of Dozier's option, attempted to interest the purchaser in a syndicate, which they were then trying to form to acquire the property under the option. The purchaser informed them that he was not interested in joining the syndicate but was interested in acquiring the property for his own account. Learning this attitude, they attempted to disinterest the purchaser in obtaining the property for himself. During the option's term, Dozier and plaintiff furnished the name and address of such purchaser, as that of a party *with whom they had been dealing for the sale of the property.* Obviously the attempt to interest this purchaser in the syndicate and disinterest him in purchasing the property for himself was not dealing with him for the sale of the property, and hence defendant's objection that the evidence does not support the court's finding that such name and address had been furnished as required by defendant's agreement is well taken. After the expiration of the option, plaintiff introduced the purchaser, at the latter's request, to defendant, and, as the court found in accord with the evidence, the purchaser and defendant, without aid or assistance of plaintiff, negotiated the terms of the sale. Measured by the rule stated in the above-cited cases, these facts clearly show that plaintiff's efforts were not the procuring cause of the sale, especially in view of his efforts to disinterest the purchaser. Necessarily included within the court's finding that plaintiff rendered services to defendant at his request is an implied finding that plaintiff's efforts were the procuring cause of the sale, which finding is unsupported by the evidence. Furthermore, this finding is based in part on the agreement which contemplated the services of a real estate broker. As plaintiff's efforts were not the procuring cause, such services were not rendered, and this finding is unsupported in the evidence.

Judgment reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

Thomas B. DOZIER, Jr., Plaintiff and Respondent, v. W. F. CHIPMAN, as Trustee of the Estate of Josephine A. Phelps, Deceased, Defendant and Appellant. (Civ. 6907.)★

District Court of Appeal, First District, Division 1, California. Nov. 27, 1929.

Rehearing Granted Dec. 27, 1929.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

W. C. Sharpsteen, Cushing & Cushing, and William H. Gorrill, all of San Francisco, for appellant.

Fred L. Berry and Dozier & Kimball, all of San Francisco, for respondent.

GRAY, Justice pro tem. This is a companion case to Harry F. Davis, Respondent, v. W. F. Chipman, as Trustee of the Estate of Josephine A. Phelps, Deceased, Appellant (No. 6876) 92 Cal. App. page —, 282 P. 992, this day decided. Respondent herein, as assignee, recovered judgment for the other half of the commission involved in the other case. For the reasons stated in the opinion in the other case, judgment is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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102 Cal. App. 264

WELLS FARGO BANK & UNION TRUST CO. v. FREY. (Civ. 6920.)

District Court of Appeal, First District, Division 2, California. Dec. 2, 1929.

Gifts 🔑49(1) — Where there was testimony father delivered stock to daughter as sale, and that daughter agreed to pay certain price there was evidence supporting decision it was sale and not gift.

Where there was testimony to effect that stock was delivered by father to daughter as and for sale, and that she accepted it with understanding and agreement to pay for it at certain price, and that reasonable value of stock was that price, there was ample evidence to support decision of trial court that stock was delivered to daughter as sale and not as gift.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Wells Fargo Bank & Union Trust Company, as executor of the last will and testament of John Frey, deceased, against Elise Frey. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Taylor, of San Francisco, for appellant.

Charles N. Douglas, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff, as executor of the above-named deceased, brought this action against defendant, a daughter of the said deceased, for the sum of $3,250 as the agreed purchase price of 100 shares of capital stock of the San Francisco Milling Company. The complaint was later amended by adding the allegation that defendant had agreed to pay for said stock the reasonable value thereof, and that the reasonable value thereof was $3,250. The defendant in her answer denied that the deceased had sold her the stock, and alleged that it was given to her in appreciation of her assistance in preparing and obtaining a certain agreement between said deceased and certain of his children.

At the trial the main issue was whether the certificate for 100 shares had been delivered to defendant as a gift or as a sale for which she had promised to pay. The case was tried by the court without a jury. The findings and judgment were in favor of the plaintiff, and the defendant appeals.

There is scarcely anything to be said in favor of this appeal except the apparent earnestness of counsel for the appellant. The briefs of appellant are entirely given over to attacks upon the sufficiency of the evidence to support the judgment and findings. The points made are such as might properly be made in the trial court, but, as each one resolves itself into a consideration of a con-

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★Rehearing granted. 286 P. 433. Hearing granted 293 P. 47.

flict of evidence, they are of no avail to appellant in this court. There is ample evidence in the record to support the decision of the trial court. There was testimony to the effect that the stock was delivered to appellant as and for a sale; that she accepted it with the understanding and agreement to pay for it; that she agreed to pay $32.50 per share for it; and that the reasonable value of said stock was $32.50 per share. The certificate of stock was dated October 2. The conversations and transaction which constituted the sale were said by witnesses to have occurred upon September 29. This, of course, does not mean that the testimony of the sale must be entirely discredited. It only means that there is a discrepancy in dates—by no means an unusual thing in the trial of a case. No point of this discrepancy was made at the trial nor in the examination of the witnesses. These dates are of no importance, and have no significance in the case, except as they might influence the trial court in weighing the testimony of the witnesses. The discrepancy in dates does not even give rise to any confusion, for there was only the one certificate and the one transaction of sale.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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102 Cal. App. 169

PEOPLE v. MADDUX. (Cr. 1557.)★

District Court of Appeal, First District, Division 2, California. Nov. 26, 1929.

Hearing Denied by Supreme Court Dec. 26, 1929.

1. False pretenses ⚿11—Realty may be subject of obtaining property under false pretenses.

Real property may be subject of obtaining property under false pretenses, although it cannot be subject of larceny.

2. Witnesses ⚿245—Sustaining objection to questions which had already been asked and answered held proper.

In prosecution for grand larceny, where information was framed under Pen. Code, §§ 484, 486, as amended by St. 1927, pp. 1046, 1047, where witness had testified that she did not remember or know of certain things having been done, sustaining objection to question whether witness would say that those things had not been done *held* proper; such questions being mere repetition.

3. Witnesses ⚿270(2)—Sustaining objection to question as to why witness had not told that certain statements were part of conversation testified to on direct held proper.

In prosecution for theft, where witness had testified regarding certain conversation, sustaining objection to question on cross-examination as to why witness had not told on direct examination that certain statements were part of such conversation *held* proper, since witness is not required to make a speech on direct examination.

4. Witnesses ⚿268(9)—Sustaining objection as to whether it was not first time witness had ever said anything about certain statement, held not error; it not being shown that question regarding such statement was asked.

In prosecution for grand larceny, where witness testified that accused had told her not to mention certain transaction, sustaining objection to question if it was not first time in any of the trials that witness had ever said anything of such request, *held* not error, it not being shown that witness was questioned regarding the request.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

William B. Maddux was convicted of grand theft, and he appeals. Affirmed.

Myron Harris and Leo A. Sullivan, both of Oakland, and John Jewett Carle, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with having committed the crime of grand theft. The defendant pleaded not guilty. The jury brought in a verdict of guilty. The defendant made a motion for a new trial. The motion was denied. From the judgment entered on the verdict and the order denying a new trial the defendant has appealed.

[1] On this appeal the defendant earnestly contends that he was tried and convicted under a statute that was enacted subsequent to the alleged date of his offense. In the information it was alleged that the offense was committed on the 22d day of November, 1926. The information was filed on the 2d day of May, 1929. It is conceded that the information was framed under the amendments to sections 484 and 486 of the Penal Code as amended (St. 1927, pp. 1046, 1047). In this connection the defendant asserts that real property cannot be the subject of larceny, and therefore cannot be the subject of obtaining property under false pretenses. He cites and relies on People v. Cummings, 114 Cal. 437, 46 P. 284, and People v. Folcey, 78 Cal. App. 62, 247 P. 916. Those cases state a doctrine which, if it still obtained, might be claimed to support the contention of the defendant. However, the doctrine of those cases was highly technical and unsatisfactory, and, in so far as this case is concerned, the doctrine of the cases cited had been modified, if not entirely departed from. People v. Rabe, 202 Cal. 409, 418, 261 P. 303. As the

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★Hearing denied by Supreme Court.

first and second points made by the defendant are but different methods of presenting the same general contention, it follows that they may not be sustained.

It is claimed that the court erroneously instructed the jury upon issues not within the pleadings. This contention rests on the claim as above stated; that is, that the information did not include the offense of obtaining property under false pretenses. As we have held above that it did, we need not pause to discuss the point when made from a different angle.

Again, the defendant claims that there was a variance between the information and the evidence. If, as we have held, the offense of obtaining property under false pretenses could be inquired into, under the information as framed the point must be ruled against the defendant. It is sufficient to state that we have no doubt but what the inquiry could be made under the information.

[2-4] When the prosecuting witness was on the stand, she was asked if she had ever signed any deed to her property before November, 1926. She answered that she had no remembrance of doing so. She was then asked, "Would you say that you have not, Mrs. Johnson?" An objection was made and sustained on the ground that it had been asked and answered. In ruling the trial court remarked that, if counsel desired to propound a specific question, calling the attention of the witness to some particular paper, such matter could be gone into, but that it would do no good to repeat the same question to the witness several times. In another place she was asked if it was not a fact that Mr. Maddux paid the interest on the property. She replied, "I don't know." Counsel then proceeded, "Would you say that he did not?" An objection that the question had already been asked and answered was sustained. The ruling was not erroneous. When the witness Tracy had testified regarding a conversation that he held with the defendant he was asked on cross-examination if in that conversation the defendant had not made some other statements. The witness testified that he had. He was then asked why he had not told the jury on his direct examination that such additional facts were a part of the conversation. An objection to the question was sustained. The ruling was not erroneous. If any single question propounded to the witness was believed to be answered erroneously, or only partly, that particular question and answer could properly have been the subject of cross-examination, but as to why the witness had not made a speech while giving his direct examination was quite irrelevant. A parallel incident arose on the examination of the prosecuting witness. During the trial she testified that on a certain occasion the defendant had told her not to mention a certain transaction to any one. The attorney for the defendant then propounded this question: "Today is the first time in any of these trials that you ever said that, isn't it?" An objection was made and sustained by the trial court, and it added: "Unless it is shown that such question was asked." The ruling was clearly correct.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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102 Cal. App. 333

REED v. WELLS. (Civ. 3924.)

District Court of Appeal, Third District, California. Dec. 3, 1929.

1. Appeal and error ⇨173(2)—In action against lessor for failing to furnish water for irrigating, defense that lessee could have minimized crop loss must be pleaded and proved.

In action by lessee for breach of lease of farm lands by reason of defendant's failure to furnish sufficient water for irrigation by putting in wells, defense that loss of crop by lessee might have been prevented by lessee's minimizing loss by small expenditure for magneto and a belt was required to be pleaded and proved in trial court, and could not be presented for first time on appeal.

2. Landlord and tenant ⇨48(½)—Lessee's failure to check land, properly asserted as defense to recovery against lessor for furnishing insufficient water, was not excused by proof that lessee followed lessor's instructions or would have had to employ engineer.

In action by lessee of cotton lands against lessor for breach of lease by failing to furnish sufficient water for irrigation, lessee's failure to check land in proper and customary manner, with result that it was unevenly irrigated, was not excused by fact that lessee had followed lessor's instructions or that lessee would have had to incur expense of employing engineer or surveyor in order to check the land properly.

3. Landlord and tenant ⇨48(½)—Lessee who failed to properly check and irrigate could not recover for loss of crop by reason of lessor's failure to furnish water.

Under lease of lands for cotton providing that lessee should properly seed and cultivate the land and that lessor should sink wells producing certain quantity of water for irrigation, failure of lessee to check land in proper and customary manner, or to plant, irrigate, and cultivate cotton, properly prevented recovery against lessor for loss of crops claimed to have resulted from lessor's failure to furnish sufficient water.

4. Trial ⇨253(7)—Formula instruction must contain all elements essential to recovery.

A formula instruction must contain all the elements essential to a recovery, and the absence of any one of such elements is not compensated for or cured by reference in other instructions correctly and fully stating the law.

5. Trial 🔑296(2)—Instruction permitting lessee's recovery from lessor for crop loss held erroneous notwithstanding subsequent instruction, where lessee did not properly check or irrigate land.

In lessee's action against lessor of cotton lands for breach of lease by failing to furnish sufficient water for irrigation, instruction permitting plaintiff's recovery of damages if lessor's breach caused failure of crop *held* erroneous, where it appeared from plaintiff's own testimony that he did not properly check the land for irrigation or properly irrigate premises, notwithstanding subsequent instruction whereby jury were told that plaintiff could not recover if he had not complied with the terms and conditions of the lease.

6. Trial 🔑251(3)—Instruction permitting lessee's recovery from lessor for damages resulting from breach of contract in any part held too broad.

In action by lessee against lessor for damages for loss of crops claimed to be due to lessor's breach of lease by failing to furnish sufficient water for irrigation, instruction permitting recovery of damages resulting from defendant's failure to comply with contract in any particular or material part *held* erroneous as authorizing recovery for breaches of lease not in issue.

7. Landlord and tenant 🔑48(1)—Refusal to permit lessor to prove that lessee's crop failure was due to lessee's financial inability held error.

In action by lessee against lessor for damages for loss of crop due to lessor's breach of lease, in which plaintiff testified that crop failure was due to insufficient supply of water for irrigation, refusal to permit defendant to prove that plaintiff's failure and abandonment were due to plaintiff's financial inability to perform his obligations under the lease *held* error.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by R. H. Reed against W. T. Wells. Judgment for plaintiff, and defendant appeals. Reversed.

Osborn & Hoar, of Bakersfield, for appellant.

Klein & Nathan, of Bakersfield, for respondent.

FINCH, P. J. The plaintiff was given judgment for damages alleged to have been caused by the defendant's breach of the terms of a lease. The defendant has appealed.

By the terms of the lease the defendant let to the plaintiff 120 acres of land for one year, commencing December 1, 1925, at a cash rental of $20 an acre, all the lands "to be cropped entirely to cotton, except 20 acres, which may be cropped in whole or in part to such other crops as said Reed may elect." Wells agreed, among other things, "to dig a well near said house and another one on the S. E. corner of the S. E. quarter of the N. W. quarter, and if either of said wells fail to produce as much as 250 gallons per minute when pumped, he will sink other wells so as to have a production of at least 250 gallons per minute at each of the two points; he will also place in each of said wells a pump and engine capable of producing and delivering at least 250 gallons of water per minute into the reservoirs, one of which shall be located at each well and shall be not less than 100 feet square and hold at least 4 feet of water. It is understood that these pumps and engines are not to be new, but they are to be in good condition and ready for use, and the said Reed is to look after their further repair and their fuel supply—Wells to have no further obligation than the setting of the pumps and having them ready for use, and in good and proper condition for use. * * * Said Wells will also level said land so that a six inch head of water will go over it—the levels to be taken between borders, and any land that he cannot or does not level shall be credited back to said Reed at the regular rental price per acre. The said Wells will also open and make passable the road running through the center of the section. * * * Also, he will extend the ditches running from the east line of the section, so as to serve all of the rented premises."

The complaint alleges:

"That plaintiff put 80 of said acreage into cotton. * * * That defendant refused and failed to level the land as agreed upon, so that plaintiff could not put the balance of said acreage into cotton as agreed upon; also refused to put in sufficient wells so that plaintiff was unable to get any or sufficient water for said cotton; also refused and failed to put in pump and engine as agreed upon for the pumping of said water; and also refused to open and make passable the road through the center of said section as set forth in the next to the last paragraph of said agreement; also failed and refused to extend the ditches running from the east line of the section as agreed upon in the last paragraph of said agreement.

"That by reason of the failure on the part of defendant to perform his part of said agreement as above set forth plaintiff was prevented from proceeding with his part of said agreement, and that said crop was a total loss to plaintiff."

The defendant answered the complaint, denying that he failed or refused to perform any of said terms of the lease on his part, and filed a cross-complaint for the rent provided for in the lease.

Under the express terms of the lease, the plaintiff was not entitled to damages by reason of the defendant's failure to level 40 acres of the land, but only to be relieved from payment of "the regular rental price per acre" for such land. The complaint does not allege that the land on which the plaintiff planted cotton was not properly leveled. In respondent's brief it is said: "No claim was made by respondent for damages by reason of the nonleveling of the land. * * * The only issue at the trial was whether or not there was sufficient water furnished by defendant for the cotton on the 80 acres. * * * Defendant had agreed by his contract to put in sufficient wells, etc., to supply water enough for the crop. That was the only question. * * * The action was commenced by respondent for the recovery of the damage due him by reason of the failure on the part of appellant to furnish sufficient water which caused a total crop failure."

During the early part of the season, the plaintiff used water from the canal of the Miller & Lux Land Company for irrigation. It appears that such use was contemplated by the parties. The lease provides for the extension of "the ditches running from the east line of the section, so as to serve all of the rented premises." The leased land was all in the northwest quarter of the section, and the wells referred to in the lease were to be located in the same quarter section. The extension of the ditches referred to connected the leased land with the canal of the Miller & Lux Land Company.

The plaintiff, regardless of the natural slope of the land, divided it into straight strip checks 40 rods long and 50 feet wide, without any cross or contour levees. The plaintiff testified that the defendant told him to check the land in that manner. In that connection, he further testified as follows:

"Q. Don't you know it is the custom * * * to throw up the levees so that the high land will irrigate * * * in separate checks and the low land in other separate checks? * * * A. Well, yes, that is the custom. A fellow don't have a civil engineer or leveling—how is he going to know the high and low land. I was just doing according to his orders. * * * Q. Now, you say you put this water on the land before you planted it, did you not? A. I did. Q. Couldn't you tell with the water on the land then where the high and low land was? A. I know— Q. Then after that couldn't you have thrown up your levees in such a manner as to hold the water on the high land? * * * A. Why, sure, I could. * * * Q. And you didn't throw up any further levees after the first irrigation? A. I did not. * * * Q. You made the borders, and in making these borders did you pay any attention to the contour of the land? A. With my natural eye, I couldn't tell. * * * Q. You could not have contoured that land at all? A. It could have been done, yes."

The plaintiff testified that he irrigated the land before planting, commencing April 15; that he commenced planting about April 25; that he did not irrigate any of the land after planting except about 26 acres "where the cotton first died"; that he "watered it (the 26 acres) the second time to put in maize," but that he did not plant any maize; that he quit irrigating "when the water quit coming down the ditch," probably about the first of June; that the land "wasn't level, but at the same time by a big head of water you could push water over it"; that the cotton came up and "got all the way from an inch high up to probably hip, shoulder high; it just depended on where the land got sufficient water to irrigate the whole thing through"; that on July 19 the crop had died "just in spots where the land was steep, something like where it would run over fast that cotton died fast; it didn't live ten days after I got it up; * * * down in other places, where it would go six or eight, ten inches deep and get a good soaking that cotton lived probably some of it until the middle of June and July kept dying"; that, where the plants died first, "the water run over the land so fast it didn't wet the land but just a little on top and by the time the cotton got up the moisture had left it"; that, after irrigating the land and before planting it, he "had it disked and harrowed"; that part of it was then "well moist" and "part of it wasn't; at the same time I went ahead and planted it"; and that the whole crops raised amounted to only 4 or 5 bales of cotton; that he left the place about July 18 or 19, without any notice to the defendant, and did not thereafter return.

The evidence shows without conflict that the defendant dug wells at the places specified in the lease, each producing about 400 gallons a minute. It is true the plaintiff testified that the well near the house was tested about the 1st of March and that it produced only "a little stream about as big as my wrist," but another well was thereafter sunk "right by the side" of the one mentioned, and the defendant "coupled the two together" and installed a pump and engine. The evidence shows that they produced 400 gallons a minute. The plaintiff testified that the pump and engine were not installed, but the only things which he mentioned as lacking were a magneto and a belt. Other witnesses testified that the magneto and belt were in place. Two wells were dug at the "southeast corner of the southeast quarter of the northwest quarter" of the section, at a point referred to as point N. A witness for the defendant testified that at point N there was "just the one that the pump was put in and the engine connected; the other one was never connected with the engine." This was done about the middle of May. At a later stage in his testimony, the witness was asked: "Do you happen to know of your own knowledge when this well at point N was connected up?" He replied: "Well, that never was connected up. After Mr. Reed left I moved the engine and pump on another well." There is nothing to indicate which of the two wells at point N was referred to in the question and answer, but, in view of the testimony of the witness first quoted, it is to be inferred that the last answer referred to the well, mentioned in the first answer, which "was never connected with the engine." Another witness testified that it was not necessary to "couple both of the wells" at point N, "because the one well furnished enough water for the pump he had on, * * * a four inch pump." The water master, who had charge of the distribution of water for the Miller & Lux Land Company, testified that until "the 30th day of June there was all the water that any one wanted." This statement finds some corroboration in plaintiff's letter to defendant, dated June 29, 1926, stating: "I would like very much if you would send some one out to fix up the pumps and res. I never got through irrigating before ditch water give out."

Viewing the evidence in the light most favorable to the plaintiff, it shows merely that the defendant failed to equip the pumping plant at the house with a magneto and belt.

[1] Appellant contends that the plaintiff is not entitled to the net value of the crop which he lost, because he did nothing to minimize his loss, which he might have prevented by a small expenditure for a magneto and a belt. There are cases which support this contention. Sargent v. North End Water Co., 190 Cal. 512, 213 P. 33; Severini v. Sutter-Butte Canal Co., 59 Cal. App. 154, 210 P. 49. The answer, however, set up no such defense, and it does not appear that any such contention was made in the trial court or any instruction in relation thereto requested. It has been held to be the duty of the defendant to plead and prove the facts upon which such a defense is based. Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, 699, 242 P. 709.

[2] There appears to be no escape from the conclusion that the failure of the plaintiff's crop was largely due to his own fault. According to his testimony, he failed to check the land in the proper and customary manner, with the result that it was unevenly irrigated, causing a considerable part of the crop to die shortly after it came up. It is no answer to say that the defendant told the plaintiff to prepare the land as the latter prepared it. The plaintiff was under no obligation to follow such direction. He had had long experience in raising cotton and in the irrigation thereof. Neither is it any excuse that it would have been necessary for the plaintiff to incur the expense of employing an engineer or surveyor in order to properly check the land for irrigation. That is a usual expense in the preparation of land for irrigation and one which the defendant was not bound to incur.

The court instructed the jury as follows: "You are instructed that, if you find by a preponderance of the evidence that the plaintiff, Reed, pursuant to the lease and agreement between plaintiff and defendant, went upon defendant's land, and prepared said land for planting, and planted therein a crop of cotton and that defendant failed to comply with his contract in any particular and material part thereof, and that such breach if you find there was a breach was the proximate and direct cause of the failure of the crop then your verdict must be for the plaintiff on his complaint, and you are further instructed that the measure of damages to which plaintiff would be entitled under these circumstances is the value of the crop in the condition it was at the time and place of destruction and in arriving at the value of the crop of cotton, as it stood at the time of its destruction, you will estimate the probable yield of the land planted to cotton, multiplied by the market value of the crops, and deduct therefrom the cost of producing and marketing said crop, and the value of the crop actually harvested. The amount remaining will be the amount of damages to which plaintiff would be entitled, if you find he is entitled to damages if the amount is less than the rent, then the damages should be deducted from the rent."

[3-5] This instruction is erroneous in at least two particulars. It authorizes a verdict for the plaintiff, even though he may have failed to check the land in a proper and the customary manner, or to plant, cultivate, and irrigate the crops properly. It is true that, in a subsequent instruction, the jurors were told that, if the "plaintiff has not complied with each and all of the terms and conditions of the lease on his part to be kept and performed, * * * he cannot recover." But the two instructions are conflicting. "The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law." Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237, 238. While the evidence in a particular case, together with other instructions given therein, may warrant the conclusion that an erroneous formula instruction has not resulted in a miscarriage of justice, there is nothing in this case to justify such a conclusion. The plaintiff called no witness except himself, and his testimony was general and indefinite in character. It appears from such testimony that he did not properly check the land for irrigation, and that he applied the water available for a second irrigation to land on which his crop had perished, instead of on land having a growing crop. The only term of the lease to which the second instruction quoted is applicable provides that the plaintiff "is to properly seed and cultivate the said lands to the crops" to be grown thereon. It is doubtful whether jurors would understand that the

plaintiff was thereby required to check and irrigate the land in a proper manner.

[6] The instruction is also erroneous in stating that the plaintiff is entitled to damages resulting from defendant's failure "to comply with his contract in any particular and material part thereof." Under this instruction the jury may have based the verdict on breaches of the lease by defendant which were not in issue. It was his duty under the lease to "level said land so that a six inch head of water will go over it." The plaintiff testified that parts of the 80 acres planted to cotton were not so leveled, but there was no such issue before the court, the only issue, as stated by respondent, "was whether or not there was sufficient water furnished by defendant."

[7] The plaintiff testified, in substance, that the failure of the crop and his abandonment thereof were due to an insufficient supply of water for irrigation. The defendant was not permitted to prove that such failure and abandonment were due to the plaintiff's financial inability to perform his obligations under the lease. The evidence sought to be introduced was admissible as tending to discredit the plaintiff's testimony last mentioned.

The judgment is reversed.

We concur: JAMISON, J. pro tem.; R. L. THOMPSON, J.

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102 Cal. App. 387

THOELE v. THOELE. (Civ. 29.)

District Court of Appeal, Fourth District, California. Dec. 6, 1929.

1. Divorce 🔑147—It is within province of trial court to pass on weight and sufficiency of conflicting evidence.

In divorce action where evidence is conflicting, it is within province of trial court to pass on weight and sufficiency of evidence.

2. Divorce 🔑184(6)—Where evidence is conflicting, fact that preponderance of evidence is on side of one party is not ground for reversal on appeal.

In divorce action, that greater weight or preponderance of evidence is on side of one party is not ground for reversal on appeal, where evidence is conflicting; it being only where there is total absence of competent evidence to sustain material finding that appellate court will reverse judgment on question of insufficiency.

3. Divorce 🔑93(3)—Allegations of extreme cruelty to wife predicated on husband's acts of larceny held to constitute cause of action for divorce (Civ. Code, § 94).

In wife's action for divorce on ground of extreme cruelty, defined by Civ. Code, § 94, predicated on husband's acts of larceny causing grievous mental suffering to wife, allegations *held* sufficient to constitute cause of action, though no acts of physical violence were shown.

4. Divorce 🔑130—Evidence held sufficient to support divorce judgment on ground of extreme cruelty based on husband's acts of larceny.

In wife's action for divorce based on ground of extreme cruelty predicated on husband's acts of larceny, evidence *held* sufficient to support divorce judgment.

5. Divorce 🔑127(4)—All acts of extreme cruelty relied on by party need not be corroborated by other evidence to support divorce judgment.

It is not necessary that all acts of extreme cruelty relied on by party be corroborated by other evidence in order to support judgment of divorce, it being only necessary that some of material number of alleged acts be supported by evidence other than that of parties.

6. Divorce 🔑127(4)—Acts of extreme cruelty relied on by party to obtain divorce judgment may be corroborated by circumstantial evidence.

Circumstantial evidence may be competent to assist in corroboration of acts of extreme cruelty relied on by party to obtain judgment of divorce.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Divorce action by Elizabeth Louise Thoele against Bernard Thoele. From an interlocutory judgment, defendant appeals. Affirmed.

James L. Davis and Sharpless Walker, both of Santa Ana, for appellant.

A. P. Nelson and Clyde Bishop, both of Santa Ana, for respondent.

MARKS, J. Respondent filed her action for divorce in the court below upon the grounds of extreme cruelty. Appellant filed his answer in which he specifically denied all of the allegations of extreme cruelty. After a trial the court granted respondent an interlocutory decree of divorce, from which appellant took this appeal.

[1, 2] Appellant presents several assignments of error, but they contain quite the same questions of law and fact and may be consolidated under two heads, namely, that respondent's amended complaint does not state facts sufficient to constitute a cause of action, and therefore that the evidence submitted in support thereof does not sustain the interlocutory decree of divorce; and that the testimony of respondent was not sufficiently corroborated. He urges an additional specification of error under which he maintains that "there is a clear preponderance of evidence in favor of the defendant, and against the plaintiff," which cannot be considered here. Where the evidence is conflicting, as in this case, it is within the province of the trial court to pass upon its weight and sufficiency. Because the greater weight or preponderance of the evidence is on the side of one party or the other is not ground

for reversal on appeal, where it is conflicting. It is only where there is a total absence of competent evidence to sustain a material finding that an appellate court will reverse a judgment upon a question of its insufficiency. Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885.

[3] In the amended complaint, upon which the trial was had, respondent alleged that prior to their marriage appellant had told her that he was of good moral character and worthy of her love and affection; that shortly after the ceremony she learned that he had been guilty of the crime of burglary; that after marriage he was guilty of larceny on several occasions and brought the stolen property to their home, showed it to her, and told her that he had stolen it; that she lived in constant fear of the arrest of her husband, and of her home being searched as a place of concealment of stolen property; that he was extremely stingy and penurious and habitually and falsely charged her with being extravagant, and criticized her expenditures in the maintenance of their home, to which allegation she added instances of the conduct of which she complained; that the treatment of her by appellant caused her to suffer greatly in her nervous system and mind; that it was wrongful and caused her grievous mental suffering. While the testimony of respondent supported the allegations of her complaint, appellant flatly contradicted all of it except that he had been guilty of burglary prior to their marriage. This was not denied by him.

In presenting his argument in support of his claim that the allegations of the amended complaint do not state facts sufficient to constitute a cause of action, and that the evidence in support thereof does not support the judgment, appellant cites and relies upon decisions of eastern and southern courts worthy of the highest respect. However, an examination of the statutes of the several states in effect at the time the decisions were rendered discloses that the extreme cruelty upon which an action for divorce could be predicated was defined by such statutes, as, such conduct on the part of the guilty spouse as would produce either physical injury or render a continued joint residence dangerous to the innocent party. The definition of extreme cruelty given us by our Legislature contains no such restrictions, so the cases cited have not been followed here.

Our Legislature has defined extreme cruelty as any act, or acts, or conduct, that would result in the "wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." Section 94, Civ. Code. Since the decisions of the cases of Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L. R. A. 660, and Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am. St. Rep. 124, it has been the recognized rule of law in this state that: "No arbitrary rule of law can be laid down as to what particular facts must be alleged and proven in order to justify a finding that the complaining party has suffered grievous bodily injury or has undergone grievous mental suffering. A correct decision must always depend upon the sound sense and judgment of the trial court. 'Whether in any given case there has been inflicted grievous mental suffering or grievous bodily injury, is a question of fact to be deduced from all the circumstances of each particular case, keeping always in mind the intelligence, apparent refinement and delicacy of sentiment of the complaining party.' (Barnes v. Barnes, 95 Cal. 171 [16 L. R. A. 660, 30 P. 298]; Fleming v. Fleming, 95 Cal. 430 [29 Am. St. Rep. 124, 30 P. 566]; Andrews v. Andrews, 120 Cal. 184 [52 P. 298]; MacDonald v. MacDonald, 155 Cal. 665 [25 L. R. A. (N. S.) 45, 102 P. 927]; Donnelly v. Donnelly, 26 Cal. App. 577 [147 P. 582]; Perkins v. Perkins, 29 Cal. App. 68 [154 P. 483]; Maloof v. Maloof, 175 Cal. 571 [166 P. 330]; McCahan v. McCahan, 47 Cal. App. 176 [190 P. 460]; Crum v. Crum, 57 Cal. App. 539 [207 P. 506].) Therefore, in the case at bar, whether or not the acts and conduct of appellant inflicted grievous mental suffering, or grievous bodily injury, or both, upon the respondent, was a question of fact for the determination of the trial court from all the facts and circumstances in the case." Hansen v. Hansen, 86 Cal. App. 744, 261 P. 503.

[4] In the case before us, appellant admitted that he had been guilty of the crime of burglary before their marriage, and that respondent knew of this fact. Respondent testified that her husband told her that he had stolen various articles of personal property, including tools, electric light reflectors, hose, burlap, copper wire, and other such articles, bringing them to their home, and that he thought it was smart on his part to defraud his rich employers. This course of conduct might well have caused her the most grievous mental suffering. She knew that he had committed the grave crime of burglary. She had his statements that he was continuing his career of crime, and the products of his alleged larceny were before her. To a woman of high principles and refinement, the belief that her husband was a criminal, together with the constant fear of his arrest and the attendant disgrace always threatening her, might furnish the keenest form of mental suffering. She testified that it not only affected her mind, but that her health was impaired by it, and her testimony upon this phase of the case was amply corroborated. The trial court found in her favor and under the decisions heretofore cited this finding will not be disturbed here.

Appellant urges with great earnestness that the testimony of respondent as to his extreme cruel treatment of her, predicated upon his acts of larceny alleged to have been committed after the marriage, was not sufficiently corroborated. He denied stealing the property and attempted to explain its acquisition by lawful means, either by gift or by purchase. The articles described by respondent as stolen by her husband were all seen at their home by at least one of her witnesses. Appellant attempted to explain the possession of the hose in question by the testimony of a relative, who said he permitted appellant to take and use some half-inch garden hose, while that seen by respondent's witnesses at the home of the parties was inch and one-half cotton covered hose. According to the testimony of appellant, and corroborated by his own witnesses, the reflectors in question, from 10 to 15 in number, were taken by him from the Moshier Special Oil Company without the consent of the company. On another occasion appellant attempted to steal a five-pound can of grease from the Standard Oil Company. Appellant denied all of the thefts except the burglary committed before marriage, and the attempted theft of the grease, but his testimony was so thoroughly impeached by the contradictory evidence of disinterested witnesses that the trial court might well have considered him unworthy of belief.

[5, 6] It is the well-settled law of this state that it is not necessary that all of the acts of extreme cruelty relied upon by a party be corroborated by other evidence in order to support a judgment of divorce. It is only necessary that some, or a material number, of the alleged acts be supported by evidence other than that of the parties, and circumstantial evidence may be competent to assist in the corroboration. Venzke v. Venzke, 94 Cal. 225, 29 P. 499; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; Avery v. Avery, 148 Cal. 239, 82 P. 967; Percy v. Percy, 188 Cal. 765, 207 P. 369; Blanchard v. Blanchard, 10 Cal. App. 203, 101 P. 536; Johnston v. Johnston, 17 Cal. App. 241, 119 P. 403. Section 130 of the Civil Code requires corroboration of the testimony of the parties. "Under this section it evidently is not necessary that the plaintiff's testimony be corroborated as to every fact and circumstance testified to. It is enough if there be corroboration as to some fact or facts which is or are sufficient to support the action and justify the entry of a decree in plaintiff's favor. Matthai v. Matthai, 49 Cal. 90. In Evans v. Evans, 41 Cal. 103, the court, speaking of the statute then in force, and which was similar to the provision of the Code above quoted said: 'The statute does not define to what extent the corroboration must go. In the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence, the statute only requires that there shall be some corroborating evidence.' * * * These facts, with the testimony of Mr. Johnson, certainly corroborated the plaintiff's testimony as to one act of extreme cruelty on the part of the defendant, and we think this sufficient corroboration to uphold the judgment." Cooper v. Cooper, 88 Cal. 45, 25 P. 1062, 1063.

Appellant further contends that other findings of the trial court as to other acts of extreme cruelty are not supported by the evidence. As the judgment is supported by the findings we have already reviewed, it will not be necessary to further consider the evidence supporting the other findings. Andrews v. Andrews, supra.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

MEADOWS v. SNYDER et al. (Civ. 3845.)★

District Court of Appeal, Third District, California. Dec. 2, 1929.

Rehearing Denied Dec. 31, 1929. Hearing Granted by Supreme Court Jan. 30, 1930.

1. Mortgages 🔑187—One taking possession of mortgaged land under agreement with mortgagor and in recognition of relation is "mortgagee in possession."

"Mortgagee in possession" is one taking possession of mortgaged land by virtue of agreement between him and mortgagor and in recognition of relation between them.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Mortgagee in Possession.]

2. Mortgages 🔑188—Trust deed conveys no right of possession, and trustor may remain in possession and until execution of trust maintain action therefor.

Though trust deed passes legal title, it conveys no right of possession, and trustor may remain in possession, and, until execution of trust, maintain action to recover possession even when trust deed is silent upon that subject.

3. Mortgages 🔑199(1)—Grantee under conveyance from trustor before execution of trust held entitled to possession rendering those wrongfully retaining possession liable for rent (Civ. Code, § 3334).

Where trustor under trust deed conveyed premises before execution of trust while he was entitled to possession, grantee *held* entitled to possession and, under Civ. Code, § 3334, parties in possession were liable for reasonable rental value thereof during time they wrongfully retained possession.

4. Landlord and tenant 🔑53(2)—Purchaser agreeing with tenant in possession that he should retain possession held not to justify tenant's withholding possession from subsequent purchaser.

Agreement between purchaser of property and tenant in possession that purchaser wanted tenant to stay in possession and keep premises up in condition it was at time in order that purchaser might resell property *held* not to justify

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★Hearing granted. 286 P. 1012.

tenant's withholding possession from subsequent purchaser.

5. **Landlord and tenant ⚷53(2)—Agreement between purchaser and tenant in possession regarding rent held not intended to give tenant right to possession without paying rent after title passed to subsequent purchaser.**

Agreement between purchaser of premises and tenant in possession that, in event of purchaser's failure to take and pay for personal property within 30 days, tenant shall be relieved of payment of any rental, *held* not intended to give tenant continuing right to hold property without payment of rent after title had passed to stranger to agreement.

6. **Appeal and error ⚷1071(6)—Failure to find on affirmative matters in answer held not prejudicial error, where findings thereon must under evidence necessarily have been adverse to appellants.**

Failure of trial court to find on all affirmative matters set up in answer *held* not prejudicial error where, if findings thereon had been made, they must necessarily have been adverse to appellants under uncontradicted evidence.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by H. W. Meadows against James A. Snyder and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Nutter, Hancock & Rutherford and Arthur P. Hayne, all of Stockton, for appellants.

Frederick Dubovsky and E. E. Keyes, both of Oakland, for respondent.

FINCH, P. J. The plaintiff was given judgment against the defendants for the sum of $700 as the reasonable rental value of the premises in Cloverdale, Sonoma county, known as "Dad Snyder's Inn," for a period of seven months, commencing October 14, 1925. The defendants have appealed from the judgment.

The answer admits that the plaintiff was the owner of the property during the seven months mentioned, that the defendants were in possession thereof during all of that time, and that the reasonable monthly rental value thereof was $100. Relying on such admissions, the plaintiff introduced no evidence. The facts hereinafter stated appear from the testimony of the defendants and documentary evidence concerning which there is no dispute.

On and prior to September 9, 1920, and at all times thereafter until March 28, 1925, the defendants Spoerke and Thompson were the owners of the property mentioned; the title standing in Spoerke's name. On September 9, 1920, in like manner, they owned and held the personal property used in and in connection with the inn. On the day last mentioned, they, in Spoerke's name, entered into an agreement with the defendant Snyder, by the terms of which they leased the inn to him until March 1, 1922, at a rental of $75 a month, and gave him an option to buy the property for $11,500. In the same instrument they agreed to sell the personal property to him for $3,500, $1,000 of which was to be paid in cash and the remainder in installments. The agreement provided that the owners might sell the premises "at any time during said lease," and that, in the event of such a sale, "the buyer must also buy the furniture therein contained." Snyder went into possession under the lease, and he has been in the actual possession thereof continuously since such entry. March 28, 1925, Spoerke conveyed the real property to W. T. Hopkins, and the latter gave his promissory note in payment of the purchase price, secured by a deed of trust covering the same property. Snyder and Hopkins executed an agreement, dated April 2, 1925, by the terms of which Snyder agreed to deliver possession of the premises to Hopkins and a bill of sale of the personal property upon his payment within 30 days of $4,000 for the personal property, Snyder to pay rental at the rate of $100 a month for the time he might remain in possession but providing "that in the event the said sum of $4,000 is not paid as hereinabove specified within the said period of 30 days, then and (in) that event this agreement shall become null and void, and the said party of the first part shall be relieved of the necessity of delivering up possession of the said premises or executing the said bill of sale or the payment of any rental as herein specified." Hopkins failed to make the payment provided for in the agreement, and it appears that he made no attempt to carry out the terms of the agreement. It appears that he conveyed the premises to the plaintiff, because, as stated, the pleadings admit that the plaintiff became the owner thereof on October 14, 1925. The plaintiff served notice on the defendants of his purchase of the property, and demanded that they pay rental at $350 a month or vacate the premises, but they did neither. Spoerke thereafter caused the premises to be sold under the terms of the trust deed. He became the purchaser at the sale and received a deed for the property May 15, 1926.

The answer of the defendants covers 15 pages of the transcript. In addition to denials and admissions of averments of the complaint, it sets up affirmative matters as a defense, and then proceeds to allege four further separate defenses. There is some uncertainty as to the particular grounds upon which the appellants rely for a reversal. In their closing brief they say: "Respondent complains that we do not specify the defense we rely on. * * * The only variable quantity in the various defenses is the way in which the relation between Thompson and Spoerke on the one hand, and Snyder on the other, is pleaded. We have this pleaded in three ways: First, that the relation is that of principal and agent. Second, vendor and vendee, and, third, landlord and tenant. The evidence discloses the exact relationship of the parties and shows that same was that of the vendor and vendee. Under the terms of this contract the vendee was to pay the vendor $75 each month as installments on the purchase price."

The answer alleges that by the agreement of September 9, 1920, Snyder agreed to pay the purchase price of the real property "in installments of $75 each and every month," but the agreement contains no such provision or any provision binding Snyder to purchase such property on any terms whatever. By that agreement he was given a mere option to purchase the property at the price stated therein. The answer alleges "that on the 28th day of March, 1925, said defendant, Frederic Spoerke, conveyed said property to one W. F. Hopkins." There is no denial of the allegation of the complaint "that the plaintiff became the owner of the said premises on the 14th day of October, 1925." The answer alleges that Spoerke purchased the property at the sale under the trust deed, and that the property was thereupon conveyed to him, and that "the said Frederic Spoerke ever since said time has been, and still is, the owner of said property, but that the defendant W. H. Thompson ever since said day, has likewise owned an interest therein." It thus appears that there is no basis for the claim that, during the period for which the plaintiff was allowed the rental value of the premises. Snyder was in possession thereof as the vendee of his codefendants, or that they had any interest in the property other than their rights under the trust deed.

[1-3] There is nothing in the record which would warrant a finding that the defendants, or any of them, were in possession of the property as beneficiaries under the trust deed. It was not introduced in evidence, and its terms were not proved. Appellants contend that such beneficiaries were in the same position as "mortgagees in possession," and that therefore they were liable at most for the income they received from the property. "A 'mortgagee in possession' is one who takes possession of the mortgaged land by virtue of an agreement between him and the mortgagor, and in recognition of the relation between them." Freeman v. Campbell, 109 Cal. 360, 362, 42 P. 35. No such an agreement was proved in this case. A trust deed passes the legal title, "but it conveys no right of possession, and the trustor may remain in possession, and, until the execution of the trust, may maintain an action to recover possession even when the trust deed is silent upon the subject of possession." Sacramento Bank v. Alcorn, 121 Cal. 379, 383, 53 P. 813, 814; Hollywood Lumber Co. v. Love, 155 Cal. 270, 273, 100 P. 698; MacLeod v. Moran, 153 Cal. 97, 100, 94 P. 604. Under these authorities, the plaintiff was entitled to possession of the property upon the conveyance thereof to him, and the defendants are liable for the reasonable rental value thereof for the time they wrongfully retained the possession thereof. Civ. Code, § 3334.

[4] There is testimony that, at the time Hopkins and Snyder executed the agreement of April 2, 1925, "Mr. Hopkins told Mr. Snyder that he wanted him to stay in possession and keep it up in the condition it was at that time in order that he might resell the property," but this is no justification for withholding possession from a subsequent purchaser of the property.

[5] The provision in the agreement of April 2, 1925, that, in the event of Hopkins' failure to take and pay for the personal property within 30 days, Snyder "shall be relieved of * * * the payment of any rental as herein specified," must be construed as relating to the period of time within which Hopkins was given the right to complete the purchase of the property, at the end of which time the agreement was to become "null and void" in the event of failure to pay for the property. That provision certainly was not intended to give Snyder the continuing right to hold the property without payment of rent after the lapse of six months, when the title had passed to a stranger to the agreement.

[6] It is true, as contended by the appellants, that the trial court did not find on all the affirmative matters set up in the answer. If findings thereon had been made, however, under the uncontradicted evidence relating to every material issue so raised, such findings must necessarily have been adverse to the defendants, and therefore it was not prejudicial error not to find thereon. 24 Cal. Jur. 944.

The judgment is affirmed.

We concur: JAMISON, J. pro tem.; R. L. THOMPSON, J.

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102 Cal. App. 199

WHITMEYER v. SOUTHERN PACIFIC CO. et al. (Civ. 6421.)★

District Court of Appeal, First District, Division 1, California. Nov. 27, 1929.

Rehearing Denied Dec. 27, 1929. Hearing Denied by Supreme Court Jan. 23, 1930.

1. Street railroads ⟹117(24)—Whether driver of stalled automobile struck by street car was negligent in remaining with automobile too long held for trial court.

Question of whether or not driver of automobile struck by street car while stalled on street car tracks was negligent in remaining with it too long in effort to remove it from dangerous position *held* one of fact to be determined in trial court from all circumstances of case.

★Rehearing denied. Hearing denied by Supreme Court.

2. Street railroads ⚿99(1)—Person may assume motorman will operate electric car in reasonable and careful manner.

Person has right to assume that motorman will operate his electric car in reasonable and careful manner.

3. Street railroads ⚿90(3, 4)—Motorman must keep lookout for vehicles on tracks of electric railroad in city and exercise ordinary care to prevent collision and stop car to avoid collision when seeing vehicle stalled on tracks.

It is duty of motorman operating an electric interurban car on streets of city to keep lookout for vehicles on track, and, when he discovers, or in exercise of ordinary care, by keeping lookout, should discover, presence of vehicle on track in place of apparent peril, he must exercise ordinary care to prevent collision, and, when seeing track is occupied by vehicle which cannot be moved in time to avoid collision, motorman must bring car to stop, and failure to do so is negligence.

4. Negligence ⚿136(14)—Negligence is usually question for jury, deducible from circumstances of particular case.

Seldom are circumstances presented which enable court to say, as a matter of law, that negligence has been shown, so that it is usually question of fact for jury, as an inference to be deduced from circumstances of each particular case.

5. Negligence ⚿136(9)—Though facts are undisputed, if reasonable minds might draw different conclusions regarding negligence, question is one of fact for trial court.

Even where facts are undisputed, if reasonable minds might draw different conclusions on question of negligence, question is one of fact for determination of trial court.

6. Street railroads ⚿114(9, 10)—Evidence held sufficient to sustain finding that street car striking stalled automobile was negligently operated because motorman failed to keep vigilant watch or operated car at excessive speed.

Evidence *held* legally sufficient to sustain finding that street car which struck automobile stalled on tracks while person was attempting to crank it was being negligently operated either on ground that motorman was not vigilant in watching track ahead or that motorman was operating car at excessive rate of speed.

7. Street railroads ⚿90(2)—That street car striking stalled automobile was running within maximum speed fixed by ordinance or statute did not absolve owner's responsibility nor prevent finding speed was excessive.

That electric railroad car striking automobile stalled on tracks while person was attempting to crank it was running within maximum speed fixed by ordinance or statute does not in itself absolve owner of electric car from responsibility, nor did it conclude trial court from finding as fact that under circumstances speed was nevertheless excessive.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Ralph Whitmeyer against the Southern Pacific Company and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco (Fletcher A. Cutler, of Burlingame, of counsel), for appellant.

Gillis & Edwards, of Oakland, for respondent.

KNIGHT, J. About 8 o'clock in the evening an automobile in which respondent was riding stalled close to, and almost parallel with, the track of the appellant company, on a public street in the city of Alameda; and, while respondent was stooped in front of the machine endeavoring to start the same by cranking the engine, one of appellant's interurban electric cars ran into the rear end of the automobile, shoving it upon respondent and severely injuring him. As a result of the accident, respondent commenced this action to recover damages for the personal injuries suffered by him, and upon trial before the court sitting without a jury was awarded judgment for the sum of $954.17, from which judgment this appeal was taken, the sole ground urged for reversal being that respondent was guilty of contributory negligence as a matter of law.

The accident occurred on Lincoln avenue between Oak and Park streets, about 150 or 200 feet easterly of Oak street, in a business section of said city. Lincoln avenue is a paved street, and runs in an easterly and westerly direction. It is a little less than 50 feet wide between curbs, and along the center thereof appellant maintains double tracks over which it operates its interurban electric cars. On the evening in question respondent had accepted an invitation to ride home with a friend in the latter's automobile. They started on Lincoln avenue east of Oak street, and, after traveling easterly toward Park street for a distance of about 75 feet, the driver pulled over toward the eastbound car track in order to pass a machine parked at the curb, and before he was able to clear the track his automobile stalled close to the outer rail thereof. Several unsuccessful attempts were made to start the engine with the self-starter, and then the driver requested respondent to get out and crank the engine, which respondent proceeded to do; and, while he was stooped in front of the machine in the act of "spinning" the crank, appellant's east-bound car came along and struck the rear end of the automobile, with the result already stated.

Lincoln avenue is straight and level for a distance of over 600 feet westerly of the point of collision, and testimony was given by persons who witnessed the accident from the sidewalk to the effect that, although the red tail light of the automobile was lighted, and the automobile itself could be seen plainly within the glare of the headlight of the electric car continuously from the time the car came within a range of 500 feet of the automobile until it was struck, the speed of the electric car was not slackened nor its brakes applied until it was within 15 or 20 feet of the stalled machine.

[1-3] Respondent testified that, when he alighted from the automobile to crank the engine, he saw the headlight of the electric car, which was then about 500 feet distant from the place where the automobile stalled, and that he knew the automobile was not clear of the track. Appellant contends, therefore, that in remaining in front of the machine until it was struck respondent was guilty of contributory negligence as a matter of law. It has been held, however, that the question of whether or not the driver of an automobile which has stalled on a street car track is negligent in remaining with it too long, in his efforts to remove it from its dangerous position, is one of fact to be determined in the trial court from all the circumstances of that particular case. In this regard the case of Unger v. San Francisco-Oakland Terminal Rys., 61 Cal. App. 125, 214 P. 510, 513, declares the law to be as follows: "The driver of an automobile or other vehicle stopped for any temporary cause in front of an approaching street car cannot be held guilty of negligence as a matter of law if he does not desert his vehicle, at least until it is reasonably certain that an impact is unavoidable. He has a right to assume that those in charge of the operation of the approaching street car, seeing his predicament, will not recklessly run him down. He has a right to make a reasonable effort to start his vehicle, if it is susceptible of being started, and so save it and its occupants from injury. Whether his act in so doing or attempting to do were unreasonable and negligent would be a question of fact, which it would be the province of the jury to determine, in view of all of the circumstances of the particular case." See, also, Maderios v. Boston Elevated Ry. Co., 254 Mass. 302, 150 N. E. 156; Brien v. Detroit United Ry. Co. (D. C.) 247 F. 693.

Furthermore, a person has the right to assume that a motorman will operate his electric car in a reasonable and careful manner (Smith v. Southern Pacific Co., 201 Cal. 57, 255 P. 500); and in this connection the general rule is that it is the duty of a motorman operating an electric interurban car on the streets of a city to keep a lookout for vehicles on the track, and, when he discovers, or in the exercise of ordinary care, by keeping a lookout should discover, the presence of a vehicle on the track in a place of apparent peril, it is his duty to exercise ordinary care to prevent a collision, and, when it becomes apparent that the track is occupied by a vehicle which cannot be moved in time to avoid a collision, it is his duty to bring the car to a stop, and a failure to do so is negligence (25 R. C. L. p. 1251; Oklahoma Union Ry. Co. v. Burgess, 124 Okl. 233, 254 P. 970); and that he is guilty of negligence if he omits without apparent excuse to look ahead and observe whether or not the track is clear (Swain v. Fourteenth Street Ry. Co., 93 Cal. 179, 28 P. 829; Callett v. Central California Traction Co., 36 Cal. App. 240, 171 P. 984).

[4, 5] In the present situation it may be fairly inferred from all of the circumstances surrounding the accident that respondent remained in front of the automobile as long as he did, believing that he would be able to start the automobile and thus remove it from the danger of being struck by the electric car before the car reached that point, but, if unable to do so, that the electric car was being operated in a careful manner and at a reasonable rate of speed, and consequently that the motorman would see the stalled automobile in ample time to stop the car before colliding with it. Under such circumstances we are not prepared to hold as a matter of law that the trial court's finding that respondent was not negligent is wholly unsupported by the evidence. Brien v. Detroit United Ry. Co., supra. As often said, rarely is a set of circumstances presented which enables a court to say, as a matter of law, that negligence has been shown. It is usually a question of fact for the jury, an inference to be deduced from the circumstances of each particular case. Gregg v. Western Pacific R. R. Co., 193 Cal. 212, 223 P. 553; Seller v. Market-Street Ry. Co., 139 Cal. 268, 72 P. 1006. And, even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the determination of the trial court. Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Zibbell v. Southern Pacific R. R. Co., 160 Cal. 237, 116 P. 513; Seller v. Market-Street Ry. Co., supra. The cases cited by appellant in furtherance of its contention that respondent was guilty of contributory negligence are not in point, for the reason that they differ materially in their facts from the present case, or relate to crossing accidents where the railroad company was operating its cars over its private right of way, and not over and along city streets.

[6, 7] It was claimed by the motorman that his view of the track ahead was obstructed by an automobile, other than the stalled one, traveling in front of his car and "afoul" of the track at a slow rate of speed, and which did not clear the track until it was close to the stalled one; and that consequently he was within 50 feet of the stalled automobile before he was able to see it. The essential portions of his testimony were contradicted, however, by the testimony of other witnesses, including the driver of the other automobile; but, aside from such contradiction, an analysis of the

motorman's testimony would seem to demonstrate that the presence of the other automobile had little to do, if anything, with the cause of the electric car colliding with the stalled machine for the following reasons: He testified that his view in the direction of the stalled machine was not obstructed until the other machine appeared on the track in front of him, and that he was then only 300 feet distant from the stalled machine, and his car was traveling at a speed of 30 or 35 miles an hour; that immediately upon sighting the other automobile he applied the emergency brakes fully, and that they were not released until after the impact, but that his car did not come to a standstill until it reached a point beyond the stalled machine, because when traveling 30 miles an hour, it could not be brought to a stop, even with all brakes fully set, within a distance of 295 or 300 feet. Therefore, being within 300 feet of the stalled automobile before the brakes were applied, and being unable to stop the car within that distance, it would appear that, irrespective of the presence of the other automobile, he could not have escaped hitting the stalled machine, at the rate of speed his car was traveling. However that may be, we are of the opinion that, when all conflicts are resolved in favor of the trial court's decision, the evidence is legally sufficient to sustain its finding that the electric car was being negligently operated, either upon the ground that the motorman was not vigilant in watching the track ahead, or that under the conditions present the electric car was being operated at an excessive rate of speed; and the fact, if it be such, that the car was running within the maximum speed fixed by ordinance or statute, does not in itself absolve appellant from responsibility, nor did it conclude the trial court from finding as a fact that under the circumstances such speed was nevertheless excessive. Carey v. Pacific Gas & Electric Co., 75 Cal. App. 129, 242 P. 97.

For the reasons hereinabove stated, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

KENNEY v. ANTONETTI et al. (Civ. 6926.)★

District Court of Appeal, First District, Division 2, California. Dec. 2, 1929.

Rehearing Granted Dec. 31, 1929.

1. Automobiles ⟹242(1)—Proof that horse was present on highway as result of owner's negligence is necessary to recover for injuries in collision between horse and automobile (Motor Vehicle Act, § 151).

Proof that horse was present upon public highway as the result of voluntary act or the negligence of owner is necessary in order to recover under Motor Vehicle Act, § 151 (St. 1923, p. 565), for personal injuries sustained in an alleged collision between horse and automobile.

2. Negligence ⟹4—Negligence is indispensable element to recovery under law holding every one responsible for injuries occasioned by want of ordinary care (Civ. Code, § 1714).

An indispensable element to actionable case for damages, under Civ. Code, § 1714, providing that every one is responsible for an injury occasioned to another by his want of ordinary care in management of his property, is proof of negligence, or, in other words, want of ordinary care on the part of owner of property.

3. Automobiles ⟹243(5)—Testimony that horse of same color had been seen on highway was inadmissible in action for damages caused by collision with horse.

In an action to recover for personal injuries sustained in an alleged collision on public highway between defendants' horse and an automobile in which plaintiff was a passenger, testimony to effect that on some previous occasion a horse of the same color had been seen on the same portion of highway was inadmissible as being insufficient to support an inference that horse seen on previous occasion belonged to defendants and that they had followed practice of permitting horses to run at large on highway.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Agnes Kenney against Joe Antonetti and others. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Harry I. Stafford, of San Francisco, for appellant.

Ross & Ross, of Redwood City, and Wyckoff & Gardner, of Watsonville, for respondents.

NOURSE, J. This is an action for damages on account of personal injuries sustained in an alleged collision on the public highway between defendants' horse and an automobile in which plaintiff was a passenger.

A motion for nonsuit on behalf of all the defendants was made and granted, and, from the judgment entered thereon, this appeal is taken.

Plaintiff's action is founded upon the theory that the horse was unattended upon the highway at night by reason of negligence on the part of the defendants, and that the negligence is to be presumed in view of the provisions of section 151 of the Motor Vehicle Act and section 1714 of the Civil Code.

Section 151 of the Motor Vehicle Act (St. 1923, p. 565) at the time of the accident complained of, read as follows: "No person owning, or controlling the possession of, any livestock, shall voluntarily or negligently permit any such livestock to stray upon or remain unaccompanied by a person in charge or control thereof upon a public highway, either side of which is adjoined by property which is separated from such highway by a fence,

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★Hearing granted. 295 P. 341.

wall, hedge, sidewalk, curb, lawn or building, nor permit the tether or any portion thereof to which such animal may be attached, to lie across or upon any public highway. No person shall feed, pasture, camp or drive any such livestock upon, over or across any public highway between the hours of sunset and sunrise, without keeping a sufficient number of herders on continual duty to keep open the road so as to permit at all times the ready passage of vehicles." Section 1714, Civil Code, provides that "every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief."

The motion for nonsuit was made upon two grounds, including the claim that plaintiff failed to introduce any evidence supporting the allegation of negligence. It becomes necessary, therefore, to examine the statutory provisions upon which appellant relies and the proof offered under the amended complaint.

[1] Section 151 of the Motor Vehicle Act declares that it is an offense for an owner to "voluntarily or negligently permit" his live stock to stray upon or remain unaccompanied by a person in control thereof upon a public highway which is fenced on each side. It is apparent that appellant sought to plead herself within this particular provision. In order, however, to enjoy such advantage as this provision might afford, it was incumbent upon appellant to prove, as well as allege, that the horse in question was present upon the highway as the result of the voluntary act or of the negligence of the defendants. 19 Cal. Jur. p. 638, § 68; Rathbun v. White, 157 Cal. 248, 252, 107 P. 309.

[2] Section 1714, Civil Code, lays down the general rule of negligence that every one is responsible for an injury occasioned to another "by his want of ordinary care * * * in the management of his property." Here again it is an indispensable element to an actionable case for damages that there be proof of negligence, or, in other words, want of ordinary care on the part of defendants in the control of their horse. Mitchell v. Southern Pac. R. Co., 87 Cal. 62, 72, 25 P. 245, 11 L. R. A. 130.

An examination of the evidence fails to reveal any evidence indicative of negligence by the defendants or the commission of any voluntary act by the defendants which would account for the presence of the horse on the highway. With the record in this situation, it would have been improper for the trial court to have permitted plaintiff's case to have gone to the jury, and the nonsuit therefore was properly granted.

[3] The appellant also complains of the ruling of the court excluding the entire testimony of several witnesses brought forward by the plaintiff. This evidence was introduced to show that on some previous occasion a horse of the same color had been seen on the same portion of the highway. It was introduced for the purpose of laying the foundation for an inference that the horse seen on the previous occasions belonged to the defendants, and that they had therefore followed the practice of permitting their horses to run at large on the highway, and that they were therefore negligent in the care exercised over their horses generally. As the evidence would have been wholly insufficient to support such an inference if drawn by the jury, it was properly stricken.

For the reasons above expressed, the judgment is hereby affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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102 Cal. App. 221

BRANDES v. RUCKER-FULLER DESK CO. et al. (Civ. 6864.)★

District Court of Appeal, First District, Division 1, California. Nov. 29, 1929.

Rehearing Denied Dec. 28, 1929. Hearing Denied by Supreme Court Jan. 27, 1930.

1. Automobiles ⇔242(2)—Where automobile struck pedestrian on sidewalk, inherent nature of accident created inference of negligence of automobilist under res ipsa loquitur doctrine.

Where pedestrian on sidewalk was struck by automobile which left highway and came upon sidewalk, inherent nature and character of accident was such as to create an inference of negligence on part of automobilist under doctrine of res ipsa loquitur.

2. Trial ⇔62(2)—Pedestrian struck by automobile on sidewalk could rebut evidence steering mechanism broke to show failure to exercise ordinary care in keeping automobile in safe condition.

When owner and driver of automobile which struck pedestrian suing for injuries introduced evidence to substantiate claim that collision occurring on sidewalk was not due to careless operation of automobile by driver, but by sudden breaking of steering wheel mechanism, plaintiff had right to rebut that evidence, and in furtherance of right was entitled to show that defense based thereon was not maintainable because of failure of defendants to exercise ordinary care in keeping automobile in safe condition.

3. Automobiles ⇔238(3)—Additional element of negligence from failure to keep automobile striking plaintiff in safe condition, where defendants introduced evidence steering mechanism broke, could be alleged by plaintiff.

If there were any circumstances developed by evidence that defendants sued for injuries to pedestrian struck by automobile on sidewalk

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★Rehearing denied. Hearing denied by Supreme Court.

were not careless, and accident resulted from breaking of steering mechanism, and plaintiff's rebuttal evidence of failure of defendants to exercise ordinary care in keeping automobile in safe condition to establish additional element of negligence, plaintiff could allege it with other negligent acts pleaded in complaint.

4. Automobiles 🔑246(4)—Plaintiff struck by automobile on sidewalk, if defendants negligently failed to keep automobile in safe condition, though steering mechanism broke, could have jury instructed accordingly.

If defendants sued for injuries by pedestrian struck by automobile on sidewalk were negligent in failing to keep automobile in safe condition as result of which steering mechanism broke, plaintiff was entitled to have jury instructed accordingly.

5. Automobiles 🔑246(4)—Instruction it was not complete defense that steering mechanism of automobile striking pedestrian on sidewalk broke, and that owner, if not ascertaining reasonably safe condition, would be liable, held not erroneous.

Instruction that it was not complete defense for corporation owning automobile running on sidewalk and striking pedestrian to show merely that automobile was caused to run upon sidewalk by breaking of steering gear, and it was duty of corporation to exercise reasonable care in ascertaining safe condition of automobile, and that failure, if contributing to accident, would make owner of automobile responsible to injured person, *held* not erroneous.

6. Automobiles 🔑246(22)—Instruction that, if negligence in slightest degree proximately contributed to automobile striking plaintiff pedestrian, defendants would be liable, held not erroneous.

Instruction that, because sole defense of corporation owning automobile striking plaintiff after running upon sidewalk was that it was not negligent, and that therefore if jury believed from preponderance of evidence that defendant or employee driving automobile were in any manner negligent, though in only slightest degree, and negligence proximately contributed to accident, pedestrian was entitled to verdict, *held* not erroneous.

7. Trial 🔑252(2)—It is only necessary to warrant instruction that there be slight evidence upon issue.

In order to warrant giving of instruction it is not necessary that evidence upon issue be clear and convincing; it being sufficient if there be some or slight evidence upon that issue.

8. Evidence 🔑571(6)—Jury need not accept expert testimony of impossibility to detect defective steering mechanism of automobile striking pedestrian on sidewalk.

Jury was not bound to accept expert testimony that it could not have been detected that steering mechanism of automobile running upon sidewalk and striking pedestrian suing for injuries was in defective condition prior thereto.

9. Automobiles 🔑244(6)—Evidence showed failure to keep automobile striking pedestrian on sidewalk in safe condition, where steering mechanism was defective.

Evidence *held* sufficient to show failure to keep automobile, which ran upon sidewalk and struck pedestrian, in safe condition, where accident resulted because steering mechanism broke.

10. Appeal and error 🔑1068(2)—Though evidence be insufficient to sustain action or defense to which instruction applies, reversal cannot be had, if evidence regarding other causes of action or defenses is sufficient.

Though evidence may not be sufficient to sustain cause of action or defense to which an instruction applies, reversal may not be had upon that ground, if evidence as to other causes of action or defenses is sufficient to sustain verdict.

11. Automobiles 🔑244(6, 35)—Evidence showed automobile striking pedestrian on sidewalk was driven at excessive speed or that, if steering gear broke before, driver was negligent in not attempting to stop.

Evidence *held* sufficient to sustain verdict that automobile running upon sidewalk and striking pedestrian was unable to hold its course on highway because it was driven too fast around curve, and that steering gear broke thereafter when machine hit curb or came in contact with stump of tree, or that, though steering gear broke while rounding curve, driver was nevertheless negligent in making no effort to stop automobile by applying brakes before it struck pedestrian.

12. Automobiles 🔑245(6)—Whether automobile striking pedestrian on sidewalk was carelessly operated held for jury.

It was question of pure fact exclusively within province of jury to determine whether or not automobile running upon sidewalk and striking pedestrian was being operated around curve prior to accident in careless manner.

13. Appeal and error 🔑994(2)—Jury's determination under evidence from which jury might draw different conclusions that automobile striking pedestrian upon sidewalk was carelessly operated held controlling on appeal.

Though situation presented as to whether automobile striking pedestrian upon sidewalk was being operated in careless manner was one from which reasonable minds might draw different conclusions, determination of jury that it was being carelessly operated *held* controlling on appeal.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Lydia Brandes against Rucker-Fuller Desk Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 280 P. 379.

Donahue, Hynes & Hamlin, of Oakland, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

KNIGHT, J. Respondent brought this action to recover damages for personal injuries sustained as a result of being struck by an automobile driven by the appellant Manbert and belonging to his employer and coappellant, Rucker-Fuller Desk Company. The trial took place before a jury, and respondent was awarded a verdict. Judgment was entered accordingly, and this appeal was taken therefrom. A reversal is sought upon the ground mainly that two instructions given at respondent's request were erroneous, appellants contending that thereby the jury was authorized to find against the Rucker-Fuller Desk Company on issues of negligence not raised by the pleadings and having no support whatever in the evidence.

The complaint alleged, in substance, that Manbert "so negligently and carelessly operated and controlled" the automobile as to cause it to leave the highway and to run along and upon the sidewalk and strike respondent, etc. The answer consisted merely of specific denials of the allegations of the complaint, no special or affirmative defenses being pleaded, and no claim being made at any time that respondent was at all negligent. The following were the undisputed facts adduced in support of the respondent's case: About 4 o'clock in the afternoon, Manbert, in the course of his employment as salesman for said company, was driving one of the latter's automobiles over and along a street in the city of Oakland, known as Park boulevard, and, while rounding a curve at a speed of between 15 and 20 miles an hour, the machine left the highway, jumped the curb, struck respondent, who was standing on the sidewalk in front of her garage, and continuing on dragged her along the sidewalk for about 20 feet and then over and down an embankment for a distance of about 50 feet more, when the automobile came in contact with the stump of a tree and stopped. The curve on which the accident happened was constructed on a descending grade, and along the side of the highway near the commencement of the curve there was a large sign reading: "Danger—Go Slow." From the time the machine started to leave the highway until it finally struck the stump of the tree it traveled approximately 90 feet.

In their exoneration appellants sought to prove that the proximate cause of the accident was the sudden breaking of the steering mechanism of the automobile. In this regard the driver testified that while rounding the curve the automobile suddenly became unmanageable, in that it failed to respond to the turn of the steering wheel; and his testimony was supplemented by evidence showing that after the accident the automobile, which admittedly had been in use nearly five years, was removed to a garage and disassembled, where it was discovered that the "short shaft" of the steering gear, which was an essential part thereof and controlled its operation, was broken; and expert testimony was introduced to prove that the ends of the broken shaft showed crystallization, that the shaft had been partially broken for some time, and that the final break was brought about by either vibration or strain. Thereupon respondent endeavored to show on cross-examination of appellants' witnesses that, if prior to the accident the steering shaft was, as claimed, in the dangerously defective condition described, then there was a failure on the part of appellants to exercise ordinary care in maintaining the automobile in a safe condition while operating the same upon and over the public streets. Appellants' witnesses insisted, however, that, even though prior to the accident the shaft had been removed from the housing in which it was inclosed, and examined, neither its crystallized condition nor the crack therein would have been visible to the naked eye, but could have been discovered only by the use of a microscope or other scientific means. Furthermore, and aside from the question as to the real cause of the machine being unable to hold its course on the curve, respondent established by the testimony of the driver that, at no time after realizing the steering gear was inoperative, as he claimed, and before the machine struck respondent, did he make any effort to stop its progress by applying the brakes.

In the state of the record above set forth the court gave the two instructions in question. The first one read as follows: "It is not a complete defense for the defendant, Rucker-Fuller Desk Company, a corporation, to show merely that the automobile in question was caused to run on the sidewalk by reason of the breaking of some part or portion of the steering gear of its automobile by reason of which the driver lost the power to control the same. It was the duty of the Rucker-Fuller Company to exercise reasonable care in ascertaining whether or not the automobile in question was in reasonably safe condition for its employees to use and if from the evidence in this case you believe that there was a failure upon the part of the Rucker-Fuller Company, a corporation, to exercise this degree of care in maintaining its automobile, and that such failure, if any, proximately contributed to the happening of the accident, then and in that event the defendant Rucker-Fuller Company, a corporation, would be responsible in damages to any person injured thereby." The second one was to the following effect: That the sole defense of the Rucker-Fuller Desk Company was that it was not negligent, no charge being made that respondent was negligent, and that therefore, if the jury believed "from a preponderance of the evidence that either the Rucker-Fuller Desk Co. * * * or its employee * * * were in any manner negligent, even though it be only in the slightest degree," and that such negligence proximately contributed to the accident, respondent was entitled to a verdict.

[1-6] Admittedly, under the conceded facts revealed by the evidence introduced by respondent in support of her case in chief, the inherent nature and character of the accident was such as to create an inference of negligence under the doctrine of res ipsa loquitur; and as will be noted, in order to meet and overcome such inference and to exculpate themselves from all responsibility for the accident, appellants asserted, and introduced evidence to the effect, that respondent's injuries were proximately caused, not by the careless operation of the automobile by the driver, as alleged and claimed by respondent, but by an agency beyond their control, namely, the sudden breaking of the steering mechanism of the automobile. Therefore, when appellants asserted this new theory and introduced evidence to substantiate it, respondent doubtless had the right to rebut the same, and in furtherance of such right was entitled to show that a defense based thereon was not maintainable because of a failure on the part of appellants to exercise ordinary care in keeping the automobile in a safe condition; and the record discloses that whatever testimony was elicited in this behalf was received without objection. Consequently, if there were any circumstances developed thereby tending to establish an additional element of negligence on the part of appellants, respondent was entitled to take advantage thereof and to urge the same, along with the other negligent acts pleaded in the complaint and upon which she relied originally for recovery (Rocha v. Garcia, 203 Cal. 167, 263 P. 238; Gleeson v. Virginia Midland R. R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, cited approvingly and quoted from in Michener v. Hutton, 203 Cal. 604, 610, 265 P. 238, 59 A. L. R. 480); and, if that be true, then she was also entitled to have the jury instructed accordingly. For the reasons stated we are of the opinion that the instructions complained of were not erroneous.

[7-9] Appellants further contend that in any event there was no evidence whatever before the jury to raise the issue that there was a want of ordinary care to maintain the automobile in a safe condition, and consequently no evidence to warrant the court in giving instructions thereon; this contention being based upon the proposition that the expert testimony given by their witnesses, to the effect that the defective condition of the steering shaft could not have been discovered by the usual and ordinary inspection of the part, was uncontradicted. The law is well established, however, that in order to warrant the giving of an instruction it is not necessary that the evidence upon the issue be clear and convincing; it being sufficient if there be "slight" or "some" evidence upon that issue. 24 Cal. Jur., p. 832, and cases cited. Here the jury was not bound to accept the expert testimony given by appellants' witnesses (Michener v. Hutton, supra, quoting approvingly from Volkmar v. Manhattan Ry. Co., 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678); and, even though it be conceded that the direct testimony of such witnesses tended strongly to establish the fact that ordinary inspection of the steering shaft, if made, would not have revealed its dangerous condition, we think that when the entire cross-examination of said witnesses is considered it cannot be fairly said that there was no evidence whatever to support the hypothesis suggested by said instructions.

[10, 11] Moreover, it is held in the case of Eppinger v. Kendrick 114 Cal. 620, 46 P. 613, and substantially to the same effect in Mundorff v. Ramm, 66 Cal. App. 553, 568, 226 P. 820, that, even though the evidence may not be sufficient to sustain a cause of action or defense to which an instruction applies, a reversal may not be had upon that ground if the evidence as to other causes of action or defenses is sufficient to sustain the verdict. In the present case, aside from the question of the evidence relating to the issue of negligence hereinabove discussed, the testimony is legally sufficient in our opinion to sustain the verdict on either of the other following theories urged by respondent: First, that the machine was unable to hold its course on the highway because it was being driven too fast around the curve, and that the steering gear broke thereafter when the machine hit the curb or came in contact with the stump of the tree; and, secondly, assuming that the steering gear broke while rounding the curve, as claimed by the driver, that he was nevertheless negligent in making no effort to stop the progress of the automobile by applying the brakes before it struck respondent. It would appear, therefore, that under the rule stated in the authorities last above cited, a reversal of the judgment herein would not be justified, even though it were determined in accordance with appellants' contention that the testimony was insufficient to sustain the verdict on the ground of the failure to exercise ordinary care in maintaining the automobile in a safe condition.

The cases cited by appellants are essentially different from the one before us, and consequently are not in point. In some of them, unlike the present case, there was no evidence whatever upon which the instructions complained of were based. In the others the foreign element of negligence to which the asserted erroneous instructions applied was injected into the case affirmatively by the plaintiffs, over the objections of the defendants; while here, as pointed out, respondent in her case in chief confined her evidence to the issue of negligence raised by the pleadings, the other element of negligence which appellants assail having arisen necessarily out of the defense interposed by appellants themselves, and the testimony adduced by respondent with reference thereto having been introduced before the jury without objection.

[12, 13] We are also unable to sustain appellants' remaining point to the effect that, regardless of the question of whether said instructions were prejudicially erroneous, the evidence is insufficient as a matter of law to establish actionable negligence on the part of Manbert in the operation of said automobile. The Motor Vehicle Law (St. 1923, p. 553, § 113) expressly provides that any person driving a vehicle upon the public highway shall do so at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface, and width of the highway, and at such a speed as not to endanger the life, limb, or property of any person. It was therefore a question of pure fact exclusively within the province of the jury to determine whether or not under the existing conditions the automobile was being operated around said curve in a careless manner; and, even assuming that the situation presented was one from which reasonable minds might draw different conclusions, the determination of the jury is nevertheless controlling on appeal. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.

For the reasons stated the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

PEOPLE v. PAINETTI et al. (Cr. 1849.)★

District Court of Appeal, Second District, Division 1, California. Nov. 29, 1929.

Rehearing Denied Dec. 12, 1929. Hearing Granted by Supreme Court Dec. 26, 1929.

Criminal law ⟹200(4)—In prosecution for possession of still, judgment of conviction was sustained as against plea of former jeopardy from conviction for possessing and manufacturing intoxicating liquor.

In prosecution for possession of still in violation of St. 1927, p. 497, judgment of conviction was sustained as against plea of once in jeopardy because of conviction of possession and manufacture of liquor under St. 1921, p. 79, although both offenses arose out of same transaction.

Houser, J., Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Fernando Painetti and Fred Casalichio were convicted of having possession of a still, and they appeal. Affirmed.

Jesse R. Shafer, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. The defendants were found guilty in the superior court in and for the county of Los Angeles of the offense commonly designated as "possession of a still," which charge was amplified by use in the information of the language of the act denouncing the offense.

From a judgment of conviction and order denying their motion for a new trial the defendants prosecute this appeal. The only question raised on the appeal relates to the ruling of the trial court on defendants' plea of "once in jeopardy." During the trial of the case, the defendants offered in evidence the records of the municipal court of the city of Los Angeles in two cases; one wherein the defendants had been charged with possession of liquor under the Wright Act (St. 1921, p. 79), and the other in which they had been charged with the manufacture of intoxicating liquor, also under the Wright Act. Counsel for defendants, in making the offer, stated that the records would show that the offenses of "possession" and "manufacture" were charged as having been committed on the same day that the defendants in the case on trial were charged with "possession of a still"; that both the defendants were found guilty upon each of the charges in the municipal court and sentence duly pronounced by the court. Subsequently, in support of their pleas of "once in jeopardy," the defendants placed on the witness stand one J. S. Martin, who as a witness for the prosecution testified as to the finding of the still in question and the defendants in charge thereof, and who also testified that he had been a witness for the prosecution in the municipal court in the trials wherein the defendants were charged with the offense of "possession" and the offense of "manufacture"; that in his testimony in the municipal court the witness had testified substantially as he had in the case on trial concerning what he had found when he and his brother officers made the raid on the premises where the defendants had been apprehended. The defendants also offered to call Officers Tolbert and Mosteller, who accompanied the witness Martin at the time of making the raid, and who, according to counsel for defendants, would testify substantially as Martin had testified. The district attorney stipulated that the said officers would so testify if put upon the stand.

The district attorney objected to the introduction of the records from the municipal court and also objected to the testimony of Martin and the proffered testimony of the other two officers on the ground that neither the records nor the testimony would sustain the defendants' plea of "once in jeopardy."

★Hearing granted 292 P. 965.

The court sustained the district attorney's objection on the theory that the offenses of "possession of intoxicating liquor" and of "manufacture of intoxicating liquor" of which defendants had been convicted, were separate and distinct offenses from the offense of "possession of a still," upon which the defendants were then on trial.

Before submitting the case to the jury, the court instructed the jury to find against the defendants on their plea of "once in jeopardy," and the jury so found. Appellants complain of the court's ruling and instruction as constituting prejudicial error,

The question is thus presented whether the offenses of "possession" and "manufacture" or either of them constitute in law and fact the same offense as that of the "possession of a still." If this question is answered in the affirmative, then the defendants' offer supported their pleas of "once in a jeopardy," and the court's ruling constituted prejudicial error.

The question as to when a previous conviction for a public offense will support the plea of "once in jeopardy" in a subsequent trial has frequently occupied the attention of our state and federal courts, and has resulted in a marked divergence of opinion. In California, however, the rule has been declared by our Supreme Court to be that, "to entitle a defendant to the plea of autrefois convict or acquit, it is necessary that the offense * * * be the same in law and fact." People v. Kerrick, 144 Cal. 46, 77 P. 711, 712. This declaration of the rule finds support by the weight of authority in our federal courts, as also in a number of our sister states. Burton v. U. S., 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362.

This brief statement of the rule has been amplified by judicial authority in a number of jurisdictions. In Morey v. Commonwealth, 108 Mass. 433, the rule is stated as follows: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence." The foregoing statement of the rule has been quoted with approval by the United States Supreme Court in Gavieres v. U. S., 220 U. S. 338, 31 S. Ct. 421, 55 L. Ed. 489.

In Ruling Case Law, vol. 8, p. 148, § 133, the author declares the rule to be as follows: "When a single transaction constitutes two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on the second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second." The author, in discussing this same question, further states (page 149, § 135): "A single act may be an offense against two statutes, and, if each statute requires proof of an additional act which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." On page 143, § 128, of the same work, the application of the rule is stated in the following language, and is supported by an extended list of citations from federal and state courts: "In determining whether both indictments charge the same offense the test generally applied is that when the facts necessary to convict on the second prosecution would necessarily have convicted on the first, a final judgment on the first prosecution will be a bar to the second, but if the facts which will convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed by the same state of facts."

In the case of People v. Brannon, 70 Cal. App. 225, 233 P. 88, the court gave its approval both to the rule and its amplification, as declared by the Supreme Court of Ohio in the case of State v. Rose, 89 Ohio St. 383, 106 N. E. 50, L. R. A. 1915A, 256, as follows: "The prohibition of the constitution is against putting a person twice in jeopardy for the 'same offense.' * * * It is the identity of the offense, and not of the act, which is referred to in the constitutional guarantee against putting a person twice in jeopardy. * * * 'The constitutional provision,' * * * 'uses the word "offense." Layman and lawyer alike understand the word "offense" to here mean simply a "crime." * * * The words "same offense" mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation. * * * It is not enough that some single element of the offense charged may have a single element of some other offense as to which the defendant had theretofore been in jeopardy, but the constitutional provision requires that it shall be the "same offense." * * *'"

In Maine, the Supreme Court, in the case of State v. Littlefield, 70 Me. 452, 35 Am. Rep. 335, states the rule as follows: "If the first indictment were such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, an acquittal or conviction on the first indictment will be a bar to the second."

In the case of State v. Elder, 65 Ind. 282, 32 Am. Rep. 69, the Supreme Court of Indiana states the rule as follows: "When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act." The foregoing amplification of the rule is quoted with approval by our Supreme Court in the case of People v. Majors, 65 Cal. 138, 3 P. 597, 52 Am. Rep. 295.

Other authorities declaring the rule in substantially the same language as that already quoted might be cited, but we feel the foregoing sufficiently declares and amplifies the rule, which is applicable to the instant case.

In an examination of the cases brought to our attention, where the question of "once in jeopardy" has been under consideration, we find they may readily be grouped in three classes:

First. Cases where the offense charged, either by reason of statutes or under the common law, necessarily includes one or more lesser offenses. Under the charge of grand larceny, a verdict of petit larceny may be found, and such a verdict would support the plea of "once in jeopardy" if the offender were again charged with grand larceny based upon the same facts. In such a case, in legal verbiage, the second charge would be the same offense, because the facts in the case have been declared to constitute petit larceny.

Grouped in the second class are cases which involve statutes which specify a series of acts; the commission of any one separately from the other being denounced as a crime, or the commission of all in the same transaction or simultaneously constituting but one crime. The statute prescribing the offense here involved, being Act No. 3795, Deering's Gen. Laws Supp. 1925–1927, adopted by the Legislature in 1927 (St. 1927, p. 497), presents this type of case. The denouncing portion of the act reads as follows: *"Ownership or Possession of Stills, etc.* Any person whether acting in his own behalf or as * * * who shall be the owner of or have any interest in or who shall operate or cause to be operated or knowingly have in his possession or control, any still, still worm, still cap, still condenser or stilling device of any kind, designed, used or intended for use in the manufacture or production of intoxicating liquor for beverage purposes, shall be guilty of a felony. * * *" Section 1.

In the recent case of People v. Clemett (Cal. Sup.) 280 P. 681, 683, wherein the above referred to act was under consideration it was held "* * * that the Legislature prescribed but one punishment for a violation of said act." The underlying principle recognized in the Clemett Case gives rise to a similar ruling in cases brought under the Volstead Act (27 USCA § 1 et seq.). The denouncing portion of section 3 of title 2 of that act (27 USCA § 12) reads: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter. * * *" The rule has been declared in California, and is, indeed, supported by the weight of authority in other jurisdictions, that, when any two or more of the acts specified in section 3 of title 2 of the Volstead Act are shown to be involved in the same transaction and synchronous in time as to their happening, but one offense has been committed. In re Louis Chaus (Cal. App.) 268 P. 422; People v. Clemett (Cal. Sup.) 280 P. 681; Miller v. U. S. (C. C. A.) 300 F. 529; Schroeder v. U. S. (C. C. A.) 7 F.(2d) 60.

In the third class fall those cases which involve a consideration of a situation wherein one or several acts are denounced by the same or separate statutes as constituting two separate offenses, or where one act may be involved in each of two separate offenses. As where the possession of a revolver by an unnaturalized foreign-born person is made a felony by an act of the Legislature adopted in 1923 (St. 1923, p. 695), and the various other crimes in which a revolver may be used. The act of possession of a revolver is involved in the several separate offenses.

The instant case clearly comes within the last group. The rule applied to the cases in the first group is not applicable, for neither the offenses of "possession of liquor" nor the "manufacture of liquor" are by statute included within the felony charge of "possession of a still." Nor does the instant case come within the rule determining the classification of the second group. The acts of "possession of liquor" and "manufacture of liquor" are not denounced in the act prohibiting the "possession of a still." In People v. Clemett, supra, defendant was charged in count I with the crime of "possession of a still" and in count II with "operation of a still." Both of these acts are denounced in the same sentence in the statute known as the Still Act. The evidence disclosed that the act of "possession of the still" was simultaneous with the act of "operation of the still." The court there held that "all of the acts set out in the statute before us for construction are coupled with the disjunctive 'or,' one of which or all of which joined, constitute but one offense"; and the court therefore concluded: "We are of the view, upon the authority heretofore cited, that the Legislature prescribed but one punishment for a violation of said act, the punishment therefor to be meted out as the facts of the case might warrant."

But appellants contend the act of "possession of the still" charged in the instant case was necessarily involved in the act of "manufacturing liquor" of which they were convicted in the municipal court, and that they may not be punished a second time for the same act. Appellants confuse the identity of the act with the identity of the offense. As we have already pointed out, the same act may be involved in two separate offenses, and there can be no doubt that the Legislature so intended. It would be quite without the bounds of reason to say the Legislature intended the crime of "possessing a still," declared to be a felony, to be included in the act of "manufacturing liquor," declared to be a misdemeanor. Furthermore, the Still Act was enacted some time after the adoption of the Wright Act, and manifestly for the purpose of making more difficult the manufacture of distilled liquors, just as the enactment of the "revolver" statute was prompted with the hope of lessening the commission of violent crimes committed with the use of a revolver.

At the risk of extending this opinion to unwarranted length, we will cite a few cases involving an application of the rule, which we believe justifies the conclusion we have arrived at.

In the case of People v. Mehra, 73 Cal. App. 162, 238 P. 802, 807, the defendant was convicted of the offense of maintaining a nuisance; the charge being based upon evidence of the possession of intoxicating liquor by defendant in the place in question. The defendant had previously been convicted under the Wright Act of possession of intoxicating liquor at the place in question, and the record of that conviction was offered in evidence in support of his plea of "once in jeopardy." The court, holding the plea not good, said: "The error of appellant lies in the failure to apprehend the fact that the act or omission constituting the crime known as the unlawful possession of intoxicating liquor is a separate and distinct offense from that of maintaining a nuisance for the sale of such liquor. The act or omission is not made punishable in different ways. The Volstead Act names different acts constituting different offenses, and punishes each act separately." Panzich v. U. S. (C. C. A.) 285 F. 871; State v. Wold, 96 Me. 401, 52 A. 909.

In Commonwealth v. Sheehan, 105 Mass. 192, it was held that conviction of keeping intoxicating liquors with intent to sell was not a bar to a subsequent charge based on the same evidence of maintaining a tenement used for the illegal keeping and sale of intoxicating liquors.

Under the National Motor Vehicle Theft Act (18 USCA § 408), which prohibits the transporting in interstate commerce of a stolen automobile, and also the selling, storing, or concealing of such an automobile, one may be held guilty of two separate offenses arising out of the same acts. U. S. v. Hampden (D. C.) 294 F. 345; York v. U. S. (C. C. A.) 299 F. 778.

In the case of People v. Devlin, 143 Cal. 128, 76 P. 900, where the accused had entered a dwelling and had taken personal property he was guilty of two separate offenses, that of burglary and that of larceny. This case frequently has been cited in California to sustain the proposition that the same act may be involved in the commission of two separate offenses, and that each of two offenses may be supported even though the same testimony is used in both.

In People v. Johnson, 82 Cal. App. 411, 256 P. 273, defendant had been acquitted of a charge of abortion. He subsequently was charged with practicing medicine without a license. The second charge was based upon the same evidence as that presented by the prosecution to support the first charge. It was held that acquittal on the first charge did not support his plea of "once in jeopardy."

In State v. Empey, 65 Utah, 609, 239 P. 25, 44 A. L. R. 558, the court had under consideration an appeal from a judgment of conviction of manslaughter. The evidence showed that the defendant was driving his car under the influence of intoxicating liquor and in a reckless manner, and, while so doing, struck a woman, who subsequently died of her injuries. The defendant was arrested and charged with the misdemeanor of driving an automobile in a reckless manner, while under the influence of intoxicating liquor. He was found guilty of the charge and subsequently an information was lodged against him charging him with manslaughter. The information charged, in substance, the same acts of negligent and reckless driving and intoxication while driving, as were charged in the misdemeanor complaint, there being added the additional charge that as the result of such negligent and reckless driving, the deceased came to her death. In support of the defendant's plea of "once in jeopardy," it was urged that the defendant was convicted of an offense based upon the same acts which the information charged as constituting the wrongful conduct resulting in the homicide. It was there urged that each and all of the wrongful acts of which defendant was guilty and which resulted in the homicide were presented to the court upon the previous conviction and formed the basis of the conviction. The court, after reviewing a number of California cases wherein was declared the rule determining what evidence might be offered in support of the plea of former jeopardy, held that defendant's plea was not good and that certain acts might be prohibited by law and punishable as an offense separate from another offense, which might, perchance, be the consequence of the same act.

In State v. Garcia, 198 Iowa, 744, 200 N. W. 201, 202, defendant was charged with driving an automobile while intoxicated. He had been previously found guilty in justice's court upon a charge of intoxication. The same evidence offered to support the charge of driving while intoxicated was used to support the charge of intoxication in the justice's court. In fact, the only evidence of intoxication in either case was that of intoxication while defendant was driving his automobile. The court held that the first conviction was not a bar to the trial of the second charge, "because two crimes may be committed in the course of one and the same transaction." The court points out that it is within the power of the Legislature to create two or more offenses out of a single act.

In People v. Majors, 65 Cal. 138, 3 P. 597, 52 Am. Rep. 295, the defendant was placed upon trial on a charge of murder. It appears from the evidence that he had advised one Jewell to rob one Renowden. In perpetrating the robbery, Jewell shot and killed Renowden and a companion, one McIntyre. The act of Majors in advising Jewell to commit the robbery had furnished the basis of the charge and conviction of Majors for the murder of Renowden, and, when brought to trial upon a charge of murdering McIntyre, Majors offered in support of his plea of "former jeopardy" his conviction of the murder of Renowden. The court held that his conviction was not a bar to the second charge, even though based upon the same acts as formed the basis of his first conviction.

The foregoing cases cited will suffice to indicate the application of the rule to various sets of facts, wherein it has been held that separate offenses have been committed.

In making application of the rule to the situation here involved, it appears: (1) That the offense in the instant case is not the same in fact and law as the offenses charged in the municipal court. (2) The evidence necessary to convict on the charge of "possession of a still" would be insufficient to convict on the charge of "possession of liquor" or the charge of "manufacture of liquor."

We therefore conclude that the offense here charged, "possession of a still," a felony, is a separate and distinct offense from those charged in the municipal court, as shown by the records offered in support of defendants' pleas of "once in jeopardy."

The judgment and ordering denying defendants' motion for a new trial are affirmed.

I concur in the conclusion reached: YORK, J.

HOUSER, Acting P. J. I dissent. It is apparent that no one can *manufacture* intoxicating liquor without being in *possession* of a still. Conviction of "manufacture" is necessarily inclusive of "possession of a still." The evidence herein is conclusive that the offense of "possession of a still," as charged in the information in the instant case, and the offense of "manufacture of intoxicating liquor," of which the defendant was formerly convicted, rested upon contemporaneous acts, was predicated upon the same transaction, and identical testimony. Personally, I am unable to appreciate the force of the argument that, because on the "manufacture" charge the defendant was prosecuted under the provisions of one statute, and in the instant case for "possession of a still" under the provisions of a different statute, perforce and necessarily he is not entitled to an acquittal on the plea of once in jeopardy. To my mind, the decision in the case of People v. Clemett (Cal. Sup.) 280 P. 681, is controlling in the instant case.

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102 Cal. App. 361

TAYLOR et al. v. KING et al. (Civ. 5623.)

District Court of Appeal, Second District, Division 2, California. Dec. 5, 1929.

1. Payment 🔑17—Under contract providing for payment for construction of building by secured note, acceptance of note constituted payment.

Where contract for construction of building provided for payment of price by note due 60 days after completion of building, which was secured by trust fund certificates and common stock of corporation, which securities were to be deposited with trustee in certain bank, note, as evidenced by express understanding of parties, was to be accepted in payment and written agreement therefor so construed.

2. Payment 🔑78—Finding that construction contractors accepted note held tantamount to finding that obligation was paid by note, where contract provided for payment by secured note.

Where it was found that contractors received and accepted note given for construction of building, finding was tantamount to one that obligation was paid, where contract provided for payment by secured note.

3. Trial 🔑404(1)—Findings must be liberally construed to support judgment.

Findings must be liberally construed so as to support judgment.

4. Appeal and error 🔑931(4)—Appellate court must conclude trial court intended to find note was received in payment for construction of building, regardless of delivery of securities therefor, where court found contractors accepted note.

Where it was found that contractors received and accepted note, and construction contract provided payment could be by note, District Court of Appeal construing findings liberally to support judgment must conclude trial court intended to find note was received in payment, regardless of delivery of securities which under agreement were to secure note.

5. Appeal and error 🔑719(6)—Appellate court must affirm judgment in absence of assignment of insufficiency of evidence supporting findings.

In absence of District Court of Appeal being pointed to insufficiency of evidence to support findings, judgment cannot be disturbed.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by James O. Taylor and others against William J. King and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Frank L. Rabe and Frank M. Smith, both of Los Angeles, for appellants.

Nichols, Cooper & Hickson, of Pomona, for respondents.

IRA F. THOMPSON, J. The plaintiffs were the general contractors for the erection of a building for the defendant Wm. J. King. This action was brought for the purpose of foreclosing a mechanic's lien for the last payment in the sum of $5,700. Judgment was rendered for the defendants, and plaintiffs prosecute this appeal.

The contract, after stating the times for and the amounts of the first three payments, reads with respect to the final payment as follows: "4. In payment of five thousand seven hundred 00/100 dollars (5700.00/100) to be paid on the following terms and conditions: One promissory note of $5,700.00/100 due 60 days after completion of building, said $5,700.00/100 note secured by 30 Royalty Trust Fund Certificates at $500.00/100 each and 150 shares of common stock of National Vacant Seat Indicator Company at $100 per share par. Said note and securities to be deposited with R. Bruce Findlay, trustee, at American National Bank, Pomona, Cal. Said securities to be sold at their par value. The first $5,700.00/100 received by said trustee from the sale of said securities to be used to liquidate $5,700.00 note. The sale of said securities to begin at the time the foundation is complete. Sale of said securities shall be prosecuted by W. J. King and associates or assigns, said Royalty Trust Fund Certificates and said common stock to be sold prior to the sale of any other Trust Fund Certificates or common stock, except that which is set aside for the employees."

The trial court has found: That after the execution of the agreement "the plaintiffs proceeded with the construction of a building as provided in said written agreement and to completion thereof substantially as in said agreement provided. That said building was completed on the 26th day of January, 1925, and that on said date said William J. King executed and deposited with the plaintiffs a notice of completion thereof and on said last-named date executed his said promissory note for $5,700.00 and delivered same to plaintiffs and plaintiffs received and accepted same. That plaintiffs understood that such note was not to be executed until the time of the completion of the building. That said note was dated the 26th day of January, 1925, and was due and payable sixty days after the date thereof. That said William J. King did not at that time or at any time deliver to the plaintiffs or to R. Bruce Findlay the securities or any of them as enumerated and described in said written agreement as heretofore set forth."

And also we have before us a finding to the effect that appellants after holding the note for more than 30 days surrendered it to the respondent King and informed him they would look to the Mechanic's Lien Law for the payment of the sum of $5,700, and did accordingly file their claim of lien therefor on April 1st. We quote another important finding as follows: "That the plaintiffs herein waived any and all right on their part to claim a mechanic's lien upon said premises and agreed to accept and did accept said promissory note of said defendant, William J. King, in payment, settlement and satisfaction of all balance to be paid them for the construction of said building." While the sufficiency of the evidence to sustain this finding of the court is not under attack by the appellants, they contenting themselves with the argument that the giving of a note does not extinguish the indebtedness and consequently does not constitute a waiver of the lien right, we must give the substance of other findings in order that we have a just understanding of the circumstances surrounding the making of the contract and the execution and acceptance of the note. They are in effect as follows: That prior to the commencement of work or the furnishing of any materials the respondent King had made arrangements to borrow from the respondents American Saving Bank of Pomona $5,500 and R. Bruce Findlay, as trustee, the sum of $5,000, and to give to them in the order named first and second trust deeds to secure the repayment of the sums so loaned; that $700 of the amounts borrowed was to be used in the purchase of the real property and the remainder in making payments to the contractors; that the three respondents making these arrangements informed the plaintiffs that the American Savings Bank and R. Bruce Findlay expected to receive first and second liens on the premises, and that no work was to be performed until the trust deeds had been recorded; that certain tools were delivered to the job on November 7th and work actually commenced on November 10th, the day on which the trust deeds were in fact executed and recorded; that recordation was after the excavation of some portion of the trench for the foundation of the building.

[1] As already suggested, the appellants contend that they did not waive their lien rights by taking a note and argue that the acceptance of a note does not, in the absence of an express agreement, operate to discharge or extinguish the debt. There can be no doubt upon the statement of the general rule of law contained in counsel's argument, but it does not necessarily follow that the trial court was in error in finding an express agreement to discharge the debt and thus waive the lien. Without reviewing the testimony let us observe that the contract says: "4. *In payment* of five thousand seven hundred 00/100 dollars (5700.00/100) *to be paid* on the following terms and conditions: One promissory note of $5,700.00/100," etc.

Let us also have in mind the circumstances, to wit: That the respondents, the American Savings Bank and R. Bruce Findlay, as trustee, were advancing on notes to be secured by trust deed liens the money necessary to complete payments for the realty and build the structure; that the respondents had informed plaintiffs that the trust deed liens were to be placed upon the premises and that no work was to be done until they had been recorded. It seems apparent from these findings of the court that it was justified in deducing from the circumstances under which the agreement was executed that the parties had an express understanding that the note was to be accepted in payment; and in fact that the written agreement was to be so construed.

[2-5] There is the further finding that the plaintiffs received and accepted the note. This, therefore, is tantamount to a finding by the court that the obligation which it is sought to foreclose was paid. While it is true that the court finds that the securities were not delivered either at the time the note was delivered or thereafter, it is to be noted that there is no finding that respondent King refused to deliver. Applying the well-known rule that the findings must be liberally construed so as to support the judgment (Haight v. Haight, 151 Cal. 90, 90 P. 197), we are forced to conclude that the court intended to find that the note was received in payment, regardless of the delivery of the securities. And since we are not pointed to the insufficiency of the evidence to support the findings, if in fact it is insufficient, the judgment must stand.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; BURNELL, Justice pro tem.

102 Cal. App. 272

ALADDIN CO. OF AMERICA v. GREGORY.★
(Civ. 6482.)

District Court of Appeal, First District, Division 1, California. Dec. 3, 1929.

As Modified, on Denial of Rehearing, Jan. 2, 1930. Hearing Denied by Supreme Court Jan. 30, 1930.

1. Trial 🔑139(1), 142—Inferences to be drawn and weight to be given testimony were questions for jury.

Inferences to be drawn therefrom, as well as weight to be given testimony of witness, were questions for jury.

2. Landlord and tenant 🔑184(2)—In action to recover deposit, evidence supported findings that neither lease nor possession of premises was delivered to plaintiff tenant, and that lease never became effective.

In action by tenant to recover deposit made under lease, evidence *held* sufficient to support findings that neither lease nor possession of premises was delivered to plaintiff, and that, due to defendant's refusal to proceed with transaction, lease never became effective.

3. Landlord and tenant 🔑184(2)—Instruction lease was delivered when signed by both lessor and lessee with intent to give it immediate effect, and that it is delivery which gives effect to lease, held not misleading.

In action by tenant to recover deposit made under lease, instruction that lease was delivered when it was signed by both lessor and lessee with intent to give it immediate effect and to place it beyond power of lessor to control or revoke, and that it is delivery which gives effect to lease, and without such delivery lease is invalid and not effective for any purpose, even though it be signed, *held* not misleading as instructing that manual delivery was essential.

4. Trial 🔑256(1)—Defendant, if believing instruction ambiguous, should have asked for more specific instruction.

If defendant believed instruction complained of on appeal to be ambiguous, he should have asked for more specific instruction.

5. Appeal and error 🔑1056(1)—In action to recover deposit, excluding evidence that tenant obtained no other location, offered on issue whether tenant abandoned lease, held not reversible error (Code Civ. Proc. § 1870, subd. 15).

In action by tenant to recover deposit made under lease, in which landlord claimed that tenant abandoned lease and premises, exclusion of evidence that tenant did not subsequently obtain any other location *held* not reversible error, notwithstanding Code Civ. Proc. § 1870, subd. 15, makes evidence tending to prove an issue admissible even though it might not justify verdict.

6. New trial 🔑104(1)—Question of granting new trial, where much of newly discovered evidence was cumulative, was one addressed to trial court's sound discretion.

Question of granting new trial for newly discovered evidence, where much of evidence was cumulative, was one addressed to sound discretion of trial court.

7. New trial 🔑108(3)—Refusing new trial in action for deposit made under lease for newly discovered evidence was not abuse of discretion, where different result was not probable.

Refusal to grant new trial for newly discovered evidence tending to prove that plaintiff corporation, suing to recover deposit made under lease which never became effective, had entered into lease of premises, but was unable to finance its business, much of which was cumulative, *held* not abuse of discretion, where probative weight of new evidence was insufficient to render different result probable.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action for money had and received by the Aladdin Company of America against J. G.

★Rehearing denied. Hearing denied by Supreme Court.

Gregory. From the judgment, defendant appeals. Affirmed.

L. Seidenberg, George M. Naus, and Joseph M. Trusty, all of San Francisco, for appellant.

Keyes & Erskine, of San Francisco, for respondent.

PER CURIAM. An action to recover the sum of $1,625 alleged to have been received by the defendant for the use and benefit of the plaintiff. The plaintiff claimed that the above amount was deposited with the defendant as security for the payment of the rent of certain real property in San Francisco; that a written lease thereof, containing the terms agreed upon by the parties and pursuant to which the deposit was made, was signed by them, but that the defendant refused possession unless the plaintiff would agree to the execution of another lease in a different form; that the latter declined to do so, and demanded the return of the deposit. The defendant maintained that the original lease was executed by both parties, and that the plaintiff, without cause, abandoned the lease and the leased premises. A jury returned a verdict for the plaintiff, and, from the judgment entered thereon, the defendant, whose motion for a new trial was denied, has appealed. As grounds therefor it is contended that the verdict is unsupported, and that the court erred in excluding certain evidence offered by the defendant, and in its instructions to the jury.

The evidence shows that George F. Shade, of the firm of Allen & Co., who appear to have been real estate agents acting for the plaintiff, entered into negotiations with Frank J. Golden, the agent of the defendant, for a lease of the premises. These negotiations resulted in a lease being drawn by Shade which was signed by both parties. The term of the lease was five years, commencing on December 1, 1925, at a monthly rental of $325, payable in advance, and, as security for performance by the plaintiff, the latter agreed to deposit with the defendant the sum of $1,625. According to Shade, the instrument was not delivered, but was held by Golden pending the payment of the deposit. Golden was absent from San Francisco for about two weeks, and upon his return a check for the amount of the deposit was tendered to him by an agent for the plaintiff. Golden then stated that he was not satisfied with the lease which had been signed, and proposed another in the form prepared by him, further stating that the check which was left with him would be held until the completion of the transaction. The new lease was submitted to the plaintiff corporation, which refused to execute the same, and the check was thereafter cashed by Golden and the amount paid to the defendant. Golden testified that, when the plaintiff refused to accept the new lease prepared by him, he stated that they would operate under the lease already signed. It was testified by Shade, however, that the plaintiff was willing to proceed under the first lease, and so notified Golden, who refused to give possession of the property unless the new lease should be executed by the plaintiff. Other witnesses testified that, for the purpose of making measurements for floor plans therein, the key to the premises was obtained by plaintiff's employees at the time the deposit was made, and that subsequently the key was returned to Golden.

[1, 2] As to whether the lease was delivered to the plaintiff, the evidence is conflicting. The agent Golden testified, in substance, that previous to his absence from San Francisco he instructed his brother, A. E. Golden, to deliver the same to the plaintiff; that he was advised that this had been done, but the witness was unable to recollect whether the instrument was still in his office upon his return. He further testified, however, that he saw a signed original thereof in the office of the president of the plaintiff subsequent to the date when the check was deposited. According to A. E. Golden, the lease was given to him, with instructions to leave it with the stenographer of Frank J. Golden, but that it was not to be delivered or possession of the premises given until the security had been deposited, and that he notified plaintiff's agents to that effect. The witness, however, failed to testify that the instrument or the possession of the premises was delivered to the plaintiff. The agent of the plaintiff refered to by Shade testified that he was sent by the plaintiff to deliver the check to Golden and procure the lease which the parties had signed, and that he was accompanied by Shade; that Golden stated that the lease was not ready, saying, with respect to the check, "so long as you have got the check here, if you will leave the check with me, I will not cash this check until these leases are signed and the business is concluded." Other witnesses for the plaintiff testified that the key to the premises was procured by them on several occasions for the purpose of inspecting and drawing floor plans, but that each time it was returned to Golden.

While the above would support different conclusions, the inferences to be drawn therefrom, as well as the weight to be given the testimony of the witnesses, were questions for the jury, and the evidence was sufficient to support findings that neither the lease nor the possession of the premises was delivered to the plaintiff, as well as the conclusion that, due to defendant's refusal to proceed with the transaction, the lease never became effective.

[3, 4] The following instruction was given at plaintiff's request: "You are instructed

that a lease takes effect upon its delivery to the party in whose favor it is made, or to his agent. The term delivery is frequently used in a popular sense as designating the mere transfer of physical custody or possession, but it also has a legal sense, and it is in this latter sense that it is used in these instructions. In the law a lease is delivered when it is signed by both the lessor and lessee with the intent to give it immediate effect and to place it beyond the power of the lessor to control or revoke. It is the delivery which gives effect to the lease, and without delivery the lease is invalid, and not effective for any purpose even though it be signed."

The defendant claims that by this instruction the jury was told in effect that, in order to make the lease effective, its manual delivery was essential. We do not so understand the instruction. The court was careful to distinguish between a mere physical transfer as constituting a delivery, and the legal significance of the term by stating that "in the law a lease is delivered when it is signed by both the lessor and the lessee with the intent to give it immediate effect and to place it beyond the power of the lessor to control or revoke." The last paragraph in the instruction clearly refers to the paragraph quoted, and the instruction, when read and considered as a whole, cannot reasonably be said to have been misleading. Moreover, if the defendant believed the instruction to be ambiguous, he should have asked for a more specific instruction as to the acts necessary to give effect to the lease.

[5] The evidence shows that the plaintiff intended to conduct its business on the premises described in the lease, and, in support of the claim that the plaintiff abandoned the lease and premises the defendant sought to show by the cross-examination of witnesses called by the plaintiff that no other location was subsequently obtained, and, upon objection to the questions being sustained, offered to prove the fact. The rulings are assigned as error. While evidence tending to prove an issue is admissible although alone it might not justify a verdict (Code Civ. Proc. § 1870, subd. 15; Moody v. Peirano, 4 Cal. App. 411, 88 P. 380), and the facts sought to be shown by defendant had some relevancy to the question whether there was an abandonment by the plaintiff, nevertheless the probative value of the evidence offered was insufficient to justify a reversal of the judgment on the sole ground of its erroneous exclusion.

[6, 7] Appellant further insists that the court erred by denying her motion for a new trial. The motion was based on newly discovered evidence, and was supported by affidavits in which the affiants relate conversations with the president of plaintiff corporation tending to prove that the corporation had entered into a lease of the premises, but was unable to finance its business in San Francisco. Much of this evidence was cumulative, and counter affidavits were filed by plaintiff, supporting conclusions contrary to those sought to be established by appellant. We are of the opinion that the probative weight of the new evidence was insufficient to render a different result probable. The question, from its nature, was one addressed to the sound discretion of the trial court (People v. Selby S. & L. Co., 163 Cal. 84, 124 P. 692, 1135, Ann. Cas. 1913E, 1267, and Estate of Loucks, 160 Cal. 551, 117 P. 673, Ann. Cas. 1913A, 868, and we cannot say that the denial of the motion was an abuse of discretion.

After an examination of the entire record, including the evidence, we are satisfied that the verdict is fully sustained, and that no error appears which would reasonably support the conclusion that the result was a miscarriage of justice.

The judgment is affirmed.

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102 Cal. App. 266

SLATER v. KESEY (KEEBLE, Intervener). (Civ. 3869.)★

District Court of Appeal, Third District, California. Dec. 2, 1929.

Rehearing Denied Dec. 31, 1929.

1. Statutes ⚷225—Statutes respecting organization, maintenance, severance, and termination of school districts must be construed together and harmonized if possible (Pol. Code, §§ 1577, 1578, 1591a, 1591b).

Pol. Code, §§ 1577, 1578, 1591a, 1591b, respecting organization, maintenance, severance, and termination of school districts, must be construed together and harmonized if it is possible to do so.

2. Schools and school districts ⚷37(3)—Elementary school district subject to union district and not suspended from union could not escape obligations by creating new elementary district without petitioning withdrawal from union as whole (Pol. Code, §§ 1577, 1578, 1591a, 1591b).

Elementary school district, which became subject to union district by formally uniting therewith, could not escape obligations incurred thereby by creating new elementary school district without petitioning withdrawal from union school district in manner provided by Pol. Code, § 1591a, where it was not suspended under provision of section 1591b, though it had complied with provisions of sections 1577 and 1578 in forming new district, since method of withdrawing as provided by section 1591a is exclusive.

3. Schools and school districts ⚷37(1)—That statute provides no means for withdrawal of part of district from union school district is not fatal (Pol. Code, § 1591a).

Though Pol. Code, § 1591a, provides no specific means by which part of school district may

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★Rehearing denied.

withdraw from union district, omission is not fatal, since express declaration of terms upon which district may sever association with union district by petition will be deemed to be exclusive and to preclude any other method of withdrawal.

4. Schools and school districts 🔑34—It cannot be assumed portion of district may withdraw from union school district because statute does not provide for withdrawal of portion (Pol. Code, § 1591a).

It may not be assumed that because Legislature failed to specifically provide in Pol. Code, § 1591a, means of withdrawal of portion of school district from union district, therefore an absolute right exists to withdraw in segregated manner, and Legislature must be deemed to have intended withdrawal only as an entire union or not at all.

5. Mandamus 🔑79—Mandamus lies to require assessor to include in union school district territory withdrawn by mere forming of new elementary district without petitioning withdrawal (Pol. Code, §§ 1577, 1578, 1591a).

Issuance of writ of mandate to require assessor of county to include in union school district, for purpose of raising elementary school taxes, portion sought to be withdrawn by creation of new elementary school district without compliance with Pol. Code, § 1591a, requiring petition for withdrawal, though new elementary district might be organized under sections 1577 and 1578, *held* not error.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Mandamus proceedings by Joseph Slater, as a taxpayer in the Upper Lake Union School District, against J. A. Kesey, as assessor of the County of Lake, State of California, to require respondent to include in the district territory that was sought to be withdrawn, in which Lulu M. Keeble intervened. A writ of mandate was issued, and the intervener appeals. Affirmed.

Hearing denied by Supreme Court; PRESTON, J., voting for a hearing.

W. D. L. Held, of Ukiah, for appellant.

M. H. Iverson and Burt W. Busch, both of Ukiah, for respondent petitioner.

H. G. Crawford, of Lakeport, for respondent assessor.

ROLFE L. THOMPSON, J. This is an appeal from a writ of mandate which was issued to require the assessor of Lake county to include in the Upper Lake union school district, for the purpose of raising elementary school taxes, the territory sought to have been withdrawn therefrom by the creation of a new elementary school district called the Lucerne school district, on the ground that the procedure of organizing this new district was illegal.

The essential facts were stipulated. The petitioner for the writ is a taxpayer in Upper Lake union school district. This union school district was duly organized by including therein Hammond school district together with other contiguous districts. Lucerne district had no prior separate existence. The territory of which it is comprised was merely an undivided part of Hammond school district when the union school district was organized. The intervener and other resident heads of families then sought to create a new elementary school district from a portion of the territory of Upper Lake union school district pursuant to the provisions of sections 1577 and 1578 of the Political Code. It is conceded that the provisions of these two sections were strictly complied with in the effort to form the new Lucerne district. These sections furnish a complete method of procedure for the formation of a new elementary school district, and do not specifically preclude the creation of such an elementary district from the territory included in a duly organized union school district. Section 1591a of the Political Code does, however, prescribe the only means by which an elementary district which is contained within the union district may withdraw therefrom. It is the exclusive method of seceding from the union district. This last-mentioned section provides, in part: "Any school district contained in a union or joint-union school district may, * * * withdraw from such union or joint-union district by action of the board * * * of supervisors * * * whenever a majority of the heads of families residing in the union or joint-union district, including two-thirds of the heads of families who reside in the district wishing to withdraw * * * shall present to such board * * * a petition for such withdrawal, accompanied by a written consent to such withdrawal signed by a majority of the members composing the board of trustees of such union or joint-union district * * *"

It is not contended by the appellant that these provisions of the foregoing section with respect to withdrawing from a district were complied with. The appellant's attorney conceded this when he said: "We admit we didn't do anything necessary to be done if we have to withdraw and they admit we did everything necessary to be done if we don't have to withdraw."

The question is therefore squarely presented: May territory which has been regularly included within a duly organized union school district be exempted from taxes and other union school district obligations by subsequently creating and maintaining within the limits of said union district a separate and distinct elementary district, without first obtaining consent and withdrawing from the union district of which it is a component part, and without any pretense of severance?

[1, 2] These several sections respecting the organization, maintenance, severance, and termination of school districts must be construed

together and harmonized if possible. This leads to the conclusion that after an elementary school district becomes subject to a joint or union district by formally uniting therewith, except when it has been suspended under the provisions of section 1591b of the Political Code, it is imperative that such district or any portion of its territory seeking independence from the union district shall first withdraw therefrom in the manner prescribed by section 1591a of the same Code. Having voluntarily become a part of a duly organized union district, independence therefrom may be secured only by a formal severance. Participation in the benefits of a union district may not be repudiated without legal process and without consent of the representatives of the union district so abandoned.

It is argued that even if this be true with respect to an entire former elementary district, it does not apply to a portion only of such district; that there is no provision of law applicable to the withdrawal of a portion only of a district.

[3] It is true that section 1591a provides no specific means by which a part of a district may withdraw from a union district. The withdrawal of a portion of a district is not contemplated, unless the lesser portion thereof is included by inference in the procedure applicable to the entire district. This omission, however, is not fatal. An express declaration of terms upon which a district may sever its association with a union district will be deemed to be exclusive and to preclude any other method of withdrawal. In the case of Washburn v. Mann, 73 Cal. App. 302, 238 P. 721, 722, the court said: "This system is complete, and must be held to be exclusive."

[4] It may not be assumed that because the Legislature failed to specifically provide the means of withdrawal with relation to a portion of a district, therefore an absolute right exists to withdraw in this segregated fashion. The omission to legislate in this regard enforces the conclusion that the Legislature intended to permit a former district to withdraw from the union district only as an entire unit, or not at all.

This very question was determined with relation to the severance of territory from a high school district in the case of Multer v. Keppel, 76 Cal. App. 517, 245 P. 218, wherein it was said: "It seems, therefore, that there is no method provided for withdrawal of a portion of the high school district from the district itself and the formation of a new high school district. * * * There is no presumption that of necessity there must be some method provided for such withdrawal."

It is true that section 1587 of the Political Code provides for the automatic dissolution of the several elementary districts after they have united and merged in a union district, except for certain purposes which are specifically reserved.

In this regard that section provides: "The districts uniting to form the union or joint-union school district shall cease to exist, except for purposes specified in sections 1585 to 1591c inclusive. * * *"

One of these purposes for which the original districts are preserved intact, as provided by section 1591a, is the very proceeding which is here involved, namely, the withdrawal of a district from the union. It follows that the Hammond school district, of which the Lucerne territory was a part, was effectively dissolved at the organization of the union district, except for the purposes reserved by the statute. Certainly this automatic dissolution may not be overcome by reorganizing the former district in whole or in part. If the entire original district may not sever its relationship with the union district except by withdrawing in the manner provided by law, then a portion of that district can accomplish the same object only by conforming to the same procedure. Otherwise, a district could circumvent the law by withdrawing piecemeal from the union. At an election held pursuant to law, the Upper Lake union school district was duly organized, and by consent the territory comprising the proposed new Lucerne district became a part of that union district subject to its management and liable for its obligations. This relationship may be terminated only in the manner provided by section 1591a.

Even though it be conceded that a new elementary school district may be organized under sections 1577 and 1578 from the territory included in a union school district, which hypothesis this court is not deciding, yet after the completion of that organization its territory would still be a part of the union district, from which it would be required to disassociate in the manner provided by law. Regardless of whether a new elementary district may be formed from the territory of a union district, it must nevertheless withdraw from the union district and terminate its former association to escape the obligations incurred thereby. This was not done.

[5] The writ was therefore properly issued, and the judgment is affirmed.

We concur: FINCH, P. J.; JAMISON, Justice pro tem.

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204 Cal. 286, 297

PEOPLE v. VENTURA REFINING CO.

PEOPLE v. GENERAL PETROLEUM CORPORATION.

(S. F. 11939, 119340.)

Supreme Court of California. June 29, 1928.

Constitutional law 🔑190—That unlawful exemption was stricken from statute by later enactment could not affect obligations under act with void exemption in it.

Fact that unlawful exemption was stricken from statute by a later enactment of Legislature *held* not to affect petitioner's obligation under act with void exemption in it.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson and George H. Cabaniss, Judges.

On petition for rehearing. Petition denied. For former opinion, see 268 P. 347, 352.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the People.

Charles W. Slack and Edgar T. Zook, both of San Francisco, for respondent Refining Co.

A. L. Weil, of San Francisco, and Salisbury & McNeil and Verne E. Robinson, all of Los Angeles, for respondent Petroleum Corporation.

PER CURIAM. On petition for rehearing herein it is urged that this court has erroneously "assumed that there were two types of contracts in existence—i. e., contracts having (a) a fixed sales price, and (b) a flexible sales price"—whereas it is insisted "it is apparent from the record either directly or by necessary inference that the so-called fixed price contracts do not exist." It is therefore contended that a conclusion cannot be drawn that the Legislature had in mind two types of contracts and by its action intended to provide only for a fixed price contract. Assuming that the record is susceptible to the construction placed upon it by counsel, namely, that only flexible sales contracts were in existence at the effective date of the act, the correctness of the conclusion that the contractors thereunder would be in no different situation, so far as the license tax was concerned, than those having no contracts outstanding, is further emphasized. The opportunity of those in each class to protect themselves against the burden of the license tax was the same. The operation of the law with the exemption in it would therefore confer upon those attempted to be exempted a special privilege or immunity not accorded to others similarly situated. The exemption, then, would effect an unlawful discrimination as between those in the same class, and would be void under section 21 of article 1 of the Constitution. See Bacon Service Corp. v. Huss. 199 Cal. 21, 248 P. 235. The fact that the unlawful exemption was stricken from the statute by later enactment of the Legislature could not affect the petitioner's obligations under the act with the void exemption in it.

The petition for a rehearing is denied.

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208 Cal. 568

YOUNG et al. v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 9986.)

Supreme Court of California. Dec. 10, 1929.

1. Railroads 🔑350(1)—Taking action against railroad for death of motorist at crossing from jury was error, unless it could be said as matter of law that no other conclusion than that railroad was entitled to judgment was possible.

In action against railroad for death of motorist at crossing, trial court erred in directing verdict, unless it could be said as matter of law that no other reasonable conclusion than that railroad was entitled to judgment was legally deducible from evidence, and that any other holding would be so lacking in evidentiary support that appellate court would be impelled to reverse it upon appeal, or trial court set it aside.

2. Railroads 🔑350(7)—Testimony that motorman gave proper signal at railroad crossing held not conclusively to establish that required signals were given, but merely created question for jury.

In action against railroad for death of motorist at railroad crossing, positive testimony that motorman blew whistle in advance of reaching crossing *held* not to conclusively establish that crossing signals were given, but merely created conflict in testimony to be resolved by jury.

3. Railroads 🔑316(4)—In absence of statute or ordinance, no rate of speed of train is negligence per se.

No rate of speed of train is negligence per se, in absence of statute or ordinance.

4. Railroads 🔑316(2)—Railroad train must pass over dangerous crossing at less rate of speed proportionate to danger.

Character of crossing affects duty of railroad company towards travelers upon public highway, and its trains must pass over dangerous crossings at less rate of speed proportionate to danger.

5. Railroads 🔑350(11)—Whether rate of speed of train at crossing is excessive is for jury.

Whether or not speed of train at railroad crossing is excessive is for jury, since whether rate is so dangerous or excessive as to constitute negligence must depend upon particular circumstances.

6. Railroads 🔑350(11)—Negligence, as regards speed of railroad car approaching crossing, held for jury, where deceased motorist's view was obstructed.

In action against railroad for death of motorist at railroad crossing, where it appeared that garage, house, and warehouse obstructed motorist's view of approaching train until motorist was within 19 feet, 6 inches of track, and that box car on side track obstructed view so that motorist would not be able to see train until front wheels of motor truck and radiator were on tracks, and there was testimony that motorman had not given proper signals before reaching crossing, and that railroad car was traveling at excessive speed, negligence *held* for jury.

7. Railroads 🔑335(1)—Contributory negligence held to bar recovery, where deceased motorist did not look in direction of crossing for approaching trains until within few feet of crossing.

In action against railroad for death of motorist caused by collision with railroad car at crossing, evidence that motorist was looking into the body of his truck and did not look in direction of crossing or approaching car until he was within few feet of crossing *held* to bar recovery, since person approaching crossing without stopping, looking, or listening for approaching trains are guilty of contributory negligence as matter of law, which bars recovery by themselves or in event of death by their personal representatives.

8. Railroads 🔑346(6)—Presumption that person takes ordinary care of himself held inapplicable in presence of evidence that motorist did not look in direction of crossing until he was within few feet thereof (Code Civ. Proc. § 1963, subd. 4).

In action against railroad for death of motorist caused by collision with railroad car at crossing, presumption set forth in Code Civ. Proc. § 1963, subd. 4, that person takes ordinary care of his own concerns *held* not applicable in presence of positive and unimpeached testimony that motorist was looking into body of his truck and did not look in direction of crossing until he was within few feet thereof.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Dorothy M. Young and others against the Pacific Electric Railway Company and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Superseding opinion of Supreme Court in 279 P. 438.

Ben. F. Griffith and Ralph W. Eckhardt, both of Los Angeles, for appellants.

Karr, Morris & Collins, O. O. Collins, Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondents.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, amici curiæ for Atchison, T. & S. F. Ry. Co.

W. I. Gilbert and Kenneth Keeper, both of Los Angeles, amici curiæ for Southern Pac. Co.

E. E. Bennett and Harry B. Ellison, both of Los Angeles, amici curiæ for Los Angeles & S. L. R. Co.

PER CURIAM. Plaintiffs, as the heirs of Peter W. Young, brought this action to recover damages for his death, resulting from a collision at a crossing between an automobile truck, driven by him, and an electric car of the defendant Pacific Electric Railway Company, operated by the defendant motorman, Howard T. Bennett. Negligence of the defendants was charged in three particulars: In failing to give a proper crossing signal; operating the car at an excessive speed; and in failing to operate the car with due care in view of the dangerous and unguarded condition of the crossing. The case was tried with a jury. When all the evidence was in, defendants moved for a directed verdict in their favor on the following grounds: (1) That the evidence showed conclusively that there was no negligence on the part of the railway company which contributed, directly or proximately, to the happening of the accident; (2) that the evidence conclusively showed that the deceased was himself guilty of contributory negligence; and (3) that if, under the evidence, the jury returned a verdict in favor of the plaintiffs, the court would have to set it aside because of the insufficiency of the evidence to support it. The court granted the motion without indicating upon what grounds it did so. Plaintiffs' motion for a new trial was denied, and they have appealed from the judgment entered on the directed verdict.

[1] The trial court erred in taking the case from the jury unless it can be said, as a matter of law, that no other reasonable conclusion than that defendants were entitled to judgment was legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal, or a trial court to set it aside. Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228, 263 P. 799; Duggan v. Forderer, 79 Cal. App. 339, 343, 249 P. 533. It becomes necessary, therefore, to determine whether the evidence in the case tended to establish the negligence charged by the plaintiffs to the defendants, or whether the testimony, as a whole, so conclusively supported one or more of the grounds of defendants' motion for a directed verdict that the court would have been under compulsion to set aside a contrary finding of the jury.

The collision which occasioned Young's death occurred on December 22, 1925, in the city of Hawthorne, where Eucalyptus avenue intersects at right angles the main line track of the Pacific Electric Railway Company running east and west. Evidence as to the condition of the crossing showed that a warehouse was located on the northwest corner. North of the warehouse, on Eucalyptus avenue, was a garage, with a house adjoining on the north. These buildings obstructed the view of persons driving in a southerly direction along Eucalyptus avenue to such an extent that they had no opportunity to observe an east-bound electric car until they were almost on, or dangerously close, to the tracks. The obstructions likewise prevented the trainmen on cars approaching the crossing from the west from seeing automobiles southbound towards the tracks. In addition to the buildings, box cars stood on the siding west of Eucalyptus avenue and north of the main track practically all the time. A power line pole west of the avenue and between the two tracks also obstructed the view from a certain angle. There was the usual standard railroad crossing sign, but no automatic signaling device nor gates, nor was a flagman stationed at the intersection to warn travelers of approaching cars. One of plaintiffs' witnesses testified that on several occasions he had discussed with the agent of the Pacific Electric Railway Company at El Segundo the dangerous nature of the crossing, and had suggested that a wigwag be installed. While the respondents assert that an examination of their exhibits will show the locality to be "a sparsely settled rural community with the standard cross-arm plainly visible," nevertheless the crossing is a well-traveled one within the city limits of Hawthorne, a witness testifying that he "would estimate, including [his] customers and others driving touring cars, inclusive of [his] own trucks, about two hundred people" daily crossed the tracks at Eucalyptus avenue.

[2] Plaintiffs' first assignment of negligence on the part of the defendants concerns the alleged failure of the motorman to blow the whistle sufficiently in advance of reaching the crossing to give proper warning. There was a substantial conflict in the testimony as to the time of giving the signals, and as to their extent. The fact that there was positive testimony on the subject does not conclusively establish that the required crossing signals were given. It creates merely a conflict of testimony to be resolved by the jury. Thompson v. Los Angeles, etc., R. Co., 165 Cal. 748, 752, 134 P. 709; Vaca v. Southern Pac. Co., 91 Cal. App. 470, 475, 267 P. 346; see, also, Marchetti v. Southern Pac. Co. (Cal. Sup.) 269 P. 529, 531.

[3-5] With reference to the alleged excessive speed of the car, respondents contend that, in the absence of a regulatory statute or ordinance, a railway company may ordinarily run its trains at such speed as it sees fit, and that a charge of negligence cannot be predicated on that rate of speed unless there are attendant circumstances which make such

speed negligence. They also cite authorities as to the right of a railroad company to operate its trains at a high rate of speed in country districts. While it is true that no rate of speed is negligence per se in the absence of a statute or ordinance, it does not follow that a railroad company will be permitted to run its trains under all conditions at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property, especially when running through towns and cities. The character of a crossing, it has been well reasoned, affects the duty of the railroad company towards travelers upon the public highway, and its trains must pass over dangerous crossings at a less rate of speed proportionate to the danger. As previously stated, the scene of the collision was not the ordinary country grade crossing, but a well-traveled, paved avenue within the city limits. It was stipulated that the distance between Hawthorne and El Segundo, the termini of the portion of the electric line involved in this case, was 4.56 miles. Estimates as to the speed of the car varied from 12 to 20 miles an hour, and there was some evidence that the train was coasting. While the defendant motorman testified that his car was traveling about 15 miles an hour as he approached the intersection, he further stated that the running time between the two termini mentioned, with seven scheduled stops, was 11 minutes. A brief computation will demonstrate that the car would have to average a trifle less than 25 miles an hour in order to keep within the allotted running time, without making any allowance for the slackening of the car before stopping, and without any deduction for the time actually lost in taking on passengers. Eucalyptus avenue was not one of the scheduled stops, and it would be only reasonable for the jury to infer that, in order to keep within the scheduled running time, the train would travel faster where there were no regular stations than it would when nearing one where it was required to stop. "A rate of speed that may be allowable in a thinly settled part of the country, where but few persons will have occasion to cross the tracks, may be so dangerous as to constitute negligence on the part of the railroad company when driving a train through a city or village, where many persons are likely to cross the track." 2 Thompson on Negligence, § 1875. As the standard of duty shifts with the circumstances developed in the case, the question whether or not a rate of speed is excessive is one of fact for the jury. As this court said in Bilton v. Southern Pac. Co., 148 Cal. 443, 447, 83 P. 440, 442: "* * * There can be no doubt that the question as to whether or not a rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the particular circumstances there existing, and, if the circumstances are such that reasonable and impartial men may well differ as to whether the speed maintained at the particular place showed a want of reasonable care, the question as to whether the railroad company was guilty of negligence in maintaining such speed is one for the jury"—citing authorities. See, also, Marchetti v. Southern Pac. Co., supra, at pages 531, 532 of 269 P.; Tousley v. Pacific Elec. Ry. Co., 166 Cal. 457, 460, 137 P. 31.

[6] The third charge of negligence against the defendants relates to the failure to operate the car with due care in view of the dangerous condition of the crossing. A witness testified that there was practically a solid wall of obstruction commencing with the house north of the garage and continuing up to within 19 feet, 6 or 8 inches of the track, and that there was no opportunity at all, until one passed the latter point, to see a car coming from the west. According to the testimony of the motorman, "a box-car was located on the siding just north of the track that [he] was operating on, approximately 40 feet west of Eucalyptus avenue." He first saw the truck as he came out from behind the box car, and about 35 feet from the crossing. There was also testimony showing that, if a box car was stopped in a position to load on the platform on the south side of the Sanderson warehouse, an automobile would have to be beyond the siding tracks to see a train coming from the west. A witness was asked whether, under those conditions, in an automobile in which the driver's point of vision was 7 feet back of the front of his car (as was the case with the auto truck involved in this collision), the driver could see a train approaching from the west—west of the telephone pole—without putting himself "in a position of peril."

"The Court: What do you mean by 'a position of peril'?

"Counsel for Plaintiffs: By 'a position of peril' I mean a position where you would be so far on the track that if a car came down there it would strike the automobile in which you were.

"The Witness: It would not strike me, but it would strike the automobile, for the reason that I would have to have at least my radiator and the center of my front wheels on the track."

In Bilton v. Southern Pac. Co., supra, this court said at page 447 of 148 Cal., 83 P. 442: "The obligation rested upon it [the railroad company] of taking such care to prevent injury by its trains to those passing over the crossing as would, under the existing circumstances, be reasonable, and if the view of its track was so obstructed that a person lawfully using the street could not, before passing from a place of safety to a place of danger, see an approaching train just beyond the obstruction, in time to escape it, if it moved at a high rate of speed, it was its duty to moderate the speed accordingly, or make the approach of the train reasonably apparent by other methods to the user of the street."

Marchetti v. Southern Pacific Co., supra, was an action for damages for death caused by a collision. The court granted defendants' motion for a nonsuit based on the contributory negligence of the deceased. There, as here, the evidence showed the crossing to be dangerous because of existing obstructions, and there was a conflict as to the sounding of proper warnings. On appeal the respondents contended that, even though it should be held there was error on the part of the trial court in granting their motion on the ground of contributory negligence, the order should be sustained, because there was no evidence of negligence on their part in the operation of their train at the time of the collision. In passing upon this contention, this court said: "It was held in Green v. Southern Pacific Co., 53 Cal. App. 194, 202, 199 P. 1059, 1062: That the law imposed 'upon a railroad company the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, to avoid injury to persons lawfully traveling upon the public highway crossed by the company's tracks and trains. It then becomes a question for a jury to decide whether or not it was negligence for the company to run its cars across the highway without providing a flagman or some means of warning to travelers at the place of crossing. And, where the facts in evidence prove that usually or frequently there are obstructions which interfere with the opportunity to see moving trains while travelers on the highway are approaching a much-traveled crossing, it cannot be held that as a matter of law it is not negligence to run trains there without warning signals other than those usually given by engines and cars.'" We thus arrive at the conclusion that the plaintiff, upon the issue of the defendants' negligence, was entitled to have the case go to the jury.

[7, 8] We are thus brought to a consideration of the question as to whether, upon the practically undisputed evidence in the case, the deceased must be held to have been guilty of such contributory negligence, as a matter of law, proximately causing his death, as would have justified the trial court in granting the defendants' motion for a directed verdict in their favor upon that ground. The uncontradicted evidence in the case discloses that the deceased was a man of good health and in the prime of life, and that he was, and for several months prior to the casualty which resulted in his death had been, engaged in the business of selling and distributing bottled water, in the conduct of which he used the small truck which he was driving just before the collision, and that the territory which he served with his product lay upon both sides of the railroad, and included Eucalyptus avenue. It must be concluded, therefore, that he was familiar with the crossing where the collision occurred. The evidence as to the rate of speed at which the decedent customarily crossed the railroad track was conflicting, and there is also some conflict in the evidence as to the rate of speed at which the deceased was driving on Eucalyptus avenue immediately before the collision occurred. There is, however, no conflict in the statement of several eyewitnesses, whose testimony is unimpeached, as to the action and conduct of the deceased in approaching the crossing upon this final and tragic occasion, and from this evidence it appears conclusively that from the place where he was first observed by these witnesses, and which varied from 45 to 150 feet from the crossing, the deceased was driving his truck, holding its steering wheel with his left hand, and looking down toward the seat or into the body of his car, his right arm and hand being extended in that direction, but whether to lay hold of an emergency brake or to do some other act does not appear. These witnesses agree that, while the deceased was thus within their observation, he did not stop and did not look in the direction of the crossing or of the approaching train until he had reached a point well within the danger zone and within a few feet of the crossing. In the presence of this positive and unimpeached testimony it is clear that there was in this case no room for the application of the presumption set forth in subdivision 4 of section 1963 of the Code of Civil Procedure "that a person takes ordinary care of his own concerns." When the deceased had thus reached a point a few feet from the crossing, without stopping, without looking, and apparently without listening, for the sight or sound of an approaching train, a section foreman, who was observing his approach and who testified that the deceased "wasn't looking where he was going," called loudly to him and immediately called again; whereupon the deceased "looked up and he got ahold of his wheel and steering his car turned his car the same way the Pacific Electric car was running." He was too late, however, to fully avoid a collision, and while his machine did not quite reach the rails, some portion of the overhang of the electric car struck the forward part of it, and by the force of the impact the deceased was thrown from his car and killed. The appellants herein urge that in view of the foregoing evidence the jury might have concluded that the deceased in thus approaching the crossing in question might have had his right hand upon the emergency brake of his car preparatory to stopping it before reaching the track, and that by the loud shouts of the section foreman he was so far distracted from such possible purpose as to conceive the idea that by suddenly turning his car to the left he might avoid a collision, and that but for such distraction he would have stopped his car in time to escape injury. This reasoning, however, does not rise above the dignity of mere conjecture and cannot be held to work

an avoidance of the duty which the deceased owed to his own safety to stop and look and listen upon approaching a railroad crossing, which is always a sign of danger, and which in this instance was rendered even more so by the obstructions to clear vision which were along or at the time upon the railroad right of way. This court has had frequent and recent occasion to define the duty of persons approaching in vehicles railroad crossings similar to that existing in this case and similarly obscured, and in each of these cases this court has uniformly held that the conduct of persons thus approaching such crossings without stopping, looking or listening for approaching trains amounted to contributory negligence, as a matter of law, which would prevent the recovery by themselves, or, in the event of their death, by their personal representatives, in the event of a consequent casualty. Griffin v. San Pedro, etc., R. R. Co., 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; Murray v. Southern Pac. Co., 177 Cal. 1, 169 P. 675; Billig v. Southern Pac. Co., 192 Cal. 357, 219 P. 992; Parker v. Southern Pac. Co., (Cal. Sup.) 269 P. 622; California Rendering Co. v. Pacific Elec. Ry. Co. (Cal. Sup.) 269 P. 922; Koster v. Southern Pac. Co. (Cal. Sup.) 279 P. 788.

We are constrained, therefore, to hold, after a full consideration of the facts of this case and of the law applicable thereto, that the action of the trial court in granting the defendants' motion for a directed verdict and in instructing the jury to return such verdict in the defendants' favor must be upheld. The judgment rendered upon such verdict is accordingly affirmed.

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208 Cal. 566

CONTINENTAL MORTG. CO. v. EYRAUD.
(L. A. 10018.)★

Supreme Court of California. Dec. 6, 1929.

Rehearing Denied Jan. 2, 1930.

Pleading 🔑49—Complaint seeking recovery for rent of apartment and furnishings supported recovery both on rental agreement and conditional sales contract.

Complaint, alleging plaintiff had rented an apartment house to defendant and that defendant became indebted to plaintiff for rent of apartment house and furnishings therein contained, *held* sufficient, under liberal rule of construction applied to pleadings, to support theory that action embraced total sum due to plaintiff, upon rental agreement and conditional sales contract.

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by the Continental Mortgage Company against Albert Joseph Eyraud. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding 278 P. 503.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

Newby & Palmer, Nathan Newby, Newby & Newby, and Dee Holder, all of Los Angeles, for respondent.

WASTE, C. J. Plaintiff brought an action alleging that it had rented to the defendant an apartment house in the city of Los Angeles, including the furniture and furnishings therein, and that during a specified period the defendant "became indebted to the plaintiff for the rent of said apartment house and the furnishings therein contained." The agreement upon which the action is based granted the defendant the right to lease the apartments for a term of years and to purchase the furniture, furnishings, and equipment in the apartments upon a conditional sales contract; both propositions being embraced in a single instrument.

The defendant took possession of the premises and the furnishings and operated the establishment for a period of more than 26 months, finally voluntarily relinquishing possession and entering into an agreement with the landlord by which the parties adjusted their rights as to their future relations under the terms of the contract, but specifically providing that any indebtedness under the contract should be determined as of the date of relinquishing possession. The plaintiff landlord thereupon brought this action to recover the sum of $15,750, the amount alleged to be due upon the original contract. The trial court took the view that the action embraced the total sum due to the plaintiff, both upon the rental agreement and the conditional sales arrangement, and fixed the total balance due upon the entire contract at the sum of $14,955, for which judgment was entered in favor of the plaintiff.

It was, and is, the contention of the defendant that the complaint should be construed strictly as one for rent, and that no part of the unpaid purchase price of the furniture should be included in the judgment. While it may be said that the allegation of the complaint might have been more specific, it was sufficient, under the liberal rule of construction now applied to pleadings in this jurisdiction, to support the theory adopted by the trial court that the action embraced the total sum due to the plaintiff, both upon the rental agreement and the conditional sales portion of the contract. We think the action of the court was proper, for any other view would be too restricted a view to take of the case. The trial court apparently took evidence upon the entire transaction between the parties,

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★Rehearing denied.

and estimated the total amount due upon the rental agreement and also upon the conditional sales contract as of the date of the termination of the relations between the parties, and deducted therefrom the total payments which the defendant had made. By so doing it found the total balance due from the defendant to the plaintiff, for which it gave judgment. We are of the view that the action properly contemplated a recovery of the whole sum due from the defendant to the plaintiff upon both parts of the single contract between them, and that the recovery is warranted by the evidence and the findings.

The judgment is affirmed.

We concur: SEAWELL, J.; SHENK, J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

NUTTALL v. WALTON et ux. (L. A. 10409.)★

Supreme Court of California. Dec. 17, 1929.

Rehearing Granted Jan. 16, 1930.

1. Automobiles ⚷244(6)—Evidence that pedestrian was struck by automobile while attempting to go around parked automobile held to support verdict that driver was negligent.

Where pedestrian was injured when struck by automobile while pedestrian was attempting to go around another automobile parked on highway, evidence *held* sufficient to support verdict that driver was guilty of negligence.

2. Automobiles ⚷244(30)—Evidence that wife was driving automobile to post office for family mail, with presumption arising from ownership held to justify verdict against husband for pedestrian struck by automobile.

In pedestrian's action for personal injuries received when struck by automobile which was community property of husband and wife, evidence that wife was driving automobile to post office for family mail, with presumption that driver of automobile was agent and owner, *held* to justify verdict against husband.

3. Trial ⚷260(3)—Refusing defendant's requested instructions relating to burden of proof, covered by other instructions, held not prejudicial.

In pedestrian's action for personal injuries received when struck by automobile, refusing defendant's requested instructions relating to burden of proof *held* not prejudicial, where their import was before jury in other instructions.

In Bank.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by R. W. Nuttall against D. C. Walton and wife. Judgment for plaintiff and defendants appeal. Affirmed.

Willis I. Morrison, of Los Angeles, and M. A. Fitzgerald, of San Luis Obispo, for appellants.

Albert Nelson, of San Luis Obispo, for respondent.

LANGDON, J. This appeal is by the defendants from a judgment entered against them for approximately $5,000 in an action brought by the plaintiff to recover for personal injuries. The defendants are husband and wife. The wife was driving an automobile, the community property of herself and husband, when she struck the plaintiff, causing his injuries. The accident occurred at Oceano Cal., on Front street, which runs in a general northerly and southerly direction. At the place of accident the street is approximately 52 feet wide and straight and unobstructed for several city blocks each way. There is a pavement in the center of the street, approximately 15 feet wide, and the accident occurred to the west of the center line of the street and on the cement portion thereof. At the time two automobiles were parked on opposite sides of the street, both headed in a southerly direction, the one on the westerly side of the highway parallel to the highway, with its left front wheel upon the cement portion thereof; the other, a Ford automobile, belonging to Mrs. Ethel Bowman, one of the witnesses in the case, was on the easterly side of the highway, with its right wheels probably a foot or so off the cement portion thereof. The plaintiff testified that he had been walking in a southerly direction on the easterly side of the highway and had crossed over the highway in a diagonal direction to the automobile on the westerly side, occupied by Mr. M. I. Benchinol; that when he reached this car the curtains were up on the left-hand side, and he therefore wanted to get around on the other side; that he walked along the highway beside the running-board on the left side to get around the front of the car, and was struck when he was about opposite the hood over the engine.

Plaintiff's theory of the case was that the defendant driver was negligent in not turning to the left to avoid plaintiff or in not stopping her automobile before injuring him, as he was in plain view as she came along the highway.

Upon appeal, the main contention of appellants, with relation to the facts of the case, are: (1) That there is no evidence of negligence on the part of the driver of the automobile; (2) that there is no evidence to charge the husband with the negligence of the wife, even though such negligence be conceded to exist.

[1] In answer to the first contention, the above-mentioned testimony of plaintiff, corroborated in part by other witnesses, is sufficient to justify the verdict of the jury upon the question of negligence. The plaintiff testified that he crossed the street to the car in which Benchinol was sitting and "I found the curtains up on this side and I tried to communicate with Benchinol and I couldn't do it and then I decided it was no use trying, I will

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★Rehearing granted.

go over to the other side and I called out, whether Benchinol heard me or not, I said: 'I am going on the other side.' I saw it was open on the other side, on the right side of the car, and then I was in the middle of the car and I saw the other car coming on me; I couldn't get back to meet it, I sprang forward. Just as I got to the left fore wheel of the Porter car (in which Benchinol was sitting) I was struck on the right hip and forced forward five or six feet and then fell backwards on my left hip and broke the leg." He testified that he saw the defendants' car coming down toward him quickly when it was 50 or 60 feet away; that it was "coming fast towards me so I couldn't go—it was around the stern of this car—I jumped thinking I would get out in front but she struck me before I got out." The width of the highway between the automobile in which Benchinol was sitting and the sidewalk in front of the butcher shop was over 25 feet and the automobile on the west side of the street occupied but 2 or 3 feet of this space, leaving ample room for the defendant driver to have turned to the left and avoided striking plaintiff. This may have been the basis of the jury's verdict, or it might have concluded that, in the exercise of reasonable care, the driver should have stopped her automobile when she saw plaintiff's perilous position, as she must have seen it if she had been looking ahead. The evidence shows that she blew her horn twice, but that plaintiff was very deaf, being a man about 90 years of age.

The foregoing discussion of the evidence indicates sufficient basis for the finding of the jury that the driver was guilty of negligence proximately causing the injury to plaintiff.

[2] Upon the second question of fact involved, which relates to the appeal of the husband, the record contains the testimony of both husband and wife that she was accustomed to use the automobile involved here for household errands, such as making purchases for the family, calling for mail at the post office, taking her husband's mail to the post office, and delivering flowers and vegetables which she raised and sold to the store; that on this particular occasion she was going to the post office for the family mail. Aside from this testimony upon which the jury might return a verdict against the husband, there was the presumption arising from ownership which would have justified the verdict. Randolph v. Hunt, 41 Cal. App. 738, 183 P. 358; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73; Diercks v. Newsom, 49 Cal. App. 789, 194 P. 518.

[3] The other assignments of error are with reference to the refusal of the trial court to give certain instructions. Several of these instructions related to the burden of proof and to the necessity of the plaintiff proving his case by a preponderance of the evidence. The instructions regarding these matters should have been given, as they are correct abstract statements of law, but their import was before the jury in other instructions given, for the court defined "negligence" and "preponderance of evidence," and stated that, "in the event such negligence on the part of plaintiff be proven by a preponderance of the evidence * * * and you further find that said negligence contributed proximately to the injury, then you must bring in your verdict for the defendants. * * *" While the same idea should have been embodied in an instruction for the defendants, upon the record before us, we may not reverse the judgment because of this omission.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.

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208 Cal. 578

STAPLES v. HAWTHORNE et al.

(L. A. 9917.)

Supreme Court of California. Dec. 10, 1929.

1. Specific performance 🔑86—Agreement to will property to certain person is valid and enforceable, on maker's death, against persons succeeding to his property contrary thereto.

Agreement to make a will in favor of certain person is valid and binding on person making it, and will be enforced on latter's death against persons succeeding to decedent's property contrary to terms of such agreement.

2. Frauds, statute of 🔑55—Validity of oral agreement to will estate to certain person is not affected by subsequent statutory amendments requiring that such agreements be in writing (Civ. Code, § 1624; Code Civ. Proc. § 1973, as amended).

Validity of oral agreement, made before 1905 and 1907 amendments of Civ. Code, § 1624, and Code Civ. Proc. § 1973, to will estate to child taken into maker's home, is not affected by requirement of such amendments that such agreements be in writing.

3. Evidence 🔑597—Evidence of facts and circumstances tending to controvert and impeach credibility of testimony, not expressly contradicted, justifies finding contrary thereto.

Evidence of facts and circumstances tending to controvert and impeach credibility of testimony not expressly contradicted by testimony of any witness, justifies finding by trial court contrary to such testimony.

4. Specific performance 🔑121(7)—Evidence of facts and circumstances tending to impeach credibility of uncontradicted testimony as to testatrix's agreement to will estate to certain person held sufficient to justify finding that no such agreement was made.

In action for specific performance of testatrix's alleged oral agreement with plaintiff's father to will her entire estate to plaintiff, and enforcement of trust in property willed to defendants, evidence of facts and circumstances tending to impeach credibility of testmony as to such agreement *held* sufficient to justify trial court's finding that no such agreement was made, though such testimony was not expressly contradicted.

5. Appeal and error 🔑930(1)—Supreme Court must assume, in support of judgment for defendants, that trial court accepted testimony contradicting plaintiff's testimony.

Supreme Court must assume, in support of judgment for defendants in action for specific performance of testatrix's alleged oral agreement to will her entire estate to plaintiff, that trial court accepted testimony of estate's attorney that plaintiff made no statement to him regarding her claim to property of estate by virtue of such agreement, and rejected plaintiff's testimony that she informed such attorney of agreement.

6. Specific performance 🔑121(6)—Trial court must base conclusion as to terms of agreement on evidence of parties' acts and surrounding circumstances, where one party has died.

Where one of parties to contract has died, and hence cannot contradict statements as to terms of agreement and performance thereunder, trial court must base conclusion on testimony as to parties' acts and circumstances surrounding them.

7. Depositions 🔑83(3)—Striking mere conclusions of law from deposition is not error.

Trial court's action in striking out portions of deposition, which are mere conclusions of law rather than statements of fact, is not subject to criticism.

8. Appeal and error 🔑1043(6)—Striking portions of deposition fully covered by portion admitted held not prejudicial to appellant.

Striking out portions of deposition *held* not prejudicial to appellant, where main part thereof was admitted in evidence and fully covered essential facts sought to be proved thereby; portions stricken being principally repetitions of what witness had before testified to in somewhat different language.

9. Pleading 🔑349—Plaintiff was entitled to judgment on pleadings against defendants, admitting allegations of complaint and stipulating that judgment might be entered as prayed for.

Where defendants, who had assigned their interests in testatrix's estate to plaintiff, filed answers admitting all allegations of complaint in action for specific performance of testatrix's alleged oral agreement to will entire estate to plaintiff, and stipulated that judgment might be entered as prayed for, plaintiff was entitled to judgment against such defendants on pleadings.

10. Stipulations 🔑17(2)—Certain defendants' stipulation that judgment might be entered as prayed for, and judgment against them, cannot affect plaintiff's right as to remaining defendants.

Neither stipulation of defendants who assigned their interests in testatrix's estate to plaintiff, that judgment for specific performance of testatrix's alleged oral agreement to will entire estate to plaintiff might be entered as prayed for in complaint, nor judgment for plaintiff against them, can affect plaintiff's right as to remaining defendants.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Ethel M. Staples against Laura Hawthorne and others. Judgment for defendants, and plaintiff appeals. Affirmed as to defendants Hawthorne and others, and so modified as to defendants Copps that plaintiff may have judgment against them.

Superseding opinion in 277 P. 1107.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

C. W. Byrer, of Los Angeles, for respondents.

CURTIS, J. Plaintiff brought this action for the specific performance of an oral agreement alleged to have been made by Clymena W. Hosmer with the father of the plaintiff, and to enforce a trust in and to all property owned by said Clymena W. Hosmer at the time of her death, and which by the terms of her last will she had bequeathed and devised to the defendants. In her complaint, plaintiff alleged that, during her infancy, her mother having died, her father gave her into the care and custody of N. H. Hosmer and his wife, the said Clymena W. Hosmer, upon the express, though verbal, agreement, entered into by the Hosmers with plaintiff's father, whereby N. H. Hosmer and Clymena W. Hosmer agreed to take plaintiff into their home and to care for her and treat her as their own child, and that upon their death they would will to her their entire estate. She further alleged the death of N. H. Hosmer; that he left a last will by which he devised and bequeathed to his wife, Clymena W. Hosmer, all of his property; that the said Clymena W. Hosmer died, leaving a last will and testament by which she attempted to dispose of the property belonging to her, including that received by her from her husband, as follows: To the plaintiff $500, to Paul C. Staples, plaintiff's husband, $500; to the defendant Alfred S. Copps the sum of $500; to the defendant Arthur M. Copps the sum of $200; and the residue of said estate in equal shares to the defendants Laura E. Hawthorne, Lelia B. Morse, Angie Williamson, and Frank S. Morse.

The evidence upon behalf of plaintiff was to the effect that plaintiff was born in Sierra Madre, Cal.; that her mother was then in poor health, and that the plaintiff was cared for by the Hosmers in their home in Sierra Madre, both before and after the death of the mother of the plaintiff, which occurred a few months after plaintiff's birth. A short time after the death of plaintiff's mother, and in the year 1885, her father took her from the home of the Hosmers at Sierra Madre and back to the state of Maine, where he left her with her maternal grandmother, Margaret Twycross, in Cedar Grove, Me. About a year or so thereafter the Hosmers made a trip to Maine and visited the home of Mrs. Twycross, when and where they prevailed upon plaintiff's father and her said grandmother to permit them, the Hosmers, to take the plaintiff back with them to California. Immediately thereafter the Hosmers left for California, and from that time on until her marriage the plaintiff lived with the Hosmers in their home at Sierra Madre, who treated her in all respects as their own child.

The principal witnesses on behalf of the plaintiff were her two aunts, S. Lillie Twycross and Edith L. Twycross. These witnesses were sisters, and their evidence was given by means of depositions. They testified that they were sisters of plaintiff's mother, and that they resided with their mother, Margaret Twycross, who was also the grandmother of the plaintiff, at Cedar Grove, Me., at the time that plaintiff's father, James W. Bower, brought plaintiff to Maine and left her with her said grandmother; that plaintiff was then about two years of age and that she lived with her grandmother about one year; that in 1886 N. H. Hosmer and his wife, Clymena W. Hosmer, came to their home in Cedar Grove. We will now quote from the testimony of Edith L. Twycross, whose testimony is in all essential features the same as that of S. Lillie Twycross:

"I was present and heard the discussion and agreement which resulted in Mr. Bower and my mother consenting that Mr. and Mrs. Hosmer should take my niece, Ethel May Bower, to be a daughter to them. My sister, Harriet Twycross Bower, and her little daughter Ethel had lived in the Hosmer home in Sierra Madre, California, for some time before my sister's death; and Mr. and Mrs. Hosmer had become much attached to the child, having no children of their own, and after Ethel's father, Mr. Bower, had brought her here and left her with her grandmother they missed her in the home so much, and had such a longing for her to take the place of a daughter to them, that they came all the way from California to get the consent of her father and grandmother to their taking the child for their own. They told us these things, and how much of brightness and joy Ethel had already brought to them, and how happy it would make them to have her for their own and they promised that, if she was given to them, they would give her a good home and their hearts' deepest affections and a good education, and that they would leave all their property to her when they died. These matters were all talked over a number of times while Mr. and Mrs. Hosmer were visiting in our old home place on the hill, a year or more after Ethel was brought here. Those present were my mother, Mrs. Margaret O. Twycross, Ethel's father, James Bower, Mr. and Mrs. N. H. Hosmer, little Ethel May Bower, my sisters, Lydia, Alice and Lillie, and myself."

This witness testified, as did her sister, S. Lillie Twycross, that as a result of the visit of the Hosmers to the home of the plaintiff's grandmother and the conference held there between the Hosmers and plaintiff's relatives, the Hosmers returned to California with the plaintiff, where she lived in the Hosmers' home as their own daughter.

There was also evidence from other witnesses that the Hosmers had at different times made admissions to the effect that they had agreed to make their will in plaintiff's favor. There was no evidence expressly contradicting the evidence given by the aunts of the plaintiff, the Twycross sisters, nor that given by the other witnesses who testified as to said admissions; that is, the defendants produced no witness who testified that the Hosmers did not agree to make their will in plaintiff's favor as testified to by the Twycross sisters. Neither were either of these witnesses impeached in the manner provided by any section of the Code of Civil Procedure. The trial court, nevertheless rejected the testimony of the Twycross sisters as to the agreement of the Hosmers to make their will in plaintiff's favor, and, while it found the facts in all other respects as testified to by them, it found that it was not true that any agreement had been entered into whereby the Hosmers agreed "to bequeath or devise or to otherwise give or transfer or convey all or any part of their property to plaintiff." Judgment based upon these findings was rendered in favor of the defendants, and the plaintiff has appealed therefrom.

The principal ground upon which the plaintiff bases her appeal is that the evidence is insufficient to support the findings, and particularly the finding of the trial court that no agreement had been made by the Hosmers that they would make a will in favor of the plaintiff, whereby they would bequeath and devise to the plaintiff their property.

[1, 2] It is well settled by the decisions of this court that any agreement to make a will in favor of a certain person is valid and binding upon the person making said agreement, and that upon the death of the latter said agreement will be enforced against those who have succeeded to the property of said decedent contrary to the terms of said agreement. Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L. R. A. 369; Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728; Monsen v. Monsen, 174 Cal. 97, 162 P. 90; Steinberger v. Young, 175 Cal. 81, 165 P. 432; Wolfsen v. Smyer, 178 Cal. 775, 175 P. 10. There are certain limitations upon this rule noted in these authorities, but it is not necessary to mention them here.

Prior to the amendment in 1905 and 1907 of our Codes (Civ. Code, § 1624, and Code Civ. Proc. § 1973), it was not required that such agreement should be in writing. The agreement involved in the present action was claimed to have been made by the Hosmers with plaintiff's father long prior to the amendments of the code just referred to, and therefore its validity is not affected by them. Monsen v. Monsen, supra. There is, therefore, nothing in the nature of the agreement relied upon by the plaintiff which would preclude or prevent its enforcement if the same had been established by satisfactory and legal evidence.

[3] It is the contention of the plaintiff that this has been done. Her position is that the evidence of her aunts, the Twycross sisters, corroborated by those witnesses who testified to admissions made by the Hosmers, stands unimpeached and uncontradicted, and therefore the trial court was in duty bound to accept it and to make its findings and render judgment in accordance with said evidence. Cases of this type have frequently been before this court. Blanc v. Connor, 167 Cal. 719, 141 P. 217, belongs to this class. In the opinion rendered therein and on page 722, of 167 Cal. (141 P. 218) this court said:

"It is asserted that this is a class of cases sometimes arising in fraud and abounding in perjury, and, although disclaiming any thought that the instant case is so tainted, counsel contend that the court was justified in scrutinizing the testimony very carefully and refusing to accept it as proof of the contract unless it presented a very strong showing that the agreement was made substantially as alleged. It is true that courts are very slow to overturn findings of fact made by a jury and a fortiori those made by a court acting without a jury, even when contrary statements which are uncontradicted appear in the testimony of witnesses. The rule was thus stated in Davis v. Judson, 159 Cal. 128, 113 P. 150, in which Mr. Justice Lorigan, delivering the opinion of this department, said: 'While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying * * * credence, unless it appears that there are no matters or circumstances which at all impair its accuracy.' In many jurisdictions such contracts as that here asserted are scrutinized with the greatest care, and they are only sustained upon the most convincing proof. It is unnecessary to review the many authorities upon this subject from other jurisdictions. In this state the rule is well established and has been ever since the decision of Owens v. McNally, 113 Cal. 444, 45 P. 712, 33 L. R. A. 369, which has been reaffirmed every time a similar case has come to this court on appeal."

The same rule is enunciated in the following decisions of this court: Cox v. Schneer, 172 Cal. 371, 156 P. 509; Travis Glass Co. v. Ibb[illegible]son, 186 Cal. 724, 200 P. 595; Wilson v. Wood, 69 Cal. App. 552, 231 P. 1010, 1012. In Wilson v. Wood, supra, this court in denying a petition for transfer and hearing herein used the following language which aptly states the rule applicable to the facts in the present action: "It is true that the testimony of appellant's father as to the terms of the contract entered into between him and the Woods was not expressly contradicted by the testimony of any witness. But there were various facts and circumstances in evidence which tended legitimately to controvert this testimony and other facts and circumstances which had a tendency to impeach its credibility. Under these circumstances the trial court was legally justified in finding that it was not true that the father of plaintiff surrendered her to the Woods and consented to her adoption by them upon any other understanding or agreement than that appearing in the written contract of adoption."

[4, 5] In the present action we think there is ample evidence of facts and circumstances which tended to impeach the credibility of the evidence relied upon by the plaintiff. Among these facts and circumstances were those brought out by the testimony of Vernon Willey. He testified that he met Mr. and Mrs. Hosmer at the time of their visit to the state of Maine in 1887, and that he accompanied them on their trip home to California during that year, and that the plaintiff did not come to California with them on that trip. Immediately on his arrival in California he went with his uncle and aunt to their home in Sierra Madre, and lived there continuously thereafter and worked as chore boy for a period of about 2½ years. He testified that when they arrived at the Hosmer home the plaintiff was not there, but that some three or four weeks after their arrival he saw plaintiff for the first time and that as near as he could recollect she was brought to the Hosmer home by her father, James Bower. The Misses Twycross testified that it was in 1886 when the Hosmers took the plaintiff from her grandmother's home and

brought her to California, and the plaintiff in her original complaint alleged that it was in September, 1886, that the agreement was made between James Bower and the Hosmers and that the plaintiff was given by her father thereafter to the Hosmers. During the trial, however, the plaintiff amended her complaint, changing the year 1886 to 1887. It appears to be conceded by all parties hereto that the Hosmers made only one trip back to Maine during the years 1886 and 1887, and that said trip was made in 1887. Therefore, if plaintiff was brought back by them, it must have been in the year 1887, and not 1886.

We do not attach any undue importance to the discrepancy in the evidence of the Twycross sisters as to the year the Hosmers were at their mother's home. They may well have remembered the event and what transpired on that occasion, and still may not have remembered the exact year in which the event took place. Particularly would this be so when they were testifying some 37 years after the time of the occurrence which they were relating. But we do attach importance to the fact, testified to by Vernon Willey, that plaintiff was not brought by the Hosmers in 1887 when they returned from their trip East; that she was not in the Hosmer home in Sierra Madre when he arrived there with his uncle and aunt, and that he did not see her until three or four weeks thereafter, when, to the best of his recollection, she was brought to the Hosmer home by her father, James Bower. If this testimony is true, then it is in direct conflict with the whole theory of plaintiff's case. The Twycross sisters testified that plaintiff's father was to meet the Hosmers "somewhere en route to California and accompany them to California, and give Ethel to them to take the place of a daughter in their home." Plaintiff testified that, while she was only three years old at the time, she remembered the trip taken with Mr. and Mrs. Hosmer back to California, and her uncle, Samuel R. G. Twycross, testified that he was living at the Hosmer home in 1886 or 1887, when the Hosmers returned from their Eastern trip and that they brought the plaintiff back with them.

The testimony of Vernon Willey is corroborated by that of the witness, Rena Hawthorne. She testified that she was 14 years of age at the time the Hosmers went East in 1887; that she went with her father and mother to live in the Hosmer home during the absence of Mr. and Mrs. Hosmer on their trip to the state of Maine made during that year; that she was present when the Hosmers returned from this trip; that Vernon Willey was with them, but that the plaintiff was not. This witness testified that she remained with the Hosmers a day or two after their return, before she went with her parents back to their home in Compton, Cal., and that she did not see or meet the plaintiff until her next visit to the Hosmers, which was some months after they had returned. The evidence given by Vernon Willey and Rena Hawthorne, if believed by the trial court, was sufficient to justify the trial court, not only in rejecting the evidence of plaintiff and her uncle, Samuel R. G. Twycross, but in seriously questioning plaintiff's whole case.

Then, again, the further evidence given by the plaintiff herself was sufficient to warrant the trial court in doubting the validity of her claim. After the death of Mrs. Hosmer, the will already referred to was found. She filed the same for probate, together with her petition asking for her appointment as administratrix with the will annexed of Mrs. Hosmer's estate. In this petition she designated herself as the adopted daughter of the deceased. She was appointed administratrix, acted as such for over a year, and even had prepared for filing her final account and petition for distribution of said estate according to the terms of said will, before she brought this action. In the meantime she met and advised with various of the beneficiaries under the will, and particularly with Laura E. Hawthorne, who came to California to look after the interests of the residuary legatees. Not only did she not make any claim to the estate of said deceased by virtue of the agreement which she claims was made by her father with the Hosmers, but she actually leased some of the property of the estate, which had been by the will given to the residuary legatees, and paid them rent, during the administration of the estate. During this time, and up to the time shortly before the filing of her final account and petition for distribution, she made no claim whatever to any person that she was entitled to any portion thereof by reason of said agreement. This claim was then made to the attorney of the estate, who testified that "she intimated that she was going to make a claim for the entire estate." This was but a few days before the final account and petition for distribution was filed. They were filed May 13, 1924, and the petition for probate of Mrs. Hosmer's will was filed March 17, 1923.

She attempts to explain her action in failing to assert any right to the estate by virtue of the agreement by stating that she told the attorney for the estate all about the agreement at the time he was employed to probate the will of Mrs. Hosmer. The attorney denied, however, that any such statement had been made to him, or that plaintiff made any claim to Mrs. Hosmer's estate by virtue of the agreement until about the date of the final account and petition for distribution was filed. She admitted that her father in 1912 had told her that the agreement had been made by him with the Hosmers that they were to leave her all their property at their death. She, therefore, had full knowledge of her rights at all times since, and for some time prior to, the death of Mrs. Hosmer. We must assume in support of the judgment that the trial court accepted the testimony of the attorney of the estate that plaintiff had made no statement to him regarding her claim to the property of the estate by virtue of the agreement and rejected the evidence of the plaintiff that she had informed the attorney all about said agreement. Her actions, therefore, for more than a year after the death of Mrs. Hosmer were inconsistent with her claim that she was entitled to the whole or any part of the estate by virtue of the agreement made by her father with the Hosmers.

[6] From these actions of the plaintiff, subsequent to the death of Mrs. Hosmer, the trial court may well have concluded that the claim which the plaintiff was making was simply an afterthought on her part, and that it had no real merit in point of fact. The evidence of plaintiff's actions and conduct just recited would justify such a conclusion. "In cases of this kind, where one of the contracting parties has died, and his voice cannot be raised to contradict statements as to the terms of an agreement and of the performance had thereunder, necessarily the trial court is led to base its conclusion many times upon the testimony as to the acts of the parties and all of the circumstances * * * surrounding them. This evidence of conditions and circumstances may oftentimes illustrate well the truth of the old saying that 'actions speak louder than words.'" Pugh v. Bell, 21 Cal. App. 530, 534, 132 P. 286, 288.

The words just quoted, we think, aptly apply to the present action. It is not reasonable to suppose that the plaintiff, if she considered that she was entitled to the whole of the estate of Mrs. Hosmer, valued at over $27,000, would have undertaken to administer said estate under a will of the decedent which gave to her only the sum of $500 and to her husband a like sum, and that she would have carried on said administration until said estate was ready to be distributed under the terms of the will, without intimating in any manner that she had a claim to said estate over and above that which she took under said will. These acts of the plaintiff, and her dealings with the residuary legatees related above, were so out of harmony with the claim which she now asserts that they furnished to the trial court sufficient legal grounds for rejecting all evidence in her favor, bearing upon the making of the asserted agreement between her father and the Hosmers. With the evidence rejected by the trial court, its negative finding that no such agreement had been made was the only finding that would have been justified or supported by the evidence in the case.

[7, 8] The plaintiff further excepts to certain rulings of the trial court striking out portions of the deposition of Edith L. Twycross on the ground that the portions stricken out were mere conclusions of law. These exceptions are not well taken. Unquestionably the portions of the deposition stricken out were conclusions of law rather than statements of fact, and the action of the trial court thereon is not subject to criticism. But, even if the court erred in striking out portions of said deposition, the plaintiff was not prejudiced thereby. The main part of said deposition was admitted in evidence and the essential facts, which were sought to be proved by said deposition, were fully covered by the portion thereof before the court. The portions stricken out were principally repetitions of what the witness had before testified to, in somewhat different language. At most, the stricken portions were simply cumulative.

[9, 10] Plaintiff further contends that that portion of the judgment in favor of the defendants Alfred S. and Arthur M. Copps should be reversed. In this claim we think she is correct, as these defendants each filed an answer in which he admitted that all of the allegations of the complaint were true, and stipulated that judgment might be entered in said action as prayed for. This matter is of slight consequence to the plaintiff or to any one else, as it appears that she holds written assignments by the Copps of all their interest in said estate. But the question of making these assignments is not within the issues of the action, and the plaintiff is entitled upon the pleadings to judgment against the Copps as prayed for in her complaint. But neither the stipulation of the Copps nor the judgment in plaintiff's favor against them can in any way affect the right of plaintiff as to the remaining defendants in the case.

The judgment appealed from is affirmed, as between the appellant and respondents herein. As against the defendants Alfred S. Copps and Arthur M. Copps, it is so modified that plaintiff may have judgment against them as prayed for.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.; PRESTON, J.

102 Cal. App. 290

CRUSE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.★

(Civ. 6817.)

District Court of Appeal, Second District, Division 1, California. Dec. 3, 1929.

Rehearing Denied Dec. 19, 1929. Hearing Denied by Supreme Court Jan. 30, 1930.

1. Dismissal and nonsuit 🔑60(1)—Dismissal of action not brought to trial within statutory time is mandatory (Code Civ. Proc. § 583).

Under Code Civ. Proc. § 583, dismissal of action not brought to trial within five years after filing of answer is mandatory; language thereof not admitting of construction or exercise of discretion by trial court.

2. Dismissal and nonsuit 🔑80—Court cannot vacate sale of note, deposited by husband as security for payments to wife, after dismissing separate maintenance suit, for delay in bringing it to trial (Code Civ. Proc. § 583).

Where wife's action for separate maintenance was at issue over 14 years without being brought to trial, it was superior court's imperative duty to grant motion to dismiss action, under Code Civ. Proc. § 583, and court had no authority to consider defendant's motion thereafter to vacate sale of trust deed note deposited by him as security for payment of sums ordered paid to plaintiff, whether or not section 473, under which defendant sought relief from effect of his mistake, inadvertence, surprise, or excusable neglect in having action dismissed, covers situation.

3. Dismissal and nonsuit 🔑81(5)—Husband's ignorance of fact that note, deposited as security for payments to wife, had been sold, held not to authorize consideration of his motion to vacate dismissal of separate maintenance suit (Code Civ. Proc. §§ 473, 583).

Husband's lack of knowledge or notice, at time of making motion to dismiss wife's action for separate maintenance for failure to bring it to trial within time required by Code Civ. Proc. § 583, that trust deed note, deposited by him as security for payments ordered made to wife, had been levied on and sold by sheriff, did not authorize court to consider motion to vacate order of dismissal for mistake, inadvertence, surprise, or excusable neglect, under section 473; such facts not directly affecting grounds for dismissal.

4. Dismissal and nonsuit 🔑81(2)—Court cannot vacate order dismissing action, unless motion is based on facts directly affecting grounds for dismissal (Code Civ. Proc. § 583).

Court is without jurisdiction, and may be prevented from proceeding with consideration, of motion to vacate order dismissing action for failure to bring it to trial within time required by Code Civ. Proc. § 583, unless motion to vacate is based on facts directly affecting grounds on which dismissal was authorized and granted.

Application by Cora Cruse for a writ of prohibition to the Superior Court of the State of California, in and for the County of Los Angeles, and J. Walter Hanby, Judge thereof, to further proceeding in petitioner's action against Edgar Cruse for separate maintenance and support of their minor children. Writ granted.

Fairfax Cosby and Benjamin Lewis, both of Los Angeles, for petitioner.

J. L. Murphey and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, J. In an action in the superior court brought by Cora Cruse (who is the petitioner herein) against Edgar Cruse, her husband, for the separate maintenance of the wife and the support of the three minor children of the parties, an order was duly made requiring the defendant thereafter to pay to the plaintiff a specified sum of money each succeeding week. Some years following the date of such order, it appearing by affidavit made by the plaintiff in the action that the defendant therein was in default as to the payments to be made by him to his wife under such order, in pursuance of a motion presented to the superior court, a second order was entered by which the defendant was required to deposit with a trustee appointed by the court a certain trust deed note owned by the defendant as security for the payment by the defendant to the plaintiff of a specified sum of money each succeeding month thereafter in liquidation of the accumulated arrearage of $989.50 which was found and adjudged by the superior court to be due on the original order made for the support and maintenance of the plaintiff and the minor children of the parties. The written order by which the defendant was required to deposit said trust deed, among other things, contained the statement that "nothing herein set forth is intended to prevent or limit the plaintiff from levying an execution and selling said note and trust deed to satisfy said judgment of $989.50." In compliance with said order, the defendant delivered the trust deed note to the said trustee appointed by the court for the purposes aforesaid. Nine days after said last-mentioned order had been made, the defendant gave notice to the plaintiff that on a designated date he would move the superior court for an order of dismissal of the action pending between the parties on the ground, as provided in section 583 of the Code of Civil Procedure, that the action had been at issue for more than five years, to wit, more than fourteen years, without having been brought to trial. Thereafter, but before said motion to dismiss the said action came on for hearing, under a writ of execution the plaintiff procured said trust deed note in the hands of the said trustee to be levied upon and sold by the sheriff; the plaintiff becoming the purchaser thereof at such sale for the amount due to her as aforesaid from the defendant, plus the costs of such sheriff's sale. Two days following the date of such sale, in pursuance

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★Rehearing denied. Hearing denied by Supreme Court.

of the motion presented to the superior court by the defendant, the action pending between the plaintiff and the defendant was ordered dismissed on the ground, as set forth in said motion, that the action had been at issue for more than five years without having been brought to trial. Within two or three weeks next succeeding the date of the order of dismissal of the action, the defendant presented a petition or motion to the superior court for an order setting aside and voiding the "execution or order of sale" and setting aside "the sheriff's sale of the property of the defendant." On the original hearing of such motion the plaintiff objected to a consideration thereof on the ground that the court was without jurisdiction in the premises for the reason that the action theretofore had been dismissed. Thereupon the defendant filed a notice of motion to vacate the order of dismissal of the action. The several motions then having come on for hearing, and at the conclusion thereof, the judge of the superior court having indicated that each of such motions would be granted, the plaintiff has petitioned this court for a peremptory writ of prohibition by which the superior court and a designated judge thereof may be restrained from proceeding further in the matter of either of such motions.

[1] In part, section 583 of the Code of Civil Procedure provides that "* * * any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

The positive character of such statutory provision and its effect upon an action falling within its terms is illustrated by the statement found in 9 California Jurisprudence, p. 534, where it is said: "* * * When the delay equals that prescribed by the statute, the court loses jurisdiction of the action and can proceed no further therein, except to dismiss the action, and prohibition will lie to prevent it from taking any other course. * * *" (Citing authorities.)

The only case to which the attention of this court has been directed, which under appropriate circumstances might possibly indicate a discretionary power resting in the trial court in the matter of ordering a dismissal of an action not brought to trial within five years after the same is at issue, is that of Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670.

That the language of the statute does not admit of construction or the exercise of any discretion in the trial court, but that upon the lapse of the prescribed period the dismissal of the action is mandatory, is attested by many authorities. In the case of Ravn v. Planz, 37 Cal. App. 735, 736, 174 P. 690, it is said: "The provision of section 583 above set forth is mandatory. (Citing authorities.) The circumstance, therefore, that the trial of the cause was postponed several times without plaintiff's consent, one of those occasions being a relatively short time before the date when the defendant would be entitled to require the court to dismiss the action, is a matter of no significance. Courts are, of course, loath to deny to a litigant a trial upon the merits; but the section of the Code of Civil Procedure above recited directs in plain terms that it shall be done when a case falls within the conditions stated, and the present is such a case. The trial court had no discretion. The motion being made, its duty was to dismiss. To relax the rule to cover hard cases would be to set at naught the express will of the Legislature."

In the case of Boyd v. Southern Pacific R. R. Co., 185 Cal. 344, 197 P. 58, 59, on motion of the plaintiff made a few months before the expiration of the five-year period, the case was set for trial on a date subsequent to the expiration of such period. A judgment based upon an order dismissing the action was affirmed. In part, the court said: "The mandatory character of these provisions (sec. 583, Code Civ. Proc.) of the statute is evident, and our decisions have held that such is in fact their character. Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670. In the present case, the action was once set for trial at a time something over a year after issue joined by answer, but the trial date was continued indefinitely by stipulation. Some years later and a few months before the expiration of the five-year period, the plaintiff moved that the cause be set again for trial, and this was done but for a date after the expiration of the period. Upon the expiration of the period and before the trial date, the defendant moved that the action be dismissed, and the order of dismissal was made."

See, also, Davis v. Superior Court, 184 Cal. 691, 195 P. 390; Sauer v. Superior Court, 74 Cal. App. 580, 241 P. 570; Swortfiguer v. White, 141 Cal. 576, 75 P. 172; Modoc L. & L. Co. v. Superior Court, 128 Cal. 255, 60 P. 848; White v. Superior Court, 126 Cal. 245, 58 P. 450; Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470.

[2] It must therefore be concluded that within the authorities hereinbefore cited, in view of the fact that at the time the motion for dismissal was made the action herein had been at issue for more than five years, to wit, more than fourteen years, without having been brought to trial, on the presentation to the superior court of the motion to dismiss the action it became the imperative duty of such court to grant the motion. It is plain

that, at least after the action had been dismissed, the superior court was without jurisdiction to hear or determine any motion unrelated to the dismissal of the action which thereafter might be presented therein; and consequently that, so far as the motion made by the defendant to vacate the sale and "the execution or order of sale" was concerned, no authority was vested in the superior court to consider the same. As to the motion made by the defendant, purportedly under the provisions of section 473 of the Code of Civil Procedure, by which he sought to be relieved from the effect of his own "mistake, inadvertence, surprise, or excusable neglect" in having the action dismissed at his own instance, it becomes unnecessary to decide whether the language of such statute is sufficiently broad and comprehensive to cover a situation such as is here presented.

The case of Davis v. Superior Court, 184 Cal. 691, 195 P. 390, 392, depended upon a construction of section 581b of the Code of Civil Procedure, the provisions of which in principle are analogous to those contained in section 583 of that Code. In the case referred to it appeared that, contrary to the provisions of section 581b, for a period of over one year the plaintiff had failed to pay the required filing fee in an action which on motion of the defendant had been removed from the county in which the action was originally filed to the county in which the defendant resided, and that thereupon (also on motion of the defendant) the action had been dismissed. On motion made by the plaintiff to vacate such order of dismissal, it was admitted that the required fee for filing the action in the county to which the action had been transferred had not been paid within the time prescribed by the statute. The facts upon which the success of the motion to vacate the order of dismissal of the action rested were that the attorney for the plaintiff, who resided in the county in which the action was originally commenced, had retained another attorney to represent the plaintiff, and which attorney resided in the county to which the action had been transferred, to which latter attorney had been sent the money with which to pay the required filing fee; but that, although the money had been duly received by such latter attorney, the filing fee had not been paid. In discussing the point relating to the jurisdiction of the superior court to vacate the order of dismissal of the action, in part the Supreme Court said:

"* * * Respondent argues that the court had jurisdiction under section 473 of the Code of Civil Procedure, to set aside the judgment of dismissal, and that its order to that effect is therefore conclusive, except upon direct appeal. It may be conceded for the sake of the argument that if the judgment of dismissal had been set aside on the ground that, although the fees had been paid in time, it was given by reason of some inadvertence and neglect of the plaintiff whereby she had failed to appear, or, having appeared, had failed or had been prevented from showing facts which would have justified a refusal to give that judgment, and she had, on the motion to vacate it, shown that she had good grounds on the merits for opposing the dismissal the superior court would have had jurisdiction to vacate the judgment of dismissal, and that the order to vacate it could not be attacked by a proceeding in prohibition.

"But that is not the case we have before us. The only answer that could have been made to the application for dismissal in the present case, and the only ground that would have been sufficient to warrant a vacation thereof after such judgment was given, would be that the fees for filing the pleadings and papers had actually been paid within the year allowed by section 581b, or, possibly, that the plaintiff had been prevented from making such payment by some fraud or other conduct of the defendant that would have created an estoppel against him to claim the benefit of the provisions requiring a dismissal. * * *

"It appears therefore, as matter of law, from the facts disclosed by the moving papers, that the fees had not been paid in time. This being the case, it follows, under the plain provisions of section 581b and the principles established by the decisions above cited in regard to the meaning and application thereof, that the superior court had then no power or jurisdiction to entertain the motion or to do anything in the action except to dismiss it. If there had been no judgment of dismissal at that time, the only duty resting upon the court and the only power it had, from the admitted facts, was to enter a judgment of dismissal. And this was a continuing duty and the sole power of the court even after it had made the order vacating the dismissal. * * * It had no power to do anything else. * * *"

To the same effect, see Sauer v. Superior Court, 74 Cal. App. 580, 241 P. 570.

[3, 4] In the instant case, on the motion to vacate the order of dismissal of the action, the defendant made no showing which in any way tended to controvert the fact that the cause had been at issue for more than five years without having been brought to trial. That fact was acknowledged; indeed, the motion to dismiss having been made by the defendant, the success of his motion depended upon that fact. The only circumstance suggested by the defendant as constituting even an approach to "mistake, inadvertence, surprise, or excusable neglect" on his part was that at the time he made the motion to dismiss the action he was not aware of the fact that under the writ of execution hereinbefore referred to the trust deed note belonging to the defendant had been sold by the sheriff, and that "if he had had notice or knowledge that

the said note had been levied upon and sold by the sheriff as aforesaid, he would not have made the motion to dismiss said action. * * * " But it is apparent that such lack of knowledge or notice on the part of the defendant could in no wise either prove or tend to prove that the time limit of five years after the cause was at issue without having been brought to trial had not expired, or that any legal excuse existed for the delay beyond the statutory period. Nor would either the fact that the said trust deed note had been regularly levied upon and sold by the sheriff, or that the defendant was wholly unaware of or without notice of such circumstance, be pertinent or relevant to the only issue which could be properly raised on the motion to vacate the order of dismissal of the action. The ground relied upon by the defendant for such result was wholly immaterial to and had no bearing upon the question as to whether the five-year period prescribed by the statute had legally and within the intent and purpose of the statute expired without the cause having been brought to trial. From the authorities hereinbefore cited the principle of law may be deduced that, unless the motion to vacate a dismissal of an action is based upon some state of facts which directly affects the grounds upon which the dismissal was authorized and granted, the court is without jurisdiction and may be prevented from proceeding with a consideration of the motion to vacate the order of dismissal.

Although as having some bearing upon a decision of the main point in the present proceeding before this court, many different suggestions are made by the respective parties hereto, each of such points being dependent upon the points already considered, it is thought unnecessary to devote the necessary time and energy to a decision of any of them which otherwise they would be entitled to receive.

It is ordered that the respondents and each of them be and they are restrained from further proceeding in the action to which reference has been had herein and which is entitled and numbered respectively in the superior court, Cora Cruse, Plaintiff, v. Edgar Cruse, also known as Edward P. Cruse, Defendant, No. B26529.

We concur: CONROY, P. J.; YORK, J.

On Petition for Rehearing.

PER CURIAM. On petition for rehearing respondents direct the attention of this court to an error which occurred in the statement of facts in the opinion herein, wherein in effect it is said that in compliance with said (written) order the defendant Cruse delivered the trust deed note to the trust appointed by the trial court. As a matter of fact, the trust deed note in question was delivered by defendant Cruse to said trustee in compliance with the requirements of the original order (as distinguished from the written order) made by the trial court and entered on its minutes several days preceding the date of the written order to which reference is had in the opinion. It should also be noted that the original order as entered on the minutes of the trial court did not contain the statement that "nothing herein set forth is intended to prevent or limit the plaintiff from levying an execution and selling the said note and trust deed to satisfy said judgment of $989.50."

The petition for rehearing is denied.

102 Cal. App. 413

HARRIS v. MOORE. (Civ. 5668.)

District Court of Appeal, Second District, Division 2, California. Dec. 9, 1929.

1. Constitutional law 🔑23 — Constitutional amendments limiting appeals from superior court to proceedings wherein it has original jurisdiction held not to affect prior appeals (Const. art. 6, §§ 4b, 5 [see St. 1927, pp. 2389, 2390]).

Const. art. 6, §§ 4b, 5 (see St. 1927, pp. 2389, 2390), limiting appeals from superior court to proceedings wherein it has original jurisdiction, does not operate retrospectively, and therefore does not affect appeals taken prior to adoption thereof, in view of Const. art. 22, § 2, providing that all written prosecutions, actions, and causes of action, except as therein otherwise provided, shall continue and remain unaffected by adoption of the constitution.

2. Contracts 🔑129(3)—Contract employing private detectives to obtain sufficient evidence to enable defendant to get divorce held invalid.

Defendant's employment of private detectives for an agreed daily fee to procure sufficient evidence to enable defendant to file divorce action, or to obtain a divorce from his wife, and the promise of a bonus if detectives caught defendant's wife in a room with a man, *held* to create invalid contract because contingent on furnishing sufficient evidence for accomplishment of desired litigation.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Nicholas B. Harris, doing business under the fictitious firm name of the Nick Harris Detectives, against Joe Moore. From a judgment for defendant in the Superior Court on appeal from judgment for plaintiff in Municipal Court, plaintiff appeals. Affirmed.

Joseph L. Call, of Los Angeles, for appellant.

W. R. Elam, of Los Angeles, for respondent.

CRAIG, Acting P. J. The appellant instituted an action in the municipal court of the city of Los Angeles for services alleged to have been rendered to the respondent herein. Judgment was rendered in favor of the plaintiff, whereupon the defendant appealed to the superior court, wherein judgment was entered in favor of the defendant, and the plaintiff appealed here.

[1] Inasmuch as the jurisdiction of this court in proceedings brought before us is fundamental, we are required to determine the question of our authority to review them, although it be not raised by the parties. By amendments to article 6 of the Constitution (sections 4b, 5, art. 6, Cal. Const.; St. 1927, ch. 77, p. 2389), the people voted on November 6, 1928, to limit appeals from the superior court to those proceedings wherein it has original jurisdiction. The effect of these amendments has heretofore been discussed by the District Court of Appeal, and by the Supreme Court, and in at least one instance the appeal was dismissed. Johnston v. Wolf (Cal. App.) 274 P. 1028; Moye v. National Surety Co. (Cal. App.) 277 P. 499, Id. (Cal. Sup.) 280 P. 982. In those cases, however, the appeals were perfected after said amendments became effective, whereas the instant case was appealed here on April 21, 1927. Judge Cooley, in his work on Constitutional Limitations, at page 62, observed: "Retrospective legislation, except when designed to cure formal defects, or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it. And we are aware of no reasons applicable to ordinary legislation which do not, upon this point, apply equally well to constitutions." In Black on Interpretation of Laws, at page 20, it is said upon cited authority: "A constitutional provision should not be construed with a retrospective operation unless that is the unmistakable intention of the words used, or the obvious design of the authors." In Cassard v. Tracy, 52 La. Ann. 835, 27 So. 368, 369, 49 L. R. A. 272, an appeal was perfected prior to the date upon which a constitutional provision became effective. The Supreme Court of Louisiana, reviewing the above and many other authorities upon the subject, remarked that previously to being deprived of jurisdiction the appellate court might have set aside the judgment. "But no authority was vested in any other department of the government either to set the judgment aside or to control the discretion vested in the appellate court in the premises, or in any other manner, without due process of law." It was there concluded: "It is in view of consequences such as these that all writers upon the construction of law concur in the opinion that, whether constitutional or statutory, it should be construed to operate prospectively only, unless such construction is absolutely precluded by the language used. * * * It must be presumed that the members of the convention which adopted the constitution of 1898 were familiar with these commonly accepted canons of construction, and that, when they intended any particular provision incorporated in that instrument to operate retrospectively, they formulated it in such language as to leave no room for doubt." By section 4b, article 6, of our Constitution, the people ordained that "district courts of appeal *shall have* appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the supreme court) in all cases at law in which the superior courts are given original jurisdiction." That retroactive operation of this provision was not intended is manifest from the language of section 2, article 22, of our Constitution, which is similar to that considered in Cassard v. Tracy, supra. Except upon the abolition of a court, when provision for the transfer of its proceedings is made, the only mention of the effect of the Constitution upon pending litigation appears in said section. It is there expressly ordained that "all writs, prosecutions, actions, and causes of action, except as herein otherwise provided, shall continue and remain unaffected by the adoption of this Constitution." We conclude that the instant case, having been appealed prior to the adoption of section 4b of article 6, was not affected thereby.

[2] It appears that in response to a telephonic communication from respondent, a representative of the detective agency called upon him at his place of business, and was informed that respondent was desirous of obtaining a divorce from his wife, inquiring if the detectives could obtain sufficient evidence to accomplish such purpose. To quote the evidence presented by appellant: "Mr. Holcomb testified that he agreed to get sufficient evidence for defendant and appellant herein to get a divorce and agreed that if they caught Mrs. Moore in a room with a man that they wanted three hundred dollars ($300.00) bonus for extra services." "Mr. Cowen testified that he explained the terms of the contract to Mr. Moore and that he agreed to get sufficient evidence to file a divorce action or to obtain a divorce from Mrs. Moore." "Joe Moore testified * * * that Mr. Holcomb then explained the terms of the contract and said that they could get sufficient evidence for him to get a divorce." It was further testified that the two operatives thereafter saw Mrs. Moore in the embraces of a man other than her husband while seated upon a park bench. The superior court held that the contract of employment was against public policy, and was therefore illegal. This is the only question presented for decision.

Each of the parties relies upon Hare v. McGue, 178 Cal. 740, 174 P. 663, 664, L. R. A. 1918F, 1099, wherein it was held that inasmuch as the investigators were to be paid whether they procured witnesses or discovered any evidence or not, the contract was not against public policy; that they did not agree "nor were they asked by appellant, to procure witnesses to testify to any particular state of facts, but only to obtain from witnesses information of what they knew, and report the matters to the attorneys for appellant." It appears that in the instant case the operatives were employed for an agreed daily fee to make an investigation, and that they were promised a bonus upon conditions specified. The defendant testified that they did nothing. In this he was contradicted by the agents of appellant, but there is no contention that the bonus was earned. We think it also apparent that they would not have been employed had they not represented to the respondent that they could and would furnish sufficient evidence for the accomplishment of the desired litigation, and that the contract was founded upon such contingency. For aught that is before us the detectives knew nothing of the probability of existing grounds for divorce, yet the uncontradicted evidence showed that "they would get sufficient evidence for him to get a divorce." They were not employed to obtain from witnesses information of what they knew and to report such matters, but solely upon their agreement to furnish a particular state of facts. As stated in the case above cited: "It is the element of payment contingent on the success of the litigation in which the evidence is to be produced, or the fact that the agreement is to procure evidence, not of facts as they exist, but of particular facts necessary to the success of the party litigant, who contracted for their production, which vitiates the contract."

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

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102 Cal. App. 350

BROWN v. LANE. (Civ. 5667.)

District Court of Appeal, Second District, Division 1, California. Dec. 5, 1929.

1. Landlord and tenant 🔑109(4)—Lessor's acceptance of surrender of possession after notice demanding payment of rent was not, under circumstances, termination of lease by mutual consent.

Lessor's acceptance of surrender of possession of premises by lessee after service of notice demanding payment of rent or, in the alternative, that lessee quit and deliver up premises, was not sufficient to constitute a termination by mutual consent of the lease within meaning of provision of lease granting right of re-entry and recovery of damages by reason of any breach.

2. Landlord and tenant 🔑108(1)—Provisions of lease requiring notice to terminate lease on retaking of premises after default in payment of rent are controlling.

Where lease itself expressly provides that retaking of premises by lessor in accordance with his rights after default in payment of rent shall not be effective to constitute a termination of lease unless lessor further gives notice of election to treat lease as terminated, such provisions are controlling.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by G. C. Brown against Percy A. Lane. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Porter & Sutton, of Los Angeles, for appellant.

R. D. McLaughlin, of Los Angeles, for respondent.

CONREY, P. J. This is an appeal by defendant from a judgment in favor of the plaintiff for a portion of the money deposited with the defendant at the time of the making of a certain lease of real property for a term of four years and ten months, ending October 31, 1927.

G. C. Brown and Percy A. Lane entered into a written lease whereby plaintiff leased from the defendant a certain storeroom, known as No. 432 South Spring street, Los Angeles, for the term of years above stated. Under the terms of said lease, plaintiff deposited with defendant the sum of $1,500, which the defendant was to hold as security for the payment of rent and faithful performance by lessee of all obligations therein undertaken by him until the termination of said lease, at which time lessor was to apply said deposit or so much thereof as might be necessary as a credit on any damages he might sustain by reason of the breach or breaches of any of said obligations by lessee, and to repay the balance of said deposit, if any, to lessee.

Plaintiff paid rent which became due under said lease up to and including March, 1925. On April 16, 1925, defendant served upon plaintiff a written notice demanding of plaintiff the payment of rent for the month of April, within three days of the service of said written notice, or, in the alternative, demanding that plaintiff quit and deliver up said premises to the defendant. Plaintiff did not pay defendant said rent, but did deliver up the premises to the defendant on April 30, 1925. Plaintiff then brought action to recover the balance claimed by him out of said deposit of $1,500. The court rendered judgment in favor of plaintiff in the sum of $860, with interest thereon at 7 per cent. per annum from April 30, 1925 (being the difference between $1,500 plus $110 collected from a subtenant, and $750, the amount of the rent for the month of April), together with plaintiff's costs of suit. This judgment was entered on the 23d day of November, 1926, nearly one year before the end of the term of the lease.

Under the terms of the lease, upon the failure of the lessee to pay the rent or surrender premises within the time specified in the notice given, it was provided that the lessor should have the right to re-enter the premises. The lease further provided as follows: "Should lessor elect to re-enter and take possession of said premises under the provisions herein made, he may either terminate this lease and recover from lessee all damages lessor may incur in recovering possession of said premises, because of any breach, or breaches by lessee; or lessor may re-let said premises or any part thereof for all or any part of the remainder of said term, to a tenant or tenants satisfactory to him, and at such monthly rental as he may with reasonable diligence secure; and should such monthly rental be less than that herein agreed to be paid by lessee, lessee agrees to pay such deficiency to lessor, in advance, on the day of each month hereinbefore specified for payment of rental; and to pay to lessor, within ten days after such reletting, the costs and expenses lessor may incur by reason thereof. No reentry of said premises by lessor as herein provided, shall be construed as an election on his part to terminate this lease unless written notice of such intention is given lessee or mailed to him at his last-known address."

[1, 2] There was no evidence that the landlord gave any written notice of intention to terminate the lease, also there was no evidence tending to prove any oral agreement or consent of the lessor terminating the lease. Nevertheless, the court found that, between the 16th and 30th of April, 1925, the lease was terminated by mutual consent of the parties. Finding 11 contains the following: "Further finds that it is not true that on the 30th day of April, 1925, the plaintiff surrendered the possession of the premises other than under the mutual agreement of the parties that the lease was terminated, and that it is not true that the defendant took possession of said premises from plaintiff under the provisions of paragraph 11 of said lease, or otherwise than under said mutual agreement to terminate said lease; that it is not true that defendant elected not to terminate said lease but to relet said premises for the account of the plaintiff, but that all subsequent reletting was on defendant's own behalf." It is evident that, in making the foregoing findings, the court must have been of the opinion that the mere acceptance of the surrender of possession of the premises at the time and under the circumstances to which we have referred was sufficient to constitute a termination by mutual consent of the said lease. We are of the opinion that this was an erroneous conclusion. It follows that the findings are not sustained by the evidence. Where the lease itself expressly provides that the retaking of premises by the lessor in accordance with his rights, after default in the payment of rent, shall not be effective to constitute a termination of the lease unless the lessor further gives notice of election to treat the lease as terminated, these provisions of the lease are controlling. Burke v. Norton, 42 Cal. App. 705, 184 P. 45; Security Realty Co. v. Kost (Cal. App.) 274 P. 608.

Since the judgment must be reversed, and since the term of the lease has now expired, it is appropriate to suggest that supplemental pleadings should be allowed, and that upon a retrial of the case the amount of damages, if any, which the lessor has sustained by reason of the tenant's failure to pay the rental provided for in the lease, may be fully determined and judgment rendered in accordance with the facts.

The judgment is reversed, and the cause remanded for further trial in accordance with the views herein stated.

We concur: HOUSER, J.; YORK, J.

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102 Cal. App. 393

ENGSTROM v. ATKINS. (Civ. 7157.)

District Court of Appeal, First District,
Division 1, California. Dec. 7, 1929.

1. Appeal and error 🔑627(2)—Reviewing court will not dismiss appeal for lack of diligence in preparing transcript until trial court has been moved to terminate proceedings for procuring transcript (Code Civ. Proc. § 953a).

Where appellant has complied with jurisdictional requirements of Code Civ. Proc. § 953a, by filing notice of appeal, and there is delay in procuring transcript either on account of lack of diligence on part of officers of court to prepare transcript or for other reasons, remedy for such delay is by motion in trial court to terminate proceedings for procuring transcript, and, until such remedy is exercised and trial court has determined such matter, reviewing court will not dismiss appeal.

2. Appeal and error 🔑628(2)—Reviewing court would not dismiss appeal for delay in obtaining transcript, where delay was occasioned by absence of reporter.

Where delay in procuring of transcript was occasioned by absence of substitute reporter acting during part of trial, reviewing court would not dismiss appeal for lack of diligence in causing transcript to be settled and allowed.

Appeal from Superior Court, City and County of San Francisco.

Action by James E. Engstrom against Bertram C. Atkins. Judgment for plaintiff, and defendant appeals. On plaintiff's motion to dismiss defendant's appeal. Motion denied.

Henry Heidelberg, of San Francisco, for appellant.

James Sykes, of San Francisco, for respondent.

KNIGHT, J. Plaintiff moves to dismiss defendant's appeal upon the ground that, "although said appeal was taken on the 30th day of April, 1929, no steps have been taken to perfect said appeal by causing a transcript or bill of exceptions to be settled and allowed."

The action was tried in extra session of the superior court, in and for the city and county of San Francisco, before a judge from another county sitting with a jury. The trial consumed two days, and on the second day the court reporter regularly assigned to said court was absent and his place was filled by a substitute employed only temporarily in the superior court. On April 30, 1929, in conformity with the requirements of section 953a of the Code of Civil Procedure, defendant filed a notice with the clerk, stating that he had appealed from the judgment, and requesting that a transcript be made up and prepared in accordance with the provisions of said section. Shortly after the trial, however, the substitute reporter moved away from San Francisco and thereafter his whereabouts were unknown until a few days prior to the hearing of this motion when defendant's attorneys were informed that he was living in Los Angeles or San Bernardino. They wrote to him at once and after several days' delay received a reply from San Bernardino, dater November 12, 1929, indicating that he would be able to furnish the transcript within a short time. The reply letter was received subsequent to the submission of this motion and has been made a part of the record herein.

[1] As will be noted from the statement of the grounds urged in support of respondent's motion, the dismissal of the appeal is not sought upon the ground that there has been a failure to file the transcript within 40 days after the appeal was perfected, because the time thus allowed does not commence to run until the transcript is certified by the trial judge, and here the transcript has not yet been prepared (rule I, § 1, Rules for Supreme and District Courts of Appeal; Mill Valley v. Massachusetts Bonding & Ins. Co., 189 Cal. 52, 207 P. 253), but the dismissal is sought upon the ground that there has been a lack of diligence on defendant's part to procure the transcript. In this connection the law is well established that when, as here, an appellant complies with the jurisdictional requirement of section 953a of the Code of Civil Procedure by filing the notice provided by that section and there is unreasonable delay in procuring the transcript, either on account of a lack of diligence on the part of the officers of the court to prepare the same or for other reasons, the remedy for such delay is by way of motion in the trial court to terminate the proceedings for procuring the transcript; and that until such remedy is exercised and the trial court has determined the matter, the reviewing court will not dismiss the appeal. Crocker v. Crocker, 76 Cal. App. 606, 245 P. 438, 439, and authorities therein cited; Mill Valley v. Massachusetts Bonding & Ins. Co., supra. Admittedly, in the present case respondent has not exercised such remedy, and consequently upon that ground his motion to dismiss the appeal should be denied.

[2] Aside from that matter, however, it is apparent from the undisputed facts appearing in the record before us that the delay in procuring the transcript herein has not been due to any lack of diligence on the part of appellant, but was incident to a matter over which the trial court had control; and, moreover, that the delay has not been of great duration. Therefore, as held in Crocker v. Crocker, supra, "this court ought not to order a dismissal of an appeal where jurisdiction is not shown to be wanting and the alleged delays are only in matters of procedure, which are in no wise fatal to a hearing of the cause upon its merits."

For the reasons stated the motion to dismiss the appeal is denied.

We concur: TYLER, P. J.; CASHIN, J.

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102 Cal. App. 606

GUNN v. GUNN et al. (Civ. 7197.)

District Court of Appeal, First District, Division 2, California. Dec. 17, 1929.

1. Appeal and error ⚷151(2)—Defendant in partition suit failing to assert interest in property is not "party aggrieved" by decree, so as to entitle him to appeal.

Defendant, in suit for partition and sale of real property, denying allegations as to ownership of undivided one-half interest and failing to assert any claim of interest in property, was not a "party aggrieved" by decree in favor of plaintiff, and was therefore not entitled to urge any contentions on appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Aggrieved Party.]

2. Partition ⚷55(2)—Plea of ownership of undivided one-half interest was equal to averment of title in "fee" authorizing partition suit; "estate of inheritance" (Civ. Code § 762; Code Civ. Proc. § 752).

Plea of ownership of undivided one-half interest by plaintiff in partition suit was equivalent to averment of title in fee, in that under

Civ. Code, § 762, every estate of inheritance is a "fee" and a tenant in common holding interest in fee has an "estate of inheritance" within meaning of Code Civ. Proc. § 752, entitling him to sue in partition.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Estate of Inheritance; Fee.]

3. Appeal and error 🔑1149—Appellate court, where interests of parties not represented are involved, will not enter decree to cure defects in failing to expressly define interests, but will remand for modification (Code Civ. Proc. § 956a).

Where decree failing to expressly define interests of parties also fails to determine interests of parties who are not represented on appeal, appellate court will not, in exercise of power given by Code Civ. Proc. § 956a, enter a new decree to cure defect, but will remand cause with directions for modification to conform to finding.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Suit by Minnie Rose Gunn against John W. Gunn and others. Decree for plaintiff, and defendant named appeals. Cause remanded with directions.

Walter McGovern, of San Francisco, for appellant.

Joseph Edward Connolly and Stanley Burke, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for the partition and sale of certain real property. The cause was tried before the court, which made findings and entered an interlocutory decree for plaintiff. From this decree the defendant has appealed on typewritten transcripts.

The complaint alleged that plaintiff and defendant John W. Gunn "are each the owners of an undivided one-half interest in the property described." The answer of defendant Gunn denied this allegation. On the trial this defendant's deed of conveyance was received in evidence. The deed conveyed to the plaintiff herein an undivided one-half interest in the property. The trial court found the allegation of the complaint true and ordered judgment for plaintiff.

[1] By reason of his denials in his answer and his failure to assert any claim of interest in the property, the appellant is not a party aggrieved by the decree and is therefore not entitled to urge any of his contentions on this appeal. Ritzman v. Ritzman, 190 Cal. 505, 506, 507, 213 P. 493.

[2] Respondent's plea of ownership of an undivided one-half interest was equal to an averment of title in fee. Directors F. I. District v. Abila, 106 Cal. 355, 363, 39 P. 794. Every estate of inheritance is a fee. See section 762, Civ. Code. Hence a tenant in common who holds his interest in fee has "an estate of inheritance" within the meaning of section 752, Code of Civil Procedure, entitling him to sue in partition. Failure to allege the precise character of the estate held by plaintiff is cured by the evidence and findings showing that the pleader comes within the category of those authorized to sue for partition under the Code sections. But in reference to the ruling on the demurrer to the complaint, since tenants in common who held the fee to realty were entitled to partition at common law under the Statutes of 31 and 32, Henry VIII (20 R. C. L., p. 743), therefore, though the complaint here did not strictly follow the terms of section 752, Code of Civil Procedure, it nevertheless stated a cause of action for equitable relief and the demurrer was properly overruled. Brown v. Anderson-Cottonwood Irr. Dist., 183 Cal. 186, 188, 190 P. 797.

[3] Respondent suggests that the decree is defective in that it does not expressly define the interests of these parties. Respondent asks this court to exercise the power given by section 956a, Code of Civil Procedure, and enter a new decree to cure this defect. But the decree fails to determine the interests of other parties who are not represented on this appeal. There is no necessity of a further hearing to determine any of the facts as the findings fully cover every issue, but we deem it the better practice to remand the cause with directions to the trial court to modify the decree to conform to the findings on file and that, as so modified, the decree shall stand affirmed, each party to bear its own costs on this appeal.

So ordered.

We concur: KOFORD, P. J.; STURTEVANT, J.

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102 Cal. App. 375

BLADE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 7156.)

District Court of Appeal, First District, Division 1, California. Dec. 6, 1929.

1. Justices of the peace 🔑160(4)—Appeal was "taken from justice's judgment" when notice thereof was served and filed as regards applicability of statute governing such appeals in certain cities (Code Civ. Proc. §§ 974, 982a).

Appeal from money judgment in justice's court to superior court was "taken," as regards applicability of Code Civ. Proc. § 982a, governing appeals from justice's courts in cities of over 30,000 population, when notice of appeal was served and filed under section 974, which provides appeal is taken by filing notice of appeal with justice or judge and serving copy on adverse party.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Taken.]

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. Justices of the peace ⚷159(10)—Filing of undertaking constituted no part of process of taking appeal from justice judgment as regards applicability of statute governing such appeals in certain cities (Code Civ. Proc. §§ 978, 982a).

Although appeal from judgment of justice's court, notice of which was served and filed, was not sufficient for any purpose until undertaking was filed, as required by Code Civ. Proc. § 978, filing thereof constituted no part of process of taking appeal, and process was complete when notice of appeal was served and filed, as regards applicability of section 982a, governing appeals from justice's courts in cities of more than 30,000 population.

3. Justices of the peace ⚷140—Appeal from justice's judgment, taken before effectual date of statute providing for appeals as from municipal courts, was not affected thereby (Code Civ. Proc. §§ 3, 982a, 988a, 988b).

Where appeal from judgment of justice's court was taken prior to effectual date of Code Civ. Proc. § 982a, providing that appeals from courts of justices of the peace in jurisdictions having population of 30,000 or more must be according to appeals from municipal courts, which are required to be taken on record containing bill of exceptions or certified transcript by sections 988a and 988b, legal sufficiency of appeal was not affected by provisions of new statute, in view of Code Civ. Proc. § 3, and should be determined by law in force when appeal was taken.

4. Statutes ⚷263—Statute will not be construed retrospectively, unless clear Legislature so intended.

Statute will not be construed retrospectively, unless it is clear that such was the intention of Legislature which enacted it.

5. Justices of the peace ⚷171(1)—Defendant appealing from justice's judgment on questions of law and fact was entitled to trial de novo in superior court (Code Civ. Proc. §§ 974, 976).

Where, at time appeal from judgment of court of justices of peace was taken, prior to effective date of Code Civ. Proc. § 982a, law afforded appellant option of appealing on question of law or fact or both under section 974, and appellant elected to and did appeal on questions of law and fact, appellant was entitled as matter of right to trial de novo in superior court, as provided by section 976.

6. Justices of the peace ⚷140—Statute providing for appeals from courts of justices of peace in places having population of 30,000 same as appeals from municipal courts held not retroactive (Code Civ. Proc. § 982a).

Code Civ. Proc. § 982a, providing that appeals from courts of justices of peace in places having population of 30,000 or more shall be taken, heard, and determined according to provisions relating to appeals from municipal courts, as regulated by sections 649, 650, 651, 953a, 983, 988a, 988b, 988h, *held* not retroactive in its effect, and not to apply to appeal from judgment of justice's court taken before effectual date of section 982a.

Application by Dante R. Blade for certiorari to the Superior Court of the City and County of San Francisco and Hon. John J. Van Nostrand to review an order denying petitioner's motion to dismiss an appeal in an action in justices' court wherein petitioner obtained a money judgment. Writ denied.

James H. Boyer, of Oakland, for petitioner.

Clarence E. Todd, of San Francisco, for respondents.

KNIGHT, J. Petitioner obtained a money judgment in the justices' court of the city and county of San Francisco, and the defendant in the action took an appeal therefrom to the superior court upon questions of law and fact. Subsequently petitioner moved for a dismissal of the appeal upon the ground that it was not supported by a proper record. The motion was denied, and thereupon he instituted this proceeding in certiorari for the purpose of having the order made in that behalf annulled.

The judgment was rendered on July 29, 1929; the notice of appeal was served and filed on August 13th; the undertaking on appeal was filed on August 16th; and petitioner concedes that the proceedings thus taken conformed to the requirements of the law relating to justices' court appeals in force at the time of the rendition of the judgment and the filing of the notice of appeal. It appears, however, that between the dates on which the notice of appeal and the undertaking were filed, to wit, on August 14, 1929, a new Code section became effective, which, in substance, provided that all appeals from justices' courts in cities, cities and counties, towns and townships, having a population of 30,000 or more, must be taken, heard, and determined in the manner provided for taking, hearing, and determining appeals from municipal courts (Code Civ. Proc. § 982a), and admittedly such appeals are required to be taken on a record containing a bill of exceptions or a certified transcript (Code Civ. Proc. §§ 988a and 988b). Petitioner contends, therefore, that, since the undertaking herein was not filed until after the new Code section became operative, the legal sufficiency of the appeal must be determined by the law in force at that time.

[1-3] The appeal was "taken," however, when the notice of appeal was served and filed (Code Civ. Proc. § 974; Farrisee v. Superior Court, 40 Cal. App. 469, 181 P. 73), and, although the appeal was not sufficient for any purpose until the undertaking was filed (Code Civ. Proc. § 978; Moffat v. Greenwalt, 90 Cal. 368, 27 P. 296), the filing thereof constituted no "part of the process of taking the appeal. That process was complete when the notice of appeal was served and filed." Rigby v. Superior Court, 162 Cal. 334, 122 P. 958, 960. And in this connection it is held in the early case of Caulfield v. Doe,

45 Cal. 221, that "* * * when, in pending actions, proceedings [on appeal] have been taken prior to the taking effect of the Code of Civil Procedure, the sufficiency of such proceedings must be determined by the law in force at the time and by no other rule." The legal principle thus declared is founded on section 3 of the Code of Civil Procedure, which provides that no part of the Code is retroactive, unless expressly so declared; and this same rule applies as well to the amendments to the Code. Estate of Frees, 187 Cal. 150, 201 P. 112. It follows, therefore, that, since the appeal herein was taken prior to the date on which the new Code section became operative, its legal sufficiency could be in no way affected by the provisions of the new Code section, but should be determined by the law in force at the time the appeal was taken.

[4] To make the new Code section applicable to appeals taken before the section went into operation would be to give its provisions a retroactive effect, and in this regard it is a well-settled rule of statutory construction that a statute will not be construed retrospectively, unless it is clear that such was the legislative intention. Estate of Frees, supra. As said in Pignaz v. Burnett, 119 Cal. 157, 51 P. 48, 49: "Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions, have been universally reprobated by civil and common law writers, and it is to be presumed that no statute is intended to have such effect, unless the contrary clearly appears. This is especially so where to give the statute retrospective effect would work manifest injustice." See, also, Estate of Parker, 200 Cal. 132, 142, 251 P. 907. The same principle is given in Cooley on Constitutional Limitations (7th Ed.) p. 529, as follows: "* * * It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." And in Endlich on the Interpretation of Statutes, p. 362, the rule is stated thus: "* * * Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be, that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention."

[5] There was no language used in the enactment of section 982a indicating that the Legislature ever intended that it should apply to appeals taken prior to the date on which it was to become operative; and it is evident from an analysis of the present situation that an injustice would be done if a retrospective effect were given its provisions, for the following reasons: At the time the appeal was taken, the law afforded the appellant the option of appealing on questions of law or fact or both. Code Civ. Proc. § 974. He elected to and did appeal on questions of law and fact, and, having done so, was entitled as a matter of right to a trial de novo in the superior court (Code Civ. Proc. § 976); whereas under the provisions governing appeals from municipal courts an appeal may be taken only on questions of law (Code Civ. Proc. § 983), and, as stated, must be based upon a bill of exceptions settled pursuant to the provisions of sections 649, 650, and 651, or on a transcript certified as provided in section 953a, Code of Civil Procedure (Code Civ. Proc. §§ 988a and 988b); and, if a new trial be granted, which may be ordered only for error, the action is tried anew in the court of original jurisdiction and not in the superior court (Code Civ. Proc. § 988h). Moreover, from the record before us it would appear that in the present case the statutory time to prepare a bill of exceptions expired before the new Code section became operative. It will be seen, therefore, that, unless the provisions of the new Code section be given a prospective operation, the appealing defendant will not only be deprived of a trial de novo in the superior court to which he was entitled as a matter of right under the law as it stood at the time of the entry of judgment and the service and filing of notice of appeal, but will be deprived of any appeal whatever because of the absence of a record which he had no opportunity to prepare.

A similar situation arose some years ago when the Legislature shortened the time for taking appeals from judgments in the superior court from one year to six months. In dealing with the question involved, the Supreme Court said: "It is quite obvious that a great hardship is likely to result if a retroactive effect is given to this statute. One may be presumed to know the laws of the land, but the very instant this amendment took effect, if it be retroactive, the right of appeal was cut off at once. No time whatever was given to appeal in those cases in which judgments had been entered six months or more previously. Unless it is absolutely necessary, we should not impute such an intention to the Legislature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the Legislature intended that its operation should be limited to judgments thereafter entered." Accordingly, it was held that the new law should be given prospective operation and the sufficiency of appeal determined by the law in force at the time the judgment was entered. Pignaz v. Burnett, supra.

[6] It is our conclusion, therefore, that for

the reasons stated section 982a of the Code of Civil Procedure is not retroactive in its effect, and that consequently the respondent court's action in denying the motion to dismiss the appeal was proper. It follows that the writ prayed for herein should be denied, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

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102 Cal. App. 536

MORRISON v. SYCAMORE CANYON GRAVEL CO. (Civ. 3962.)

District Court of Appeal, Third District, California. Dec. 14, 1929.

1. Contracts ⟹147(2)—Intent of parties to contract must be determined from terms thereof.

In construing a contract, the intent of the parties must be determined from the terms of the agreement.

2. Contracts ⟹221(3)—Subcontract for hauling materials which permitted contractor to delay payments to subcontractor until after contractor's receipt of money held not to make performance of main contract by other contracting party condition precedent to contractor's liability to subcontractor.

Agreement between contractor and subcontractor for latter's furnishing truck for hauling materials at specified rate, under main contract for furnishing materials for work on road, and providing further that contractor should not be compelled to pay subcontractor for hauling charges except on contractor's receipt of money for materials hauled in preceding month, *held* not to make contractor's performance under subcontract contingent on other party's fulfillment of main contract, so as to relieve contractor when provision of main contract for hauling of materials was canceled.

3. Contracts ⟹322(3)—Evidence in action by subcontractor for breach supported finding that contractor repudiated subcontract.

In action against contractor by subcontractor for damages for breach of contract for employment of plaintiff to haul gravel used in highway construction, in which defense was that the main contract had been canceled with reference to hauling of materials, evidence *held* sufficient to support finding that defendant repudiated subcontract.

4. Contracts ⟹221(3)—Clause in subcontract authorizing contractor's delay in payment for hauling materials until after contractor received payment held no defense to subcontractor's action for damages for breach.

Clause in subcontract for hauling of materials for highway construction, authorizing delay in payment of subcontractor for hauling until 24 hours after contractor had received payment for hauling of materials in preceding month, *held* no defense to action by subcontractor against contractor for damages for breach of contract, since method or conditions affecting payments under contract were immaterial.

5. Contracts ⟹221(3)—Payment for services may be conditioned upon receipt of special fund or made payable from designated source.

By agreement, payment for services may be made conditional upon receipt of special fund or made payable from a designated source.

6. Contracts ⟹313(1)—Contractor's repudiation of contract employing subcontractor prevented contractor's resort to condition delaying time for payment of subcontractor as defense in action for damages (Civ. Code, § 1511).

Contractor's repudiation of subcontract for employment of another to haul materials for construction of highway prevented contractor from subsequently relying on condition of subcontract, delaying time for payment of subcontractor until contractor should be put in funds, as excuse for escaping liability, and such condition furnished no defense to action for damages for breach of contract, since, under Civ. Code, § 1511, party to contract cannot take advantage of his own act or omission to escape liability.

7. Contracts ⟹313(1)—One absolutely repudiating contract cannot escape liability by reliance on conditions delaying time or designating source for payment of obligation.

Absolute repudiation of contract by one of contracting parties precludes him from subsequently resorting to a condition delaying the time or designating the source from which he expects to procure the funds with which to meet his obligation, as an excuse for escaping liability.

Appeal from Superior Court, Los Angeles County; Harry B. Archbald, Judge.

Action by J. V. Morrison against the Sycamore Canyon Gravel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. A. Lewis and Thomas A. Wood, both of Los Angeles, for appellant.

Thomas L. Clay, of Los Angeles, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment for damages for the breach of a contract of employment to haul gravel to be used for the purpose of highway construction.

On June 23, 1925, the respective parties executed a written contract of employment providing in part: "Whereas first party (Sycamore Canyon Gravel Co.) has secured the contract to furnish certain materials to Kuhn Bros. for work on the Whittier Boulevard * * * and is desirous of obtaining the assistance of second party (Morrison) in hauling the same * * * it is agreed that second party shall furnish the trucks * * * hauling continuously such materials as may be required by first party from the beginning of the work on said job until the completion thereof, and first party agrees to pay second party therefor the sum of $1.15 per

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

five sack * * * batch, subject to the conditions hereinafter contained. * * * First party shall not be compelled to pay second party for such hauling charges until twenty-four hours after first party shall have received the money from said Kuhn Bros. for the hauling of the materials in such preceding month, and that payment by first party to second party is contingent upon the receipt thereof of the money for such materials so hauled. * * *"

Pursuant to this contract, the plaintiff purchased and procured the necessary trucks and prepared to do the hauling. On June 30, 1925, the defendant sent plaintiff the following notice: "We regret very much to have to inform you that Kuhn Bros. have cancelled their contract with us calling for the delivery of material on Whittier Blvd. We entered into our contract with you in good faith and trust you may see it in that light. We would ask that the first time you are by Whittier Blvd. that you would stop and talk to Mr. Walker Kuhn, so that he may more fully explain the matter to you. It is simply a case over which we have no control. We are still selling them the material at our El Monte bunkers, but Kuhn Bros. are buying enough additional trucks to do their own hauling. We wish to thank you for the trouble that you have been to in looking up this job, and trust that this will not inconvenience you to any great extent."

Subsequently the plaintiff did interview Walker Kuhn as requested, who informed him they had decided to haul their own material, but would hire him at 90 cents per batch in lieu of the contract price therefor. This modification of the contract was refused by the plaintiff. The plaintiff regarded the contract as renounced by the defendant, and filed this complaint for damages on July 24, 1925. The complaint contained two counts. The last one, however, was abandoned and is therefore not involved in this appeal.

Upon trial, the court rendered judgment for plaintiff for the sum of $3,942.75 and adopted findings to the effect that the defendant, on June 30, 1925, repudiated and abandoned the contract; that the terms thereof were not subsequently modified; that the plaintiff was at all times ready, willing, and able to perform its covenants; and that he was damaged by its breach in the sum mentioned. The amount of the ascertained damages is not challenged.

[1, 2] In the appellant's brief a single ground of reversal is urged. It is asserted that the contract of employment is conditional upon the fulfillment of another agreement with defendant on the part of Kuhn Bros. authorizing the defendant to haul the materials for the highway construction, and that this contract was subsequently canceled by Kuhn Bros., so far as hauling the material is concerned, thus releasing the defendant from its obligation to plaintiff. In support of this contention, the defendant relies upon the case of H. Hackfeld & Co. v. Castle, 186 Cal. 53, 198 P. 1041.

There is no merit in this contention. The contract is definite and certain regarding the employment, the material to be hauled, and the amount of compensation for service. The only condition mentioned relates to deferred payments from month to month on account of a possible delay in receiving defendant's money from Kuhn Bros. A total failure to pay, on the part of Kuhn Bros. is not contemplated. In construing a contract, the intent of the parties must be determined from the terms of the agreement. In considering the present agreement as a whole, it seems quite evident the defendant himself fully expected to provide for the hauling of the material. There was no suggestion that any one else might undertake to do so. But it was foreseen that Kuhn Bros. might delay their payments to the defendant for about a month. And so the contract reserved the privilege of delaying the payments to plaintiff, "24 hours after the first party shall have received the money from said Kuhn Bros. for the hauling of the materials *in such preceding month*." This language may not be said to create a condition precedent which will authorize the termination of the contract.

[3-5] There is ample evidence to support the findings that the defendant repudiated the contract. The question of deferred payments was not mentioned or involved in the cancellation of the contract of employment. This is not a suit for compensation of services. The clause authorizing the delay in the payments for hauling is therefore no defense. This is an action for damages for the breach of the contract. The method or conditions affecting the payments under the terms of the contract are immaterial in this action for damages. It is true that by agreement the payment for services may be made conditional upon receipt of a special fund or from a designated source. 6 Cal. Jur. 452, § 269; 6 R. C. L. 944, § 325; 13 C. J. 630, §§ 698–703; Lynch v. Keystone Const. Mining Co., 163 Cal. 690, 126 P. 968.

[6, 7] In the present case the provision relied upon is not a condition precedent, but is merely a proviso for deferred payments, and confers no option to cancel the contract for failure of the fund. The absolute repudiation of a contract by one of the parties thereto precludes him from subsequently resorting to a condition delaying the time or designating the source from which he expects to procure the funds with which to meet his obligation, merely as an excuse for escaping his liability. Such condition will furnish no defense to a suit for damages for the breach of a contract. A party to a contract may not take advantage of his own act or omission to escape liability. Section 1511, Civ. Code; 13 Cal. Jur. 647, § 721; 6 Cal. Jur. 438, § 261; Ross v. Tabor, 53 Cal. App. 605,

612, 200 P. 971. In 6 Ruling Case Law, 946, § 326, it is said: "An absolute repudiation of his part of a contract by one of the parties thereto prior to the time fixed by the contract for performance * * * will entitle such other party to an action for damages as for a breach of the contract."

The foregoing rule is not modified by the case of H. Hackfeld & Co. v. Castle, supra, relied upon by appellant. In that case the plaintiff contracted to sell defendant an output of honey for a specified season, to be shipped from Honolulu by way of Tehuantepec to Hamburg, "*or at our* [buyers'] *option*, via Panama Canal, in case the Tehuantepec route is discontinued." The last-mentioned route was discontinued. It was held that the contract was thereby terminated unless the buyer saw fit to exercise his option to permit the honey to be shipped by way of the Panama Canal. There was no breach of contract in that case.

In the present case, if the contract had been conditioned upon Kuhn Bros. exercising an option to haul the material themselves and had subsequently decided to do so, that would have terminated the contract with the plaintiff. No such condition, however, existed. The Kuhn Bros. fulfilled their agreement to purchase the material from the defendant, and it was subsequently hauled and delivered. The evidence indicates that the motive for repudiating the contract with the plaintiff for hauling the material was an expectation on the part of Kuhn Bros. or the defendant to procure the hauling for less than the contract price.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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101 Cal. App. 748

BENCE v. TEDDY'S TAXI et al. (Civ. 3832.)★

District Court of Appeal, Third District, California. Dec. 12, 1929.

Hearing Denied by Supreme Court Jan. 9, 1930.

1. Appeal and error 🔑832(1) — Appellate court's opinion, reversing judgment for plaintiff because of undisputed evidence of his lack of due caution, held not to justify rehearing because not stating that his contributory negligence was proximate cause of injury.

Statement in appellate court's opinion that judgment for plaintiff must be reversed because undisputed evidence of his lack of due caution precludes recovery warranted conclusion that court invoked doctrine of contributory negligence, which is based on assumption that plaintiff's negligence contributed to his injuries, thereby precluding rehearing for failure to state that plaintiff's negligence was proximate cause of injury.

2. Negligence 🔑136(32)—Application of last clear chance doctrine may be question for jury.

Application of the last clear chance doctrine may properly be a question for submission to, and determination by, the jury.

3. Appeal and error 🔑173(13)—Effect of last clear chance doctrine, not presented to jury by instructions or otherwise, cannot be considered on appeal.

Appellate court cannot consider effect of last clear chance doctrine, where issue was not presented to jury by instructions or otherwise, and there is nothing in record indicating that jury considered it in rendering verdict.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Petition for rehearing. Petition denied.

For original opinion, see 282 P. 392.

Irving D. Gibson, of Sacramento, for appellants.

Fred J. Harris and M. F. Shelley, both of Sacramento, for respondent.

PER CURIAM. [1] Upon a petition for rehearing, two points are insisted upon: First, that the opinion which reversed the judgment for plaintiff upon the ground that he was guilty of contributory negligence fails to state that his negligence was the proximate cause of the injuries which he sustained; second, that, in spite of the contributory negligence of plaintiff, the judgment should, nevertheless, be sustained on the doctrine of the "last clear chance." The first point is without merit. After reviewing the evidence, the opinion clearly states that the failure of the plaintiff to look in the direction from which he should have anticipated the approach of vehicles, before attempting to cross the street, constituted contributory negligence. It was then said it was therefore necessary to reverse the judgment because "the undisputed evidence showing a lack of due caution on the part of plaintiff precludes his right of recovery." This conclusion is ample upon which to assume the appellate court was invoking the doctrine of contributory negligence which is necessarily based upon the assumption that the negligent acts or omissions on the part of the plaintiff in fact contributed to the cause of his injuries. Upon a careful review of the evidence, we are unable to reach any other conclusion.

[2, 3] It is true that the application of the doctrine of the last clear chance to avoid the accident may properly be a question to be submitted to, and determined by, the jury. 19 Cal. Jur. 653, § 80; also page 733, § 139. Although a construction of the evidence in the present case which would be most favorable to the plaintiff would admit of the application of this doctrine of the last clear chance (Darling v. Pac. Elec. Ry. Co., 197 Cal. 702, 242 P. 703; Haber v. Pac. Elec. Ry. Co., 78 Cal. App.

★Hearing denied by Supreme Court.

617, 632, 248 P. 741), unfortunately this court is precluded from considering its effect, since the issue was not presented to the jury by instructions or otherwise. There is nothing in the record indicating that the jury, in rendering its verdict, considered the doctrine of the last clear chance. No instruction upon this subject was offered. It therefore becomes necessary to deny the petition for rehearing.

It is so ordered.

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102 Cal. App. 474

HUMMEL v. MULLER et al. (Civ. 32.)★

District Court of Appeal, Fourth District, California. Dec. 10, 1929.

Rehearing Denied Jan. 6, 1930.

1. Partnership 🔑64—Contention that plaintiff suing under firm name failed to prove she was doing business as such held without merit, where stipulations and evidence showed contrary.

Contention that plaintiff suing under firm name failed to prove she was doing business under that name at times mentioned in complaint *held* without merit, where it was stipulated at trial that plaintiff was doing business under firm name and had filed certificates and due affidavit of publication, and testimony of manager of plaintiff that he was such and had authority to act for company and make arrangement with defendants in question was not contradicted.

2. Appeal and error 🔑1074(2)—Denying motion to stay execution pending motion for new trial held not prejudicial, where no showing was made in support thereof or bond furnished.

Denying motion for stay of execution pending hearing of motion for new trial in action for labor and materials furnished *held* not prejudicial, where no showing of any kind in support of motion was made and no bond was furnished and same purpose was accomplished by filing stay bond on appeal.

3. Appeal and error 🔑891—Statutory provisions for producing additional evidence on appeal apply only where appellate court can make contrary findings.

Statutory provisions for producing additional evidence in courts of appeal apply only to cases were appellate court could appropriately make findings of fact contrary to or in addition to those made by trial court.

4. Appeal and error 🔑891—Application for leave to produce additional evidence on appeal, where materiality was not shown nor diligence in producing it at trial, was denied (Rule 38, Supreme and District Courts of Appeal).

Application for leave to produce additional evidence on appeal by defendant in action for labor and materials furnished was denied, where there was no showing whatever why certain matters sought to be produced were not proved in trial court as required by Rule 38 governing Supreme and District Courts of Appeal, and that other evidence if produced would have any effect whatever on questions involved.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Emma Hummel, doing business under the firm name and style of the Placentia Welding Company, against A. R. Muller, doing business under the firm name and style of the A. R. Muller Tool Company, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Will H. Winston, of Long Beach, for appellants.

Arthur E. Koepsel, of Orange, and John T. Houser, of Long Beach, for respondent.

BARNARD, J. Under an arrangement made by their respective managers, the plaintiff operated a welding shop in a machine shop run by defendants at Huntington Beach, Cal. The arrangement was never reduced to writing, but the defendants were to deduct a percentage from the bills for work done by the welding company, and pay the balance to the plaintiff. After some months of operation, plaintiff sued defendants for the value of labor and materials done and furnished. Judgment was for the plaintiff, and defendants have appealed.

[1] Appellants first contend that the respondent failed to prove that she was doing business as the Placentia Welding Company at the times mentioned in the complaint. They argue that two parties, other than the plaintiff, were the real copartners in the Placentia Welding Company, at the time involved, basing this claim upon statements set forth in an affidavit filed in support of a motion for a new trial. The contention is utterly without merit. Aside from the impossibility of considering such evidence, under the circumstances, there was no failure of proof in this regard. It was stipulated at the trial that the respondent "is doing business under this name and has filed a certificate and due affidavit of publication." The record shows no contradiction of the testimony of the manager for respondent that he was such manager; that he had authority to act for the company; that he made the arrangement in question; and that the Placentia Welding Company performed the work and services involved in this action. And during the progress of the trial it was stipulated that an audit of the work done, after deducting all of the credits, left a balance of $7,781.04 due from the defendants *to the plaintiff*.

It was further agreed by the parties that the above stipulation did not take into consideration whether defendants were entitled to an additional 5 per cent., as claimed, or whether, under the agreement, it was incumbent upon plaintiff to wait for her money until the same had been collected by the defendants from the customers. The court proceeded to hear evidence upon these two questions, and resolved them both in favor of plaintiff.

★Rehearing denied.

Appellants urge that the evidence is insufficient to support the findings of the court upon these two points. In effect they argue that the preponderance of the evidence is the other way. But the manager of the plaintiff company testified positively that no additional 5 per cent. was agreed upon, and that the agreement was that the amount of the bills should be paid on the first of each month. Defendant A. R. Muller testified that on one occasion he used $5,000 of a larger sum borrowed from the bank to pay a portion of respondent's account, although corresponding bills had not then been collected from the customers. The findings are amply sustained by the evidence, and the matters called to our attention by appellants create, at best, no more than a conflict in the evidence.

[2] Appellants have included in their notice of appeal a statement that they further appeal from an order of the court denying a motion for a stay of execution pending the hearing of a motion for a new trial. Assuming that this was an appealable order, no showing of any kind in support of the motion appears to have been made in the trial court, and none is made here. Although mention of a bond is made in an order shortening the time for hearing of the motion, no bond of any kind appears in the record, and even the one so mentioned is not for double the amount of the judgment. Nothing appears, either at the hearing or since, to show any reason why the motion should have been granted, and no harm or prejudice is shown. While the record itself is silent on the point, appellants' brief indicates the purpose was accomplished by filing a stay bond on appeal.

[3, 4] An application was filed for leave to produce additional evidence, the hearing on which was continued until the time for presenting the cause on its merits. Two matters of evidence are sought to be produced here. As to the first one, it is contended that it was shown at the trial, by uncontradicted evidence, that one particular item should not have been included in the account between these parties. And we are asked to take the testimony of the auditor, whose audit was used at the trial, that this item is in fact included in the sum stipulated, except for the questions left to the decision of the court, to be due to the plaintiff. Not only was the correctness of the auditor's statement of the work done and the amount due fully covered by stipulation of the parties, but no showing whatever is here made as to why the facts sought to be produced here were not proved in the trial court. Rule 38, Rules, Supreme and District Courts of Appeal. We are also asked to order to be produced here a bond for release of attachment said to have been filed with the sheriff of Orange county. Nothing appears in the record to show how this, if produced, could have any effect whatever on any question involved in this appeal.

The provision for taking additional evidence in courts of appeal applies only to cases in which it would be appropriate for such court to make findings of fact contrary to, or in addition to, those made by the trial court. No such case is presented by the record here. The findings of the trial court are fully sustained by the evidence, and no good reason for adding to or changing them is shown.

The application for leave to produce additional evidence is denied, and the judgment is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

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102 Cal. App. 464

RITZMAN v. MILLS (two cases).

(Civ. 3958.)

District Court of Appeal, Third District, California. Dec. 10, 1929.

1. Damages 🔑132(3)—$5,000 for skull fracture, concussion of brain and hemorrhages, body bruises, and inability to work, held not excessive, where special damages amounted to almost $3,000.

$5,000 damages to 26 year old woman for fracture of skull, concussion of brain, and hemorrhages within skull cavity, preventing her from working, and for bruises, and for special damages consisting of hospital and nurses' and doctors' bills and lost salary and other items amounting to almost $3,000, *held* not excessive.

2. Damages 🔑132(1)—$5,000 for broken ribs and shoulder held not excessive, where doctors', nurses', hospital bills, lost salary and other items of special damage aggregated over $3,000.

$5,000 damages to female plaintiff for body bruises, broken ribs, broken shoulder, causing stiffness, and which was rendered lame in walking, *held* not excessive, where special damages consisting of hospital and doctors' and nurses' bills and lost salary and other items aggregated over $3,000.

3. Trial 🔑296(11)—Instruction relative to compensatory damages for injuries, though incomplete, held not deficient, where supplemented by other instructions limiting recovery.

Instruction in actions for injuries consolidated for trial that jury should bring in verdict for amount in each case which would reasonably and fairly compensate for injuries received and proved as proximate result of accident, though alone incomplete, *held* not deficient, where court in another instruction told jury they were not to infer that court was intimating plaintiffs were entitled to recover damages, and where court also instructed jury fully on all phases of negligence and contributory negligence.

4. Trial 🔑296(11)—In actions for injuries, instruction stating amount claimed by respective plaintiffs, and directing compensatory damages not exceeding amount claimed, held not to prejudice defendant, in view of other instructions.

In actions for injuries consolidated for trial, instruction stating amount of damages claimed by each plaintiff, and limiting verdict in each case to amount thus claimed, and concluding with statement to jury to bring in verdict which would reasonably and fairly compensate for injuries received and proved as proximate result of accident to respective plaintiffs, *held* not to prejudice defendant as intimating that sums claimed by plaintiffs should be awarded, especially where other instructions directed jury that no verdict could be had for plaintiffs, unless they established their cases by preponderance of evidence, and were free from contributory negligence.

5. New trial 🔑99—Motion for new trial for newly discovered evidence is not favorably regarded.

Motion for new trial for newly discovered evidence is not looked on with favor by the courts.

6. New trial 🔑99—Motion for new trial for newly discovered evidence is primarily addressed to trial court's discretion.

Motion for new trial for newly discovered evidence is primarily addressed to the sound discretion of the trial court.

7. New trial 🔑102(1)—To obtain new trial for newly discovered evidence, it must be shown evidence could not have been discovered by reasonable diligence.

To obtain new trial for newly discovered evidence, it must be shown that diligence was exercised before the trial in obtaining the proffered evidence, and that it could not be discovered by reasonable efforts before the trial.

8. New trial 🔑99—Denial of new trial for newly discovered evidence held not abuse of discretion on showing evidence was of questionable character and counsel knew about witnesses long before trial.

Denial of new trial for newly discovered evidence *held* not abuse of discretion by trial court, where examination of uncontradicted affidavits showed that counsel knew about witnesses long before the trial, and that evidence was of questionable character, and that such witnesses were negotiating for compensation for their testimony prior to the trial.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Actions by Florence Ritzman and Hannah Ritzman against James E. Mills. Judgments for plaintiffs, and defendant appeals. Affirmed.

Lon A. Brooks, of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

PLUMMER, J. The above-named actions are brought by two sisters on account of personal injuries sustained by them from an automobile driven by the defendant while the plaintiffs were crossing a certain street in the city of Pasadena. The actions were consolidated and tried together, submitted to the jury upon the same testimony, and a verdict was returned in each case in the sum of $5,000. The two cases are presented to us upon one transcript, and will be considered as one. From the judgments entered upon the verdicts, the defendant appeals in each case.

The record shows that the plaintiffs were both injured as they were crossing Pasadena avenue, on April 5, 1926; that the injuries were inflicted by an automobile owned and operated by the defendant. The jury found that the injuries were inflicted by reason of the negligent operation of the automobile, at said time and place, by the defendant.

The defendant's motion for a new trial being denied, the defendant appeals, and presents for our consideration three questions: Error of the court in instructions to the jury; that the damages awarded were and are excessive; and that the court erred in denying the defendant's motions for a new trial on the ground of newly discovered evidence. These are the only grounds argued by the appellant, and will be the only ones considered by the court. No question is raised as to the sufficiency of the evidence to support the verdict.

[1, 2] Departing from the order of the argument presented in the briefs, we will consider the question of excessive damages first. A statement of what the record exhibits we consider a complete answer. The transcript shows that Florence Ritzman suffered such injuries that she was required to remain in St. Vincent's hospital 10 weeks; that there was a wound on the right side of her skull with sutures in it; a large swelling on the right side of the skull with a large bloodclot; right eye swollen practically shut; bruises all over her body; that the fracture in the skull extended from four to five inches on the right side; that she suffered from concussion of the brain and hemorrhages within the skull cavity; that at the time of the trial she was in a normal mental condition, but not able to work as had previously been the case; that she was a woman 26 years of age; that by reason of the injuries she had been subjected to the following expenses: Paid a hospital bill in the sum of $631.85, nurses' bill $332, ambulance $5, damage to clothing $40, damage to hat $10, damage to glasses $13, fountain pen $5, lost in salary $1,542.59, still indebted for doctors' bills in the sum of $400, making a total sum of $2,-

974.44 special damages. This sum, deducted from the $5,000 awarded by the jury, allows but $2,025.56 for the personal injuries stated above. The plaintiff Hannah Ritzman had many bruises on her body, the particulars of which we need not state: two broken ribs, the left shoulder broken, some stiffness left in the shoulder, rendered somewhat lame in walking. Prior to the injury this plaintiff also was employed, receiving a salary of $175 per month. This plaintiff was confined to the hospital 81 days; paid hospital bills in the sum of $465.55, doctors' bills $100, nurses' bills $356, ambulance $5, damage to clothing, etc., $97.50; lost nine months' salary, amounting to the sum of $1,692, doctor bill still owing $600—aggregating special damages in the sum of $3,196. This, subtracted from the $5,000 awarded by the jury, left for personal injuries the sum of $1,804.

Neither argument nor citation of authorities is necessary to show that the damages awarded were not excessive. If there is any valid complaint in this particular, it belongs to the plaintiffs and not to the defendant.

The main contention of the appellant is that a new trial should be granted by reason of a certain instruction given to the jury. That instruction reads as follows: "You are instructed that there are two cases being tried together, but you should consider the evidence as applying to each case separately, and render a separate verdict in each of said cases, according to the evidence and the law that the court gives you and in view of the fact that two cases are being tried together you should not consider whether the judgment is large or small in either case, but if you find for the plaintiffs, and each of them, you should bring in a verdict in each particular case for a sum not greater than the amount prayed for in the complaints respectively. In the complaint entitled Hannah Ritzman against James E. Mills, the amount prayed for is $12,119; in the complaint entitled Florence Ritzman against James E. Mills the amount prayed for is $11,650. You are to bring in a verdict for the amount in each case that will reasonably and fairly compensate for the injuries received and proven as the proximate result of the accident to the plaintiffs Florence and Hannah, respectively."

[3] It may be admitted that this instruction standing alone does not fully state the law applicable to the case. However, it is fully supplemented by other instructions, as the court very fully and carefully instructed the jury on all phases of the subjects of negligence and contributory negligence. In this particular it is urged by the appellant that the instructions, other than the one referred to, are contradictory of, and conflict with, the instruction which we have set out. This contention, however, is not borne out by an examination of the instructions. All the other instructions contained in the record given by the court are simply supplemental to the instruction which we have set out, and cover every phase of the subject of negligence. Our attention has not been called to a single instruction which conflicts, or is contradictory, with the quoted instruction. In addition to instructing the jury correctly on the question of damages and the burden of proof resting upon the plaintiffs, and also that, if the plaintiffs were guilty of any contributory negligence whatsoever proximately leading to their injuries, no recovery could be had, the court in one of its instructions specifically told the jury that they were not to infer from any instruction given by the court that the court was intimating that the plaintiffs were entitled to recover damages; that the jury must find that the injuries were caused by the negligence of the defendant, without any contributory negligence whatsoever on the part of the plaintiffs, and that this applied to both cases.

[4] The main contention of the appellant that reversible error appears from the instruction which we have quoted, and that it affirmatively appears therefrom that the appellant has suffered prejudice is by reason of the fact that the amount of damages claimed by the respective plaintiffs was stated to the jury by the court. In other words, that in giving the instructions the court called the attention of the jury to the amount claimed by the respective plaintiffs, and was an intimation that such sum should be awarded. In support of this contention the appellant cites the case of Hollinger v. York Ry. Co., 225 Pa. 419, 74 A. 344, 17 Ann. Cas. 571, where the following instruction was condemned: "The plaintiffs' claim for damages suffered by them, respectively, $20,000 and $1,000, * * * for certain injuries suffered by Nora M. Hollinger as a passenger on one of the York and Dallastown cars of the York Railways Company, from the collision of two cars on said railway on August 18, 1907, near Dallastown through the negligence of the railway company." The jury in that case returned a verdict of $3,500 in favor of Nora M. Hollinger and $500 in favor of her guardian Frederick F. Snyder, the other plaintiff. That case refers to a former case of Reese v. Hershey, 163 Pa. 253, 29 A. 907, 43 Am. St. Rep. 795, where it was held to be exceedingly bad practice to place before the jury the averment as to damages, on the theory that it tends to get figures and amounts into the jury's mind without evidence. What other instructions were given in that case does not appear from the opinion of the court or the facts stated preceding the opinion.

The case of McIntyre v. Quaker City Cab Co., 283 Pa. 395, 129 A. 112, is also cited as supporting the appellant's contention. There, the instruction under consideration reads: "I think you understand that I took the figure that was given as an example. You will determine * * * what * * * he earned. * * * Any loss of those earnings he is entitled to recover." This is all of the instruction as appears in the record. In that case it was held that the reference was not prejudicial, by reason of the fact that the figures quoted by the court had been testified to by some of the witnesses. The appellant also cites the case of Illinois Ry. Co. v. Becker, 119 Ill. App. 221, as sustaining the contention that the giving of the instruction which we have quoted constitutes reversible error. However, as appears by an examination of the opinion in that case, the judgment was not reversed on account of the court having referred to the amount of damages claimed in the declaration, as appears by the following language contained in the opinion: "The reference in the fourth instruction, to the amount claimed in the declaration, when taken in connection with the errors in the third and the failure in all three of the series here under consideration, to require on the part of appellee a preponderance of the evidence, was error calculated to mislead the jury. While it is not always error to refer in an instruction to the amount claimed in the declaration, it is always error to do so when the state of the instructions or of any other feature of the record is such that the jury might be misled by such reference." The court then proceeds to say that many cases have been reversed for this error alone, and such reference in instructions has been "roundly" condemned in many more, citing a number of decisions of the appellate court of the state of Illinois. In the case at bar the instructions show that the jury was specifically and clearly instructed that no verdict could be had unless the plaintiffs established their cases by a preponderance of the evidence, and were also shown to be absolutely free from any contributory negligence.

In the case of Muren Coal & Ice Co. v. Howell, 204 Ill. 515, 68 N. E. 456, 458, the court instructed the jury with reference to the amount of damages claimed, in the following language: "The jury may give such damages as they may deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the widow and next of kin of such deceased person, not to exceed, however, the sum of $5,000." It was held in that case that the mentioning of the sum of $5,000, the limit allowed by statute in such cases, was an intimation to the jury that the court expected it would render a verdict for that amount, and that such an instruction "could not fail to have had an improper influence on the jury, and in a doubtful case like this, the verdict rendered either way, not subject to be disturbed, to tell the jury they must find to the extent of the law, was improper and ought to prejudice the finding."

Just how the instructing of a jury that they can find in favor of the plaintiffs only such sum as will reasonably and fairly compensate the plaintiff, as shown by the testimony, not exceeding the amount claimed in the declaration, amounts to an intimation that the court expects the jury to find that sum, does not clearly appear. We see no logical connection between the conclusion arrived at in the cases referred to and the instructions given by the court there under consideration. It is true that some of the instructions considered in the cases referred to were defective for other reasons, but the statement of the amount claimed in the declaration does not appear to us to be any reason whatever for concluding that the court expected the jury to be guided by the declaration when the jury has been explicitly advised that their verdict must be based solely upon the testimony showing the injuries must preponderate in favor of the plaintiff, and as well, also, that the negligence of the defendant in causing the injuries must be shown by a preponderance of the testimony, and likewise that no plaintiff can recover where his own contributory negligence has proximately caused the injury.

While our own decisions have not expressly passed upon this question, there are a number of cases where the instructions to the jury with regard to the finding of damages conclude with the statement "not exceeding the amount claimed in the complaint," and a number of them stating the amount.

In the case of Hersperger v. Pacific Lumber Co., 4 Cal. App. 460, 88 P. 587, 590, 591, the concluding portion of the instruction attacked read as follows: "Not exceeding in amount the sum claimed in the complaint." In Scally v. W. T. Garrett Co., 11 Cal. App. 138, 104 P. 325, 330, the concluding portion of the instruction attacked read: "Not exceeding the amount claimed in his complaint, as amended, to wit, $15,000." In the case of Storrs v. L. A. Traction Co., 134 Cal. 91, 66 P. 72, the instruction read: "* * * Not exceeding the amount alleged in the complaint." The court, in speaking of damages, said: "The third and fourth elements are, from necessity, left to the sound discretion of the jury; but the damages in all cannot exceed the amount alleged." In Scott v. San Bernardino Valley Co., 152 Cal. 604, 93 P. 677, 681, the concluding portion of the instruction read: "The court instructed the jury that if they found for the plaintiffs, the verdict should be in such * * * damages, not exceeding the sum of $15,000," etc. In the case of White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318, 320, the concluding portion of the instruction we find to be as follows: "And necessary amount of money paid to any nurse or nurses for caring for her said injuries in all not exceeding the amount alleged in the complaint, to wit, $965." It is true that in the California cases it does not appear that the court, in any of them, expressly considered the naming of the amount, to wit, the dollars and cents claimed in the complaint. The practice, however, of instructing the jury, with reference to damages, to conclude an instruction with the words "not exceeding the amount claimed in the complaint," as shown by the few decisions which we have cited, has been general in this state for a long period of time. In most cases the complaint is read to the jury, and in this particular our practice differs from the practice apparently prevailing in the state of Pennsylvania, where the pleadings, called declarations, are not permitted to be read to the jury. In this state, so far as we are advised, the practice is general at the very beginning of the case to read the pleadings and to make an opening statement as to what is claimed by the respective parties.

While we recognize the eminence of the authorities cited by the appellant, the reasoning of the cases where not controlled by statute, upon which the appellant relies, does not appeal to us as being sound. Where the trial court explains to the jury fully the law relative to the testimony to be considered by them in determining the amount of damages to be awarded, and then adds that their judgment shall in no case exceed the amount claimed by the plaintiff, a holding that such statement by the court is the expression of an opinion that the verdict should be for the amount claimed by the plaintiff appears to us to be more in the nature of an assumption than a logical conclusion from the premises laid down. In the case at bar no contention is made that the negligence of the defendant was the proximate cause of the injury. All that is urged in this particular is that the instruction of the court affirmatively appears to be prejudicial by reason of naming the damages claimed by the respective plaintiffs. While the respondent calls our attention to the provisions of section 4½ of article 6 of the Constitution relative to errors in instructions and that judgments are not to be reversed for errors, unless, upon a review of the entire case, including the evidence, the appellate court is satisfied that there has been a miscarriage, we do not deem it necessary to rest our decision upon the section of the Constitution which we recognize would apply in this case, but are of the opinion that, without reference to the constitutional provision, no prejudice has resulted to the defendant from the giving of the instruction objected to, and especially is this true when considered in connection with all the instructions given by the court to the jury, particularly explaining how a verdict should be arrived at in damage cases.

[5-8] The assignment of error by reason of the court's denial of the appellant's motion for a new trial requires but little consideration. In the first place, such a motion is not looked upon with favor; in the second place, it is primarily addressed to the sound discretion of the trial court; and, in the third place, it must be shown that diligence was exercised before the trial in obtaining the proffered evidence, and that it could not be discovered by reasonable efforts before the trial. An examination of the uncontradicted affidavits of Sylvester Wilder and Paul Blackwood, submitted by respondents upon hearing of appellant's motion for a new trial, establish clearly that counsel for the appellant knew about the witnesses alleged to be able to give the newly discovered evidence, long before the trial. The affidavits also show the questionable character of the evidence and that the witnesses who were to give the so-called newly discovered evidence were negotiating for compensation for their testimony prior to the trial. The affidavits also show that counsel for the appellant was advised of the whereabouts of the so-called newly discovered witnesses before the trial of the action at a time before counsel for the appellant appeared as an attorney in the case.

With these facts before the trial court, and others which show the questionable character of the so-called newly discovered evidence, and also that the presence of the witnesses might have been secured, if reasonable efforts had been put forth, no basis is laid for our holding that the trial court abused its discretion in denying the appellant's motion for a new trial.

The judgments of the trial court are affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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102 Cal. App. 535

Clara E. DEACON, Plaintiff and Respondent, v. Daniel A. DEACON, Defendant and Appellant. (Civ. 3689.)

District Court of Appeal, Third District, California. Dec. 14, 1929.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Glen H. Munkelt, of San Diego, for appellant.

Sloane & Sloane, of San Diego, for respondent.

PER CURIAM. This action, Civil No. 3689, is before us upon appellant's appeal from the interlocutory judgment entered in said action, and also upon respondent's motion to dismiss the appeal.

As stated in appellant's brief, this appeal was primarily for the purpose of keeping undetermined questions open until a decision was rendered, taken by the appellant from the final judgment in said cause, which appears upon the records of this court as Civil No. 3653. Deacon v. Deacon, 281 P. 533. A stipulation was entered by the parties that, if the motion to dismiss the appeal should be denied, the appeal involved herein should be submitted upon the briefs filed in the main appeal, No. 3653.

As the questions involving all the merits presented herein have been determined in said appeal No. 3653, all questions now before the court are moot.

It is therefore ordered that the motion to dismiss the appeal be denied, and, in so far as the appeal involved herein affects the judgment, the judgment is affirmed. And, by reason of what is stated in the opinion filed in the appeal No. 3653, the costs incurred upon this appeal are taxed against the community property belonging to the respective parties.

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102 Cal. App. 507

STENZEL v. KRONICK et al. (Civ. 3965.)

District Court of Appeal, Third District, California. Dec. 11, 1929.

1. Quieting title 🔑10(2)—General lien created by virtue of general money judgment was not "vested interest" in particular property, authorizing suit to quiet title (Code Civ. Proc. §§ 671, 681).

General lien created upon real property of judgment debtor by provisions of Code Civ. Proc. § 671, by virtue of general money judgment, does not constitute such a "vested interest" in particular piece of real property as authorizes maintenance of a suit to quiet title; there being a speedy and complete remedy at law for satisfaction of judgment by procuring and levying an execution under section 681 and selling any available property.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Vested Interest.]

2. Quieting title 🔑10(2)—Judgment creditor, in absence of decree specifically attaching lien to particular property, has no interest enabling him to maintain suit to quiet title.

Judgment creditor, in absence of decree specifically attaching lien to particular property and in absence of levying of execution, has no such interest in real property of judgment debtor as will enable him to maintain a suit to quiet title.

3. Action 🔑6—Judgment creditor was not entitled to declaratory relief by reason of statutory lien of general money judgment, in view of other adequate remedy (Code Civ. Proc. §§ 671, 681, 1060, 1061).

Judgment creditor was not entitled to declaratory relief under Code Civ. Proc. § 1060, by reason of lien created under section 671 by virtue of general money judgment, in that he had a speedy and adequate remedy for satisfaction of judgment under section 681, within provision of section 1061, justifying court in refusing to exercise power in any case where declaration of determination was not necessary or proper.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by A. E. Stenzel against Rosina M. Kronick and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

John C. Packard, of Los Angeles, for appellant.

Robert I. Kronick, of Los Angeles, for respondents.

R. L. THOMPSON, J. This is an appeal from a judgment which was entered against the plaintiff upon sustaining a demurrer to the complaint to quiet title.

The complaint alleges only an interest in a particularly described piece of real property by virtue of a general money judgment which, as the law then existed, gave him a statutory lien upon all the real property of the judgment debtor which was situated in the county where the judgment was procured. Section 671, Code Civ. Proc. The usual other allegations of an ordinary suit to quiet title pursuant to section 738 of the Code of Civil Procedure are made. The complaint further alleges that a controversy exists between the respective parties to the action regarding the validity of the asserted lien upon the property described as security for the payment of the judgment.

A demurrer was sustained upon the ground that the complaint failed to state a cause of action. The plaintiff was denied the privilege of amending his pleading, and a judgment of dismissal was thereupon entered against him, from which this appeal was perfected.

The appellant contends that under the provisions of section 671 of the Code of Civil Procedure he was given such a vested interest in the real property as authorized the maintenance of a suit to quiet title, and that the complaint stated a cause of action entitling him to declaratory relief pursuant to section 1060 of the same Code.

[1] The plaintiff had a speedy and complete remedy at law for the satisfaction of his valid and binding judgment, by procuring and levying an execution under section 681 of the Code of Civil Procedure and selling this or any other available property. A suit to quiet title under such circumstances would accomplish no more than to affirm the validity of the lien already established by virtue of the provisions of section 671 of the Code of Civil Procedure. A suit to quiet title will not lie in the present case. The judgment does not create an actual interest in the real property upon which it becomes a lien, such as will warrant the maintenance of an action to quiet title. The general lien which is created upon all the real property of the judgment debtor, by the provisions of section 671, supra, is not such a vested interest in a particular piece of real property as authorizes the maintenance of a suit to quiet title. A specific lien attached by decree of a court upon a particular property for the sat-

isfaction of a judgment would suffice for this purpose. But the statutory lien created by the entry of a mere money judgment is too general in its nature to furnish such a claim of title as may constitute the foundation of a suit to quiet title. In 1 Jones on Liens, 8, § 13, it is said: "Even a judgment does not constitute a (specific) lien upon (particular) real estate to be enforced by an execution and levy upon some part or the whole of it." In the case of Bagley v. Ward, 37 Cal. 121, 133, 99 Am. Dec. 256, quoting approvingly from Mr. Justice Kent's Commentaries, the court says: "The lien [created by the money judgment], after all, amounts only to a security against subsequent purchasers and incumbrancers; * * * the judgment creditor gets no estate in the lands." In Huff v. Sweetser, 8 Cal. App. 689, 695, 97 P. 705, it is said: "The lien created by a judgment is not a transfer or conveyance of the property. (Wilcoxson v. Miller, 49 Cal. 193.) It is not a specific lien on the real estate of the judgment debtor, but is merely a general lien, and is subject to all prior liens, either legal or equitable. The lien is not an interest in the real estate of the judgment creditor, he [the judgment creditor] having neither a jus in re nor a jus ad rem, as regards the debtor's property; the lien merely confers the right to levy thereon, to the exclusion of other adverse interests subsequent to the judgment. These principles are laid down and fully supported by cited authorities in Metz v. State Bank of Brownville, 7 Neb. 165."

In the case of French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 931, 51 L. R. A. 910, 914, 81 Am. St. Rep. 856, the court says: "When the right to a lien upon the property fraudulently conveyed ripens into a lien in fact by an actual seizure of the property under attachment or execution, a court of equity will then lend its aid to free the lien from the cloud upon it created by the fraudulent conveyance."

[2] In the present case no specific lien upon any particular property was decreed. Upon proper pleadings in an action for that purpose the court may render a money judgment and attach a lien upon specific real property to secure the payment thereof. However, that was not done in this case. So far as the pleadings in the present case are concerned, the judgment debtor may have possessed several separate tracts of real property, any one of which would satisfy the judgment. In the absence of a decree specifically attaching the lien to a particular property and in the absence of the levying of an execution, obviously the appellant has no such interest in the real property described as will enable him to maintain a suit to quiet title.

[3] Nor will a suit for declaratory relief necessarily lie under such circumstances. Section 1061 of the Code of Civil Procedure provides: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

Since the appellant has a speedy and adequate remedy for the satisfaction of his judgment by means of levying an execution, upon which proceeding the validity of the lien may be tested if it should then be questioned, the court had a discretion to refuse to accept jurisdiction under section 1060 of the Code of Civil Procedure on the ground that it was unnecessary.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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102 Cal. App. 370

HALLER v. HALLER et al. (Civ. 3919.)

District Court of Appeal, Third District, California. Dec. 5, 1929.

1. Fraudulent conveyances 🔑208—Excluding testimony regarding husband's purchase of property deeded wife and their intention held not error, where parties in action to quiet title stipulated husband was not then defendant creditor's debtor.

Sustaining objection to questions as to source of money with which defendant who conveyed property to wife had purchased it, and as to when property was acquired, and intention of husband and wife, as being incompetent, irrelevant, and immaterial, *held* not error, where it was stipulated by parties in action to quiet title that, at time of conveyance of property by defendant husband to plaintiff wife, husband was not indebted to defendant creditor.

2. Fraudulent conveyances 🔑208—Subsequent creditor of grantor to wife could not avail himself of fraudulent conveyance statute, unless grantor was insolvent or contemplated insolvency (Civ. Code, § 3442).

Where there was no allegation in answer of defendant in action to quiet title that, at time of transfer of property by defendant husband to plaintiff wife, grantor was either insolvent or in contemplation of insolvency, and at time of conveyance defendant creditor was not then existing creditor of grantor, he could not avail himself of provisions of Civ. Code, § 3442, providing that any transfer of property without valuable consideration by party while insolvent or in contemplation of insolvency shall be fraudulent and void as to existing creditors.

3. Fraudulent conveyances 🔑269(1)—In absence of allegation and proof by subsequent creditor of fraudulent intent of husband deeding wife property, refusing testimony thereon held not error.

Refusing testimony as to what intent of parties was in making deed from husband to wife *held* not error, where answer of one subsequently becoming creditor of grantor raised no issue as to fraudulent intent of grantor when he conveyed property to his wife, and fraudulent intent was neither alleged nor proved.

4. Witnesses 🔑190—Declarations of grantor husband and grantee wife regarding intent of deed held inadmissible as privileged communications (Code Civ. Proc. § 1881).

Declarations of grantor husband and grantee wife regarding intent of deed *held* inadmissible, in action to quiet title, since declarations were privileged communications, as provided by Code Civ. Proc. § 1881.

5. Fraudulent conveyances 🔑208—Husband's subsequent creditor cannot question validity of husband's deed to wife, executed while free from debt (Civ. Code, § 1040).

One subsequently becoming creditor of husband who conveyed property to wife cannot question validity of deed from husband to wife, where husband at time was free from debt, under Civ. Code, § 1040, providing voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general.

6. Fraudulent conveyances 🔑208—Subsequent creditor of husband conveying property to wife could not dispute presumption property became wife's separate property (Civ. Code, § 164).

One not an existing creditor of grantor at time deed of property to grantor's wife was made could not inquire into fact in action to quiet title by grantee wife against husband and subsequent creditor whether property is still separate or community property, though Civ. Code, § 164, providing that, whenever property is conveyed to married woman by instrument in writing, it is presumed that title is thereby vested in her as separate property, may be controverted by any competent evidence.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action to quiet title by Jennie M. Haller against Jacob H. Haller, Paul Stewart, and others. From an adverse judgment, the defendant Stewart appeals. Affirmed.

A. T. Stewart, of Los Angeles, for appellant.

Richard A. Dunnigan, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendant Paul Stewart from a judgment entered against him in an action to quiet title.

The undisputed facts are these: The plaintiff, Jennie M. Haller, and Jacob H. Haller were at all times herein mentioned, husband and wife. The property involved was purchased and title taken in the name of Jennie M. Haller and Jacob H. Haller, and is conceded to have been at the time of the purchase community property. Thereafter, and on August 7, 1921, Jacob H. Haller made, executed, and delivered to his wife, Jennie M. Haller, a grant deed, conveying said property to her, which deed was acknowledged on May 6, 1922, and duly recorded on the same date. Said deed contained this clause: "This deed is made for the purpose of making the property herein described the separate property of the grantee herein." Thereafter, and on January 15, 1923, appellant, Paul Stewart, became a creditor of said Jacob H. Haller, and subsequently and at the time this action was commenced, had become a judgment creditor of said Jacob H. Haller in the sum of $1,407.83. Appellant had an execution issued on said judgment and caused the property in question to be levied upon in satisfaction of said judgment.

The present action was instituted to clear the cloud of that execution and judgment from said land, and quiet the title in plaintiff as her separate property.

The case was tried before the court without a jury, and judgment was entered quieting plaintiff's title, from which judgment the defendant Paul Stewart alone prosecutes this appeal.

The following stipulation was entered into at the time of the trial of said action: "It was stipulated that at the time of the transfer of the property, the subject of the above entitled cause, by Jacob H. Haller to Jennie M. Haller, to-wit, the 7th day of August, 1921, and at the date of the recordation of said deed, to-wit, May 6, 1922, that the said Jacob H. Haller *was not indebted in any sum of money, or any other obligation of any kind or character, to the said Paul Stewart, and that the said Paul Stewart did not become an existing creditor of the said Jacob H. Haller until subsequent to the transfer of said property, to-wit, until February 15, 1923.* It was further stipulated that the defendant, Paul Stewart, is a creditor of Jacob H. Haller upon a judgment upon which the sum of $1,407.83 is due, owing and unpaid, and that said judgment was obtained against said defendant upon an obligation incurred by Jacob H. Haller with the said Paul Stewart *subsequent to the transfer of the property mentioned in the deed.*"

Therefore it is clear from the stipulated facts that the appellant, Paul Stewart, *was not* an existing creditor of Jacob H. Haller at the time Jacob H. Haller conveyed to his wife, Jennie M. Haller, the real property in question, and did not become a creditor until *one year and six months after the delivery of said deed.*

The bill of exceptions shows the following: "On cross examination of the said Jennie M. Haller, to the question as to what was the source of the money with which her husband had himself purchased the property set forth in said deed, objection by counsel for plaintiff that the same was incompetent, irrelevant and immaterial, was sustained by the court, after counsel for defendant Paul Stewart had stated that he proposed to prove that the property was in fact community property and that said defendant was a creditor of J. H. Haller. * * * To the further question of said defendant's counsel as to when the property covered by said deed was acquired by J. H. Haller the same objection was made followed by the same ruling. To the further question by said defendant's counsel as to what was the intention of herself and her husband and what their arrangement as to this property so deeded to her, there was the same objection interposed and followed by the same ruling of the court. * * * The defendant, Jacob H. Haller, called as a witness on behalf of defendant Paul Stewart, testified that he was the husband of the plaintiff and was familiar with the deed introduced in evidence. * * * To both the questions as to the time he acquired the property in question and what was the source of the funds with which he purchased it, counsel for plaintiff objected on the ground that each of such questions was incompetent, irrelevant and immaterial and the court sustained such objections, and the court further stated that no evidence would be permitted unless it was first shown that defendant Stewart *was an existing creditor of the husband of the plaintiff at the time of the execution of the deed in question.* * * * To the further question as to what was the understanding between himself and his said wife as to the rights each should have in the property under this deed, the objection of counsel for plaintiff that the same was incompetent, irrelevant and immaterial was sustained by the court."

[1] Appellant contends that in all these rulings the trial court committed prejudicial error. In view of the foregoing stipulated facts, we think the court's ruling was correct in each instance.

[2] Appellant seems to rely on section 3442 of the Civil Code. This section provides that any transfer of property without a valuable consideration "by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and *void as to existing creditors.*" As appellant *was not an existing creditor of Jacob H. Haller at the time of the delivery of the deed in question,* and as there is no allegation in appellant's answer that at the time of said transfer the said Jacob H. Haller was either insolvent or in contemplation of insolvency, this provision can be of no assistance to appellant in the case at bar. Tainter v. Broderick Land & Investment Co., 177 Cal. 666, 171 P. 679; Bull v. Bray, 89 Cal. 286, 26 P. 873, 13 L. R. A. 576; Atkinson v. Western Development Syndicate, 170 Cal. 506, 150 P. 360.

[3] Furthermore, the answer of appellant raised no issue as to the fraudulent intent of Jacob H. Haller when he conveyed the property to his wife. Fraudulent intent is neither alleged nor proved. For this reason alone the proffered testimony as to what the intent of the parties was in making the deed was properly rejected.

If the conveyance was made by Jacob H. Haller to his wife with intent to defraud creditors, it is void as against those creditors, *but the intent is a question of fact, and must be alleged and proved.* Careaga v. Moore, 70 Cal. App. 620, 234 P. 121; Emmons v. Barton, 109 Cal. 662, 42 P. 303.

[4] The questions propounded to Mrs. Haller and to Jacob H. Haller regarding the intent and purpose in making the deed in question, were also inadmissible, for the reason that such declarations were privileged communications. Section 1881, Code Civ. Proc.

In Emmons v. Barton, supra, it is said: "The declarations of the husband to the wife at the time of the conveyance to her of certain property, as to his purpose in making it, are privileged, and it is error to compel the wife to testify thereto."

Appellant also states in his brief as follows: "There appears, therefore, to be really but the two main questions before the court upon this appeal: (1) Was the deed, reciting a consideration of $10.00, and the stipulation of respondent that no money was in fact passed as consideration therefor, a void deed? (2) If the deed was valid, was the presumption raised by it, that the property thereby became the separate property of the wife, as grantee, a rebuttable or a conclusive presumption?"

Section 1040 of the Civil Code provides: "A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; *except that a consideration is not necessary to its validity.*" See Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am. St. Rep. 189; Treat v. Treat, 170 Cal. 329, 150 P. 53, 57; Tillaux v. Tillaux, 115 Cal. 663, 47 P. 691.

[5] The proof that there was no valuable consideration would not affect the validity of the deed as a conveyance. Jacob H. Haller was free from debt and had a perfect right to give his property to his wife. Under such circumstances, his deed of gift was perfectly valid. Appellant was not at that time an existing creditor of the said Jacob H. Haller, and cannot be heard to question the validity of the deed.

Section 164 of the Civil Code provides in part that, "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property."

[6] That this is a disputable presumption there can be no doubt, and the same may be controverted by any competent evidence tending to overcome it (Killian v. Killian, 10 Cal. App. 312, 101 P. 806); but, as we have already repeatedly stated, the appellant *was not an existing creditor at the time the deed was made and has not by his pleadings shown himself entitled* to inquire into the fact whether

the property is still separate or community property.

Further discussion seems entirely unnecessary. We find no merit in the appeal.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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102 Cal. App. 557

GULLEY v. TRADERS' OIL CORPORATION. (Civ. 7100.)

District Court of Appeal, First District, Division 2, California. Dec. 16, 1929.

1. Landlord and tenant 🔑169(8)—Evidence supported conclusion that one traveling on road on landlord's premises to visit tenant was "invitee" and not "licensee."

Evidence *held* sufficient to support conclusion of trial court that plaintiff traveling on road across landlord's premises to visit his brother, who was tenant, was not "licensee" on premises but "invitee."

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Invitee; First, Second, and Third Series, Licensee.]

2. Landlord and tenant 🔑167(8)—Landlord retaining right of way across premises to house of tenant must see that road is kept in safe condition for traveling.

Where landlord retained right of way across property to house of tenant, it was landlord's duty to see that the road was kept in safe condition for traveling.

3. Landlord and tenant 🔑169(8)—Evidence supported conclusion that oil well operator did not use ordinary care in protecting from danger traveling public crossing land to visit tenant.

In action against oil well operator for injury sustained by plaintiff while crossing defendant's land to visit defendant's tenant when cable used in operation of oil well broke from supports, evidence *held* to justify holding that defendant did not use ordinary care in protecting traveling public, even though accident was caused by the crystallization or fatigue of iron rod which could not have been detected.

4. Landlord and tenant 🔑167(8)—That oil well operator's employee passed over lease to ascertain whether cables were in place did not constitute inspection of supporting rod as regards landlord's liability for injury to invitee.

In action for injuries to invitee crossing land to reach defendant's tenant when cable used in operation of oil well broke away from supports, fact that defendant's employee on day before accident passed over lease to ascertain whether cables were in place *held* not to show any inspection of "hold-down rod," breaking of which caused injury.

Appeal from Superior Court, Kern County; E. W. Owen, Judge.

Action by James Gulley against the Traders' Oil Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Adams, Adams & Binford and John Q. Adams, all of Los Angeles, for appellant.

E. A. Klein, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem. The plaintiff brought this action to recover damages for personal injuries alleged to have been suffered by him through the negligence of the defendant. The case was tried by the court without a jury, and judgment entered in favor of the plaintiff, and from said judgment the defendant appeals.

Appellant contends that the findings and judgment are not supported by the evidence in two particulars: First, that at the time and place of the accident that caused the plaintiff's injuries the latter was a licensee, and not an invitee upon the property of the defendant, and therefore the defendant owed him no duty other than to refrain from committing a willful or wanton injury to him. Second, that the equipment, appliances, and methods in use by the defendant in carrying on its business were, at the time of the accident, the same as generally used by others in the same business in that locality; that the cause of the accident was a defective iron rod; that said defect in the rod could not, by any amount of diligence or care on the part of the defendant, have been anticipated, guarded against, or prevented.

[1, 2] Bearing in mind the well-established principle of law that courts of appeal will not interfere where a finding of fact is based upon conflicting evidence, the evidence in support of the findings of the court shows that on January 10, 1926, and for some time prior thereto, the defendant was engaged in the business of operating oil wells in the Kern river oil fields, in Kern county; that it was the owner of a piece of property called "The Rambler Oil Lease," on which there were a number of oil wells; that on the day last mentioned the plaintiff was riding in an automobile on a road on the said "Rambler Oil Lease," and that a cable used in the operation of one of defendant's oil wells broke away from its supports and struck the automobile in which the plaintiff was riding; that as a result thereof the automobile was damaged, and the plaintiff suffered personal injuries, both of which injuries are the basis of this action. The evidence further shows that at the time of the accident the plaintiff was on his way to visit a brother, who, though not employed by the defendant, lived in a house on the "Rambler Oil Lease" as the defendant's tenant; that the road was generally used, and was the most direct road to the brother's house from the direction plaintiff was traveling; that

there were other residences near the house in which the brother lived, and tradesmen, mail carriers, and visitors, and, in fact, any one desiring to do so, had used this road for a number of years before the accident; that there were no signs or marks to indicate that it was claimed as a private road. The defendant introduced evidence to the effect that a road to the east of the one upon which the plaintiff was traveling was a public road and also the most direct road to the house occupied by the plaintiff's brother, but such evidence merely raised a conflict, and the court was not bound to accept it.

Without detailing any more of the evidence on this phase of the case, we are satisfied that the authorities bear out the conclusion of the trial court that the plaintiff was not a licensee upon the premises, but an invitee.

In 15 Cal. Jur. 741, it is said: "Where a building is let in flats or offices, the hallways, entrances and stairways not being demised to the tenants, but used in common by all, the landlord owes a duty to those visiting the premises and entering such passageways to visit a tenant, * * * as they are invitees of both landlord and tenant." We think that this language applies to the facts of the case at bar. The plaintiff was on his way to visit his brother, who was a tenant of the defendant, and the inference from the testimony is clear that the defendant retained the right of way to the house of the brother of plaintiff, and it was therefore its duty to see that the road was kept in a safe condition for travel. In Brown v. Pepperdine, 53 Cal. App. 334, 200 P. 36, 37, in passing upon the sufficiency of a complaint dealing with the distinction between a licensee and an invitee, the court used the following language: "We are of the opinion that the plaintiff, while using the common entrance to the basement to transact business with the tenant of the defendants, was an invitee of both the tenant and the defendants, and that, having been injured while he was such an invitee, the complaint states a cause of action against the defendants."

In Grant v. Sunset Telephone, etc., Co., 7 Cal. App. 267, the court, at page 273, 94 P. 368, 370, quoted approvingly from Sweeny v. Old Colony, etc., R. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644: "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon. * * * The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, but from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used."

The following language, taken from Phillips v. Library Company of Burlington, 55 N. J. Law, 307, 27 A. 478, is quoted with approval in Grant v. Sunset Telephone, etc., Co., supra: "A person entering premises of right or by invitation, expressed or implied, and using a path which for many years had been used with the acquiescence of the owner, is not precluded from recovering damages for an injury caused by a danger placed by the owner across the path solely on the ground that the owner had provided another way that was safe and might have been used by the plaintiff. In such a case it is a question of fact whether the path taken by the plaintiff has by its accustomed use, with the knowledge of the defendant, become a way which by its use and appearance indicated a way that persons so using the premises were invited to use."

Counsel for appellant has cited authorities in support of his contention that the respondent was a licensee upon the property, and not an invitee. We are satisfied that, under the statement of evidence above set forth, such authorities are not in point, and that the plaintiff was not a licensee, but an invitee upon the premises of the defendant at the time of the accident.

[3, 4] We next consider the claim that the accident was proximately caused by the breaking of the wrought-iron "hold-down rod," which could not, by any amount of diligence or care on the part of the defendant, have been anticipated, guarded against, or prevented, and that the method used by the defendant was the same as is customarily used for similar purposes in the locality of the defendant's lease. On this phase of the case the evidence discloses that, in pumping oil from the wells, the pumps were operated from a central power plant connected with the wells by cables. A number of cables crossed the road over which the plaintiff traveled at the time of the accident. These cables were suspended from posts set in the ground. Attached to each post was an iron rod seven-eighths of an inch in diameter and about three and a half or four feet long. The rod was attached to the top of the post by an eyebolt. The lower end of the rod was a hook, and the cable was suspended in this hook. There was also driven in the ground an iron pipe called a "dead man," which was attached to the rod above described by a cable, and held the rod in place, and thus steadied the cable that runs from the power plant to the well and kept it from coming out

of the hook. Shortly before the accident one of these rods broke and allowed the cable to swing up and down across the road, and, when plaintiff reached this place, his car was struck by the cable, and the injuries complained of resulted.

The court received evidence offered by the defendant to show that this method used to hold the cable in place was in general use by oil operators in that locality, and further evidence to show that the breaking of the "hold-down rod" was due to crystallization or fatigue of the metal in the rod, and that it could not have been detected except by the breaking of the rod itself. However, Albert Lucas, a witness for the plaintiff, testified that he had worked in and about the oil fields and in the locality of the "Rambler Oil Lease" for many years, and that at the time of the accident he was working for the defendant; further, he was familiar with the various methods used to suspend the cables in that vicinity, and that there was in general use throughout that district an additional appliance; that in case of the breaking of the "hold-down rod" the cable could not come down; that since said accident that method has been used by the defendant. This witness further testified that it was not unusual for hold-down rods to break. In the light of the evidence of this witness, the court was justified in holding that the defendant did not use ordinary care in protecting the traveling public from the danger attendant upon the method in use by it. It also appears that, even though the accident was caused by the crystallization or fatigue of the hold-down rod itself, and that it could not have been detected, the defendant was in duty bound to use every reasonable precaution to protect invitees upon the premises—such a method for instance, as testified to by the witness Lucas.

In Phillips v. Pickwick Stages, 85 Cal. App. 571, 259 P. 968, 969, the answer alleged "that the accident was unavoidable by reason of the fact that the brake foot pedal suddenly broke while being used to stop said stage at the time and place of the accident, and that the breaking of said brake foot pedal was caused by a latent defect in said brake foot pedal, which was unknown to defendant under constant use and careful inspection." It is further said in the opinion that the question of the latent defect in the brake foot pedal was a question of fact for the jury, and, further: "The auto stage in question, as is universally the custom to-day, was equipped with two sets of brakes; that is, the customary foot brakes operated by means of a foot pedal and a so-called emergency brake operated by means of a hand lever. Upon the breaking of the foot pedal, it was not possible to operate the foot brake, and according to the testimony of the driver of the auto stage, the emergency brake was not adequate at the time to stop the car, due to it not being in 'prime condition.' It is apparent that, if the emergency brake had been in prime condition the auto stage could have been brought to a stop and the accident avoided."

In the instant case, had the defendant used the system to hold up the cable which was testified to by Lucas as being generally used in that locality, it is only reasonable to believe that the accident would not have occurred. So far as the inspection of the various "hold-down rods" are concerned, it appears that on the day previous to the accident employees of the defendant passed over the lease to ascertain if the cables thereon were in place. This, however, could not be held to be an inspection of the "hold-down rod." Indeed, under the theory of appellant, such an inspection would not have revealed any defect in the rod.

No good reason has been shown why the judgment should be disturbed, and it is therefore affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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102 Cal. App. 420

FARIS v. WILLIAMS et al. (Civ. 6259.)

District Court of Appeal, Second District, Division 2, California. Dec. 9, 1929.

Appeal and error ⚷757(3)—Appellate court would not make exhaustive analysis of transcript to review facts, where appellant set out only skeleton interpretation of testimony.

Appellate court would not make exhaustive analysis of whole transcript in order to determine whether appellant's theory, that careful review of facts would disclose necessity for formal demand, rescission, and suit for damages, whereas these steps were not taken, was tenable, where appellant set out only skeleton interpretation of testimony covering less than 30 pages from transcript of more than 300 pages and no references were made to pages of official record.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for money had and received by W. A. Faris against J. H. Williams and another. From the judgment, defendant named appeals. Affirmed.

Leonard Comegys, of Los Angeles, for appellant.

Clark J. Milliron and George H. P. Shaw, both of Los Angeles, for respondent.

CRAIG, Acting P. J. An action was commenced by the respondent against appellant and the defendant bank, alleging by a common count in the usual form for money had and received that they were indebted to the plaintiff in a sum for which demand had been made, but that no part had been paid. Each of the defendants denied all of said allegations, except as to a form of demand which the defendant bank admitted. By supplemental complaint it was alleged that since the commencement of the action Williams had transferred his interest in certain property, as collateral security. To this pleading the defendant Williams also filed an answer. Much evidence was introduced tending to elucidate asserted contractual relations and negotiations leading to the plaintiff's claim, and all of the issues were strenuously contested. Judgment was rendered in favor of the plaintiff against the defendant Williams, and absolving the bank from liability. Respondent has remitted $10,000 of the amount of the judgment.

Appellant, J. H. Williams, attacks the judgment and findings by a lengthy discussion of the evidence, involving asserted agreements for the disposition of bonds, a purchase of an interest in a realty syndicate, and attempted but ineffective rescission, and urges a reversal upon the ground that the evidence is insufficient to sustain the judgment as rendered. It is argued throughout the briefs that a careful review of the facts would disclose the necessity for a formal demand, rescission, and a suit for damages, whereas these steps were not taken. However, we have before us only a skeleton interpretation of the testimony by the appellant which, aside from exhibits, covers less than 30 pages, from a transcript of more than 300 pages. The evidence is not attempted to be quoted, nor are references to pages of the official record supplied for our assistance. No rulings of the trial court are assigned as error, yet an exhaustive analysis of the whole transcript is demanded for the purpose of determining whether or not appellant's theory of a more propitious and expedient cause of action against him is tenable.

The case is so similar to that presented in Title Insurance & Trust Co. v. Wilson, 87 Cal. App. 143, 261 P. 767, 768, wherein we called attention to repeated infractions of the rule in such cases, that we need but quote therefrom: "The provision of the Code here involved is intended for the benefit of the adversary party as well as of the appellate court. It is unfair to both, and also to other litigants whose appeals are pending awaiting decision, to cause this court to devote its time to a performance of the labors of investigation and research expressly required of the appellants by law."

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

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102 Cal. App. 254

BARROWS et al. v. WM. SIMPSON CONST. CO. et al. (Civ. 3918.)

District Court of Appeal, Third District, California. Nov. 30, 1929.

1. Landlord and tenant 🔑80(3)—Provision for cancellation of lease on damage to building did not preclude sublessees from recovering for negligent excavation of adjoining property, where rent was required to be paid without exception.

In sublessees' action for damages to building caused by negligent excavation of adjoining property, contention that sublessee had proved no damages *held* not supported by fact that original lease provided for cancellation thereof in case of damages to building, since sublease provided for payment of rent without exception or deduction for any cause.

2. Landlord and tenant 🔑101—Lease and sublease held not terminated by destruction of part of building by negligent excavation of adjoining property so as to preclude sublessees' recovery of damages (Civ. Code, § 1933).

Lease and sublease *held* not terminated by destruction of one wall of premises by negligent excavation of adjoining property so as to preclude sublessees from recovering damages therefor, although Civ. Code, § 1933, provides that contract of hire is terminated by destruction of thing hired, since only portion of building was damaged and rendered untenable and balance of building remained tenable.

3. Landlord and tenant 🔑80(3)—Excavator could not escape liability for damages caused adjoining property because sublessees could have proceeded against landlord (Civ. Code, §§ 1941, 1942).

In sublessees' action for damages to building caused by negligent excavation of adjoining property, fact that sublessees did not elect to follow remedy against landlord under provisions of Civ. Code, §§ 1941, 1942, *held* not grounds on which negligent excavator could escape liability.

4. Landlord and tenant 🔑80(3)—Limiting sublessees' damages to rent paid for untenable portion of building could not be complained of by party excavating adjoining property (Civ. Code, § 3333).

In sublessees' action against excavator for damages caused to building by negligent excavation of adjoining property, excavator could not complain because court limited damages to actual rent paid by sublessees for portion of building rendered untenable, where sublessees were probably entitled to more damages, since, under Civ. Code, § 3333, which provides for proper measure of damages, rent was only one element thereof.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action Willard Barrows and R. E. McGinnis, copartners doing business under the fictitious name of the Barrows Motor Car Company, against the Wm. Simpson Construction Company and the Guaranty Building & Loan

Association. Judgment for plaintiffs, and defendants appeal. Affirmed.

G. R. Dexter and Howard B. Henshey, both of Los Angeles, for appellants.

Maurice C. Sparling, of Los Angeles, for respondents.

PRESTON, Justice pro tem. This is an appeal by the defendants, the Wm. Simpson Construction Company, a corporation, and Guaranty Building & Loan Association, a corporation, from a judgment entered against them in the sum of $1,120 in an action for damages.

In the month of November, 1923, plaintiffs and respondents herein were occupying a building in Hollywood, Cal., used by them for the display and sale of Chrysler automobiles; that, as found by the trial court, "for some days prior to November 13, 1923, the defendants negligently and without use of ordinary care or skill, and without taking reasonable precautions to sustain the land occupied by the plaintiffs, excavated the land adjoining on the west to the said lands and buildings so occupied by the plaintiffs, and excavated and removed the earth therefrom to a depth in excess of twenty feet, without leaving sufficient support for the land and building so occupied by the plaintiffs, and by reason thereof, and by its own natural weight, a great part of the land so occupied by plaintiffs sank and gave way, and by reason thereof, the walls and foundation of the said building on said land so possessed by plaintiffs were undermined, and by reason thereof, the westerly wall of plaintiffs' said building, and the westerly half of the floor thereof, bulged, buckled and broke, and plaintiffs were thereby deprived of the occupancy and use of the west one-half of said building so possessed by them for a period of four months from November 13, 1923."

Plaintiffs were occupying said land and building under a sublease from Paul G. Hoffman Company and paying $560 per month therefor, and, because of their said loss of the use of the west half of the premises for four months, they claimed damages in the sum of $5,000, and were awarded by the court, sitting without a jury, damages in the said sum of $1,120.

[1] Appellants first contend that no damages were proved. This contention is based upon the following facts: The property in question was leased by the former owner to Paul G. Hoffman Company, who in turn *subleased* the premises to plaintiffs. After these leases had been made, the property was conveyed to one E. V. Rosenkranz. The original lease to Paul G. Hoffman Company contained a provision that, in the event of certain catastrophes happening to said premises, and in the event said premises, because thereof, were damaged so they could not be repaired within 90 days after the work of reconstruction could reasonably be begun, then, in that event, said Paul G. Hoffman could cancel said lease.

Under this provision of the original lease, appellants argue "that respondents were under no obligation to pay rental during the time the building was unusable, and the rental, if so paid by them, was a voluntary payment, not made under any legal obligation, and not a basis for damages."

We are unable to agree with this contention. In the first place, appellants introduced no evidence whatever that we are able to discover as to the time within which said damage could have been repaired in order to even bring this case within the conditions set forth in the original lease. Furthermore, the respondents were occupying said premises under a *sublease* from Paul G. Hoffman Company, which said lease was complete and entire within itself, and did not even refer to or mention the original lease, and did not contain any such provisions as referred to by appellants; but, on the contrary, specifically provided that said rental payments of $560 per month were to be paid without exception or deduction for any cause, and that the "strict performance of which shall be precedent to the rights of lessees to remain in possession of said premises or to have this lease continue in effect."

[2] Appellants also contend: "The lease had terminated by the destruction of the premises (Civ. Code, § 1933), and plaintiffs could have vacated the premises and been discharged from the further payment of rent."

Neither the original lease nor the sublease of respondents terminated with destruction of the west one-half of the wall of said building. A lease of land with a building thereon is not terminated by the destruction of or damage to one of the walls of the building, unless so provided by contract or statute. No such provision is contained in either of the leases in question.

Section 1933 of the Civil Code provides: "The hiring of a thing terminates * * * (4) By the destruction of the thing hired." Here the "thing hired" was the land and building thereon, and only *a portion of the building was damaged and rendered untenable, and the balance of the building remained tenable;* therefore the "thing hired" was not destroyed, and the lease did not terminate by the operation of said statute. Hamer v. Ellis, 40 Cal. App. 57, 180 P. 30.

[3] It is true that respondent might have, in the absence of an expressed contract in the lease relating to repairs, pursued the remedy against the landlord, provided for in sections 1941 and 1942 of the Civil Code, and, if they had done so and the landlord had failed to repair, respondents would have had, *against the landlord,* either one of two remedies, viz.: (a) Treat the failure to repair as a breach of the lease and vacate the premises; (b) themselves make the repairs at the expense of the landlord, after notice to him, provided they do not entail an expenditure of more than one month's rent. Van Every v. Ogg, 59 Cal. 565;

Grazer v. Flanagan, 35 Cal. App. 724, 170 P. 1076; Priver v. Young, 62 Cal. App. 405, 216 P. 966; Gately v. Campbell, 124 Cal. 520, 57 P. 567; Ferber v. Greenberg (Cal. App.) 277 P. 534.

However, the respondents did not elect to follow the provisions of sections 1941 and 1942, Civil Code, against the landlord alone or terminate the lease, but elected to keep their lease alive and sue the parties who caused the injury to the building they had leased. This they had a perfect right to do. They were not required to surrender up a valuable lease and move, or discontinue business altogether, to avoid payment of rent, simply because appellants had injured their leased property and rendered a portion thereof untenable. It seems to us that it was no concern of the appellants whether respondents elected to continue paying rent or surrendered the lease. If appellants wrongfully injured respondents' leased property, they are liable in damages and cannot escape the consequences of their negligent act by simply saying that respondents could have surrendered the lease and thereby avoided paying any rent.

If appellants' argument be sound, then they could negligently and wantonly destroy the entire building and then say to respondents: "You can not recover damages from us because you had the right to terminate the lease and move out, which you did not do, therefore we are immune from damages, no matter how valuable your leasehold may have been." This would put a premium upon the wanton and negligent destruction of leased property, and is certainly not the law.

[4] Appellants next complain that the court did not adopt the proper measure of damages. Section 3333 of the Civil Code provides the proper measure of damages in such an action, but the trial court limited the damages to the *actual rent paid by respondents for the portion of the building rendered untenable.* The rent was only one element going to make up respondents' damage. Respondents undoubtedly held a valuable lease and were probably entitled to more damages, but, if they are satisfied with the trial court's award, certainly appellants are in no position to complain.

Appellants next complain that there was no showing that the defendants failed to use ordinary care. There is likewise no merit in this contention. The court found that the defendants failed to use ordinary care or skill in the work of excavating and also in the shoring up of the building, all of which is amply supported by the evidence.

Neither is there any merit in the contention that there is no evidence to support a judgment against the Guaranty Building & Loan Association. The evidence against this particular defendant is not as strong as it is against the other defendant, but, when all the facts and circumstances in the record are considered, we cannot say that the court was not warranted in rendering a judgment against them also.

Other contentions made by appellants are without merit and need no special discussion.

After a careful review of the entire record, we are satisfied that the appellants have no legal ground for complaint, and that the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

102 Cal. App. 563

RHOADES v. PETROLEUM EXPORT CORPORATION (two cases). (Civ. 7105.) ★

District Court of Appeal, First District, Division 2, California. Dec. 16, 1929.

Rehearing Denied Jan. 14, 1930. Hearing Denied by Supreme Court Feb. 13, 1930.

1. Brokers 🔑52—Under contract showing commissions were contingent on sale, broker's assignee could not recover commission on goods shipped to subagent in absence of actual sale.

Under contract by which one became agent for sale of petroleum products which fixed prices as sale price, and which included commission to agent showing that contract for commissions was contingent on a sale, agent's assignee *held* not entitled to recover commissions on goods which principal shipped to one whom agent appointed as subagent, where there was no actual sale of goods.

2. Brokers 🔑49(1)—Broker's assignee could recover commission on goods sold and paid for, under contract fixing price including broker's commission.

Under contract by which sale price of petroleum products was fixed, including commission of 5 per cent. to broker, where broker sold goods to another which were paid for, his assignee was entitled to recover commissions from principal therefor.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Actions by F. C. Rhoades against the Petroleum Export Corporation. From the judgment in the first action, defendant appeals, and from judgment in the second action, plaintiff appeals. Affirmed.

Black, Hammack & Black and Carey McWilliams, all of Los Angeles, for appellant.

Thomas T. Robinson and Thomas A. Sanson, both of Los Angeles, for respondent.

BURROUGHS, Justice pro tem. These actions were commenced to recover the sum of $6,572.27, alleged to have been earned by the plaintiff's assignor as a commission on the sale of certain petroleum products manufactured by the defendant. The court awarded plaintiff a judgment in the sum of $2,626.50, which was $1,920 commission and interest thereon from 1921. Both parties have appealed from the judgment.

★Rehearing denied. Hearing denied by Supreme Court.

Plaintiff's assignor, Zenon C. Malis, and the defendant, by virtue of a letter written by the latter on May 4, 1921, entered into a contract by the terms of which Malis became the agent of the defendant for the sale of its said products in the Levant. The contract quotes fixed prices per case as the sale price of benzine and kerosene, which included a commission to Malis of 5 per cent.; there is a further provision that, if Malis sold goods for a greater sum than the price quoted, the excess should be divided equally between the parties. There is a further proviso in said contract that "commissions will be payable immediately after payment has been received for each order, or will be paid to you quarterly or semi-annually as you prefer."

[1, 2] By virtue of this contract Malis sold to one Tavernaris, of Famagusta, merchandise, which was paid for in full, and it is alleged in the complaint there became due thereon a commission of $1,920. Thereafter the defendant shipped to Assiha Safar Trad, of Beirut, goods of the value of $51,647.50, upon which there was paid to the defendant the sum of $26,000, and no more, and it is alleged in the complaint there became due thereon a commission of $4,652.27. The facts surrounding the sale to Assiha Safar Trad are as follows: The goods were shipped to Trad, who had been appointed by Malis as his agent for certain designated territory in the Levant, and he paid defendant $26,000 at the time the goods were shipped, and upon the arrival at the point of destination it was claimed by Trad that the articles were not as represented by the defendant, either in quantity or quality, and that they had been damaged in transit. This claim resulted in a controversy between the parties, and a number of investigations were made. One of these was made by the United States consul and resulted in a report adverse to the defendant. There were no further sums paid for these goods. Defendant claims it developed for the first time at the trial that Assiha Safar Trad was the agent of Malis and was simply the dummy who received the goods for Malis, and that Malis having acted in bad faith he is not entitled to recover any commissions whatever. It is clear from the record that at least a month before the shipment defendant knew Trad was the agent of Malis; further, from the defendant's letter of October 7, 1921, that upon payment of $26,000 it was defendant's intention to make the shipment to the Bank of Syria upon the payment to the bank of the balance due on each case of merchandise released as the same was sold, but upon the receipt of a cablegram from Malis to the effect that the shipment could not be handled that way the shipment was made and the goods released without any further payment than the initial payment of $26,000, and the balance due was to have been paid when the goods were sold by Assiha Safar Trad. From this statement it is apparent that the contract for commissions was contingent upon a sale, and, so far as the record discloses, there was no sale made, and therefore plaintiff is not entitled to recover a commission on the so-called Trad sale. In the case of the sale to Tavernaris the goods were sold and the money paid to the defendant, and therefore entitled plaintiff to the judgment rendered by the court.

The judgment is affirmed, without costs to either party.

We concur: KOFORD, P. J.; NOURSE, J.

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102 Cal. App. 592

In re DES GRANGES' ESTATE AND GUARDIANSHIP.

APPLING v. DES GRANGES.

(Civ. 36.)

District Court of Appeal. Fourth District. California. Dec. 16, 1929.

1. Insane persons 🔑29—Evidence of sanity of absent ward, in proceedings for restoration to capacity, held insufficient to sustain finding that ward was capable of caring for herself and property; "insane"; "incompetent" (Code Civ. Proc. § 1766).

Evidence produced by deposition as to sanity of 76 year old ward, who had been in hospital for insane for about 14 years and was not present at trial limited to issue of sanity, *held* insufficient to sustain finding of capacity of ward to take care of herself and her property, in proceedings for restoration of capacity, under Code Civ. Proc. § 1766, requiring as condition to restoration that person be of sound mind and capable of caring for himself and his property; words "insane" and "incompetent" being not necessarily convertible terms, as person may be incompetent by reason of insanity or for some other cause, as indicated by section 1763, relative to beginning of guardianship proceedings; condition of incompetency being measured by sections 1767 and 1764.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Incompetent; Incompetency; Insane; Insanity.]

2. Appeal and error 🔑1011(1)—Trial court's conclusions on substantially conflicting evidence will not be disturbed.

Where there is any substantial conflict in the evidence, the conclusion reached by the trial court after weighing the evidence and considering the inferences that may reasonably be drawn therefrom will not be disturbed.

3. Insane persons 🔑29—In proceeding for restoration to capacity, court must require proof of ward's ability to care for his property, and that he is not likely to be imposed upon (Code Civ. Proc. § 1766).

It is the duty of the court to zealously guard the property of a person who has been declared insane or incompetent, and, upon proceeding for restoration to capacity under Code Civ. Proc. § 1766, proof is required, not only of sanity, but of ward's ability to care for his property, and that he is not likely to be deceived or imposed upon.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Proceeding by Alfred A. Appling for legal restoration to capacity of Katherine des Granges, opposed by J. D. des Granges, guardian. From a judgment restoring the ward to capacity, the guardian appeals. Reversed.

Allen & Lyon, of Fullerton, for appellant.

Alfred A. Appling and S. M. Davis, both of Santa Ana, for respondent.

BARNARD, J. Katherine des Granges was declared insane by the county court of Brown county, Wis., on October 12, 1911. Thereafter, in a proceeding in the superior court of Orange county, Cal., the appellant herein was appointed guardian of the person and estate of said Katherine des Granges, and is still acting as such guardian. On July 1, 1926, the county court of Brown county, Wis., entered a judgment and decree declaring Katherine des Granges to be sane. Thereafter the respondent herein, as friend and attorney for said Katherine des Granges, filed a petition alleging that the said Katherine des Granges is now sane and competent, and praying that the court order an investigation into her mental condition, to the end that she be restored to capacity. The cause went to trial upon the issues presented by this petition and an answer thereto. Judgment was entered in favor of the petitioner, and the guardian has appealed.

The court found "that the said Katherine des Granges is now sane and of sound mind and fully capable of caring for herself and managing her property." The only question involved in this appeal is whether or not the evidence sustains this finding. The ward was not present at the hearing, being then in the state of Wisconsin, and all of the evidence introduced by the petitioner was in the form of depositions. The respondent sets forth in his brief, his own summary of the evidence introduced, and relied on as being sufficient to sustain the finding in question, as follows:

"Summarized the Witnesses Testify as Follows:

"1. Dr. A. O. Olmsted—'She is sane.'

"2. Dr. R. M. Burdon—'She appeared to be normal. Is sane.'

"3. Lorraine Ross, Nurse—'She was exceptionally bright. Is sane.'

"4. Dora Brown—'She was sane.'

"5. Arthur Brown—'She was well enough to be paroled. She is sane. She is all right.'

"6. Jacob Landenklos—'She is all right as near as I can tell.'

"7. Emma Luecke—'I think she is sane.'

"8. Charles F. Luecke—'She conversed normally. I judged her sane.'

"9. Minnie Schoen—'She is sane. I have never seen anything wrong with her. Her memory is good.'

"10. L. M. Schoen—'I regard her sane. I never saw anything wrong with the woman.'

"11. Harrie des Granges—'She appears to be intelligent. She acted normally.'"

While the parties testified as stated, it is necessary to consider their testimony in the light of the questions asked of them, and the context. Dr. Olmsted was asked as to whether he had examined the ward and whether he had formed an opinion as to whether she was sane. Also, the following: "Q. State whether or not you and Dr. Burdon did determine her sanity? A. We certified that we believed she was sane." Dr. Burdon was asked as to his examinations of and conversations with the ward, including:

"Q. When Dr. Olmsted and yourself were appointed to examine her, the purpose of your examination was to determine sanity or insanity? A. Yes it was.

"Q. And as a result of the examination of Dr. Olmsted and yourself, you reported a finding of sanity? A. Yes."

Lorraine Ross was asked for a definite statement as to whether she regarded the ward as sane or insane. As a reason for her opinion she testified: "My opinion of her is that she was exceptionally bright because her memory was so good. She could memorize—She was in a room with other people, and she could tell you about the people that came in, their names and things they did, that I knew were done, things like that. * * * Well, she talked about things that happened in her childhood days, and about different things that she had read in papers and that we had read and knew that they were true." Dora Brown was asked if she had formed an opinion as to whether or not the ward was sane. Arthur Brown was asked the same question. Jacob Landenklos testified: "Q. From your acquaintance with her, knowledge of her, examination or observation, you have made an opinion, have you formed an opinion as to whether or not she is sane? A. Whenever I see her she is all right as near as I can tell. I have kept a close watch all the time, as close as I could." Emma Luecke was asked only as to her opinion on the ward's sanity, and the reasons for it. Charles F. Luecke was asked for his opinion on her sanity. He testified:

"Q. What were her actions as to whether she was a woman of normal mind or otherwise? A. She behaved herself, acted normal, obeyed orders, and did what little work she had to do.

"Q. How did she converse with you? Did

she converse readily and normally? A. She did during all the conversation I had with her."

Minnie Schoen, on being asked her opinion as to her sanity, and the reasons therefor, testified: "She has been with me nine months and I have never seen anything wrong with her. She understands everything about what she reads and her memory is good about years ago. I see nothing wrong with her." Harrie des Granges testified as follows: "Q. From your visit with her back there in September, state whether or not in your opinion that your mother is sane or insane? A. As far as I could see she was sane but I do not feel she was competent to handle business; her memory is very good on things that happened years ago, but not very good on present day things."

[1] While the evidence is sufficient to sustain the findings that the ward is sane, that is, of sound mind, we think it is not sufficient to sustain the other essential finding that she is "fully capable of caring for herself and managing her property." There is a difference between insanity and mental incompetency to handle one's property. "The words, 'insane' and 'incompetent' are not necessarily convertible terms, as a person may be incompetent by reason of insanity or from some other cause." 14 Cal. Jur. 333. "A weak mind may be sound, and a strong mind unsound." 14 Cal. Jur. 335, and cases cited.

This action was brought under section 1766 of the Code of Civil Procedure. This section relates to the legal restoration to capacity of a person whose capacity to act in matters of business has been legally taken away through the procedure provided for by other sections of the same article of this code. Section 1763, providing the manner of beginning such a guardianship proceeding. reads in part: "When it is represented * * * that any person is insane, *or from any cause mentally incompetent to manage his property*." Section 1764 provides what must be found by the court before a guardian is appointed. The essential thing to be found is that "the person in question is incapable of taking care of himself and managing his property." Sections 1767 and 1764 together provide a test by which the condition of the alleged incompetent is to be measured. In re Cassidy (Cal. App.) 273 P. 69. If, measured by the test, the person in question is found to be incompetent a guardian is appointed, regardless of whether the incompetency is due to insanity or to some other cause. Matter of Coburn, 165 Cal. 202, 131 P. 352. It being necessary only to prove such incompetency to secure the appointment of a guardian, this being in the interest of the person affected and for the preservation of his property, it would be logical that the converse would be true in a proceeding to do away with the guardianship. Not only logic, but the statute dictates this. Section 1766, under which this proceeding is brought, provides also what must be found by the court in order to restore the person to capacity. That is, "that the person is of sound mind, and capable of taking care of himself and his property."

Respondent says in his brief: "The appellant takes the position that it is necessary for the respondent to allege and prove that Katherine des Granges is not only sane but also competent." We agree with appellant in this regard. It is therefore necessary that the sufficiency of the evidence be considered in connection with that portion of the finding holding her capable of caring for herself and her property. The petitioner alleged in his petition that the ward was sane and competent, but offered proof only of sanity. There was no direct or affirmative evidence on the matter of competency. All of the questions asked were on the question of sanity. In fact the record shows the court tried the case on that theory. During the progress of the trial the court said: "The question is whether the woman is sane or insane." "We will adjourn now until two o'clock; get the stuff that pertains to sanity or insanity; if sane she has the right to do what she pleases with her money; the question is whether she is sane or insane; it isn't a question of whether she owes a bill or not."

Upon the conclusion of petitioner's case the appellant moved for a dismissal upon the ground that, irrespective of insanity, there was no proof that the ward was competent. Answering this, the attorney for respondent said, in part: "This court is not going to split hairs to the extent of pleading of this sort when we allege sufficient in our petition and sufficient to have her discharged from the insane asylum; as to how competent she is is another matter; in the evidence it says she is a smart, old woman; there is nothing in the record, your Honor; no evidence offered to show she was incompetent or insane, and we have the record before the court that she is sane, and that court can't hold people in asylums when they are sane; the Wisconsin courts don't—." This proceeding bears no relation to the question of confinement or release from an insane asylum. Sullivan v. Dunne, 198 Cal. 183, 244 P. 343. When the case was submitted the court said: "I think the only thing we are concerned with is whether or not the woman is sane or insane; it is conclusively shown that J. P. des Granges was appointed guardian of the person and property of Katherine des Granges, an insane person, in 1916; he is still acting in such capacity; from the testimony of these depositions it shows that she was paroled from the Institution some time in June—June 23, 1926—and the Superintendent of the Institution said she would not be paroled unless they thought she was sane.

On top of that we have an order of court finding she was sane and declaring her to be a sane person. I think that the evidence is conclusive if we recognize the order of the court from that State; it shows that it was done upon notice that she has been declared a sane person."

[2, 3] There is no evidence to support the finding of the court as to competency, unless, from the testimony of the witnesses on the question of insanity, an inference may reasonably be drawn that she was capable of taking care of herself and her property. The ward was about 76 years of age, had been in a state hospital for the insane in Wisconsin for about 14 years and was not present at the trial. Viewing the evidence as a whole, under the existing circumstances, we think such an inference cannot be reasonably drawn. The rule is that, where there is any substantial conflict in the evidence, the conclusion reached by the trial court, after weighing the evidence and considering the inferences that may reasonably be drawn therefrom, will not be disturbed. Not only is it true that the inferences referred to cannot reasonably be drawn from the evidence here, but the record discloses that the court proceeded upon the theory that the question of the ward's ability to handle her property was not in issue. It is the duty of the court to zealously guard the property of a person who has been declared to be insane or incompetent (Sullivan v. Dunne, supra), and upon a proceeding to restore such a person to capacity, to require proof, not only of said person's sanity, but also of his ability to take care of his property, and that he is not likely to be deceived or imposed upon by artful or designing persons.

For the reasons given the judgment is reversed.

MARKS, J., deeming himself disqualified, takes no part in the decision of this case.

SLOANE, P. J. I concur in the opinion of Mr. Justice BARNARD. Were it not for the fact that the investigation before the court in the proceeding from which this appeal was taken was obviously confined to the question of the mental sanity of the ward, the sufficiency of the evidence to support the judgment of restoration to capacity to manage her own affairs might be upheld.

The trial court found in favor of capacity, and there were general statements of the witnesses for petitioner as to her general competency. But, as pointed out in the opinion here, the testimony was all directed to the question of sanity, and the statements of the trial judge, as shown in the record, so clearly indicate that the findings were governed by the sole question as to whether the petitioner was sane or insane, that it must be conceded that the further conditions affecting her competency to take care of herself or her property, were not taken into account.

Insanity implies want of capacity, but the mere restoration to sanity, such as justifies a discharge from detention in an asylum, does not determine such a restoration as to terminate the necessity for guardianship.

This is indicated by section 2189 of the Political Code, which provides under the subhead "Certificate of Discharge" that such certificate of discharge, *where no guardian has been appointed*, "shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of section seventeen hundred and sixty-six of the Code of Civil Procedure." See, as bearing on this point, Aldrich v. Barton, 153 Cal. 488, 95 P. 900.

Where such guardian has been appointed there is no method of restoration to capacity provided excepting by the procedure under section 1766, Code of Civil Procedure, and that section distinctly provides for the calling and examination of witnesses on the hearing, and, if it is found that the person is of sound mind, "and capable of taking care of himself and his property, his restoration to capacity must be adjudged, and the guardianship of such person, if such person is not a minor, must cease."

In a case like this, where the person under disability is shown to be 76 years of age and has been for 14 years confined for insanity, the question not only of mental sanity, but that also of capacity to take care of herself and her property should be made a definite issue before the protection of a guardian is withdrawn.

102 Cal. App. 213

DOUD v. JACKSON. (Civ. 3.)

District Court of Appeal, Fourth District, California. Nov. 27, 1929.

1. Appeal and error 🔑768—Absent brief by respondent in record on appeal, appellate court may decide case on statement of facts contained in appellant's brief.

Where record on appeal from order dissolving attachment consisted of clerk's transcript and appellant's opening brief, but contained no brief in behalf of respondent, appellate court may, under Rule 5 governing appellate courts, decide case on statement of facts contained in appellant's brief.

2. Attachment 🔑8—Implied contract to repay money, where consideration entirely failed, may be contract for direct payment of money and support attachment only where no consideration was received and damages are liquidated.

Implied contract to repay money received under contract, consideration for which had entirely failed, may be considered contract for direct payment of money as basis for attachment proceedings only, where nothing has been received in consideration for amount sought to be recovered, and where damages may be said to be liquidated and definitely ascertainable.

3. Sales 🔑404—Plaintiff suing for breach of contract, having received 63 of 64 rabbits contracted for, there was not entire failure of consideration entitling plaintiff only to damages.

Where plaintiff received 63 of 64 rabbits of designated sex contracted for, though rabbits had not fulfilled breeding obligations called for by contract and failure to do so was not shown to have been caused by any organic disability, there was not an entire failure of consideration, and plaintiff was only entitled to damages.

4. Sales 🔑92—Where defendant, sued for breach of contract, refused to accept plaintiff's offer to return rabbits on conditions specified, there was no rescission.

Where plaintiff suing for breach of contract offered to return rabbits purchased on condition that he be repaid money and compensated in damages, but defendant refused to agree to such settlement, there was no rescission of contract.

5. Cancellation of instruments 🔑1—Contracts 🔑252—Contract may be rescinded by consent and agreement or by notice of rescission and action to place parties in status quo.

Contract may be rescinded by consent and agreement of parties or by serving notice of rescission and action to place parties in status quo.

6. Sales 🔑391(1)—If consideration entirely failed, breach of contract would establish implied contract to refund purchase money.

Breach of contract for sale of rabbits for breeding purposes by failure of seller to perform obligations thereunder, if there was entire failure of consideration, would establish implied contract to refund purchase money.

7. Sales 🔑404—On partial failure of consideration purchaser could affirm contract and sue for damages or give timely notice of rescission and enforce same.

Where there was only partial failure of consideration for contract for sale of rabbits for breeding purposes, purchaser's remedy was either to affirm contract and sue for damages, or give timely notice of rescission and enforce same by proper action, neither of which would imply agreement by seller for direct payment of money.

8. Contracts 🔑274—Mutual rescission on breach of contract involves promise of defaulting party to refund money received.

Mutual rescission on breach of contract involves promise of defaulting party to refund any money he may have received under contract.

9. Attachment 🔑14—That plaintiff suing for breach of contract asked for damages did not affect right to attachment for part of demand based on contract to repay purchase price.

Fact that plaintiff suing for breach of contract, in addition to return of purchase price, demanded damages for expenses incurred, for which admittedly attachment lien would not lie, *held* not to affect right to attachment for any part of demand which was based on implied contract to repay money advanced.

10. Attachment 🔑105—Affidavit for attachment, including in lump sum stated unliquidated damages, held defective as not stating amount of defendant's indebtedness (Code Civ. Proc. §§ 537, 538).

Affidavit for attachment, alleging defendant was indebted to plaintiff in specified sum, which included implied contract to return purchase price of rabbits and unliquidated damages for expenses incurred, *held* defective, under Code Civ. Proc. §§ 537, 538, requiring affidavit for attachment to state amount of defendant's indebtedness.

11. Appeal and error 🔑843(2)—On affirmance of order dissolving attachment, failure to file undertaking on appeal from order dissolving attachment became immaterial (Code Civ. Proc. § 946).

On appeal from order dissolving attachment, plaintiff's failure to file undertaking on appeal, under Code Civ. Proc. § 946, resulting in lapse of attachment, became immaterial on affirmance of order dissolving attachment.

12. Appeal and error 🔑460(2)—Statute providing appeal does not continue in force attachment unless undertaking be filed applies only to appeal from judgment on merits when attachment is involved (Code Civ. Proc. § 946).

Code Civ. Proc. § 946, providing that appeal does not continue in force attachment unless undertaking be executed applies only to appeal from judgment on merits when attachment is involved.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by W. H. Doud against Robert Jackson. From an order dissolving an attachment, plaintiff appeals. Affirmed.

A. S. Maloney and Chas. Bagg, both of San Bernardino, for appellant.

Le Roy B. Lorenz, of Los Angeles, for respondent.

SLOANE, P. J. This is an appeal by the plaintiff, an attaching creditor, from an order of the superior court of San Bernardino county dissolving an attachment. Plaintiff brought suit to recover from defendant the sum of $1,375 damages from breach of a contract entered into between plaintiff and defendant.

The complaint alleges:

That the contract was entered into on the 27th day of June, 1926, under the terms of which plaintiff purchased from defendant, who was engaged in a business known as the Fontana Fur Industries, 64 rabbits, sex does, for breeding purposes, paying therefor the sum of $640. That it was represented to plaintiff that the 64 rabbits were does and were bred and would be "cleared" in about 30 days. That the rabbits delivered included 63 does and one buck. That it turned out that the 63 does were not bred, and they had not "cleared" to date of filing suit, November 22, 1926. That by the terms of the contract of purchase it was further agreed that all breeding, feeding, housing, and graduating of litters was to be done under the supervision of the defendant, without charge to the plaintiff, and that it was further agreed that defendant would furnish bucks for breeding without charge, and that defendant would purchase from plaintiff all young does at the age of three months at $2.50 per head, and all bucks at the price of 75 cents each. That plaintiff expended for housing and maintaining said rabbits the sum of $360, in addition to the purchase price paid of $640.

That the representations so made by the defendant to plaintiff "did defraud the plaintiff in the sum of one thousand three hundred and seventy five ($1,375.00) dollars, $640.00 being the purchase price of said bred does, $360.00 for hutches, $375.00 for care and feed, making a total of $1,375.00, representing the amount which plaintiff was compelled to expend and did expend, through the deceit, misrepresentation and fraud practiced by the defendant upon the plaintiff," and that the defendant wholly failed to live up to any terms of the agreement entered into with the plaintiff in any manner whatsoever.

That the plaintiff has offered, and does now offer, to return the rabbits in his possession upon the return by defendant of the sum of $1,375 so expended by plaintiff, but that defendant has refused to accept said offer.

No demurrer was filed to this complaint, but defendant has answered by a general denial of each of the allegations of the complaint.

After answer filed, plaintiff took out a writ of attachment on the claim set out in the complaint and levied same on property of the defendant. Defendant was at all times a resident of this state, and the affidavit for attachment is in the form prescribed for attachment against residents, and alleges that "the defendant is indebted to plaintiff in the sum of $1,375.00 over and above all legal set-offs and counterclaims upon a contract for the direct payment of money, and that such contract was made payable in this state and that the payment of the same has not been secured by any mortgage, lien or pledge, upon real and personal property," etc.

Thereafter in due time respondent served and filed his notice of motion to have the attachment dissolved and the writ quashed. A hearing on this motion was on due notice thereafter had on the records and files in the case and upon the affidavit of defendant that he was, and had at all times covered by the proceedings been, a resident of the state of California.

The motion to dissolve attachment was noticed and made on the grounds, among others: That the writ was not issued in an action based upon a contract expressed or implied for the direct payment of money, and that it was not issued in accordance with the provisions of sections 537 and 538 of the Code of Civil Procedure. That the action is for damages for the fraudulent breach of a contract, and that the damages are unliquidated and cannot be ascertained with reasonable certainty from an inspection of the complaint or of the affidavit upon which the attachment is based.

An order granting motion to dissolve attachment was made January 10, 1927, and notice of appeal from said order was served and filed January 11, 1927.

The record on appeal consists of the clerk's transcript and appellant's opening brief. No brief was filed in behalf of respondent.

On oral argument, attorney for respondent appeared and stated that he had made no appearance for his client on appeal, for the reason that the respondent had refused to advance money for a brief or to go to further expense in the matter. Counsel for respondent suggested, however, that the court was without jurisdiction by reason of the fact that the record had not been certified by the trial judge, and that in any event the attachment had not been kept alive by filing the bond provided for by section 946 of the Code of Civil Procedure.

The transcript was thereafter, by leave of court, certified by the trial judge, and, the parties not having availed themselves of leave of court to file further briefs, the matter was ordered submitted.

The respondent, having failed to answer appellant's opening brief, is not entitled to much attention from the court in protecting his rights. It is scarcely fair to the appellate court, no matter what the ultimate rights of the respondent may be, to leave the burden on the court to search out his defense.

[1] We would ordinarily be justified under rule 5 of this court in deciding the case on the statement of facts contained in appellant's brief. Unfortunately for appellant's case, we do not find from such statement that he is entitled to the reversal of the order appealed from. It appears from appellant's own statement of the facts that the writ of attachment in question was not issued on a contract for the direct payment of money, but in an action for unliquidated damages for the alleged fraudulent breach of a contract.

[2] It is true, as argued by appellant, that an implied contract to repay money received under a transaction where the consideration has entirely failed is sometimes recognized as a contract for the direct payment of money, which will serve as a basis for attachment proceedings. But we think this application of the law must be confined to cases where nothing has been received in consideration for the amount sought to be recovered and where the damages may be said to be liquidated and definitely ascertainable under the facts shown.

Appellant's own citations from Santa Clara Valley Peat Fuel Co. v. Tuck, 53 Cal. 304, and Willett & Burr v. Alpert, 181 Cal. 652, 185 P. 976, 979, point out this distinction.

In the Peat Fuel Co. Case, the court, referring to the complaint upon which the affidavit for attachment was predicated, says: "We think this is substantially an averment that the defendant had failed and refused to perform any part of the contract; and the action is to recover the money advanced, on the ground that the consideration upon which it was paid had wholly failed. The authorities appear to be uniform to the effect that where a sum of money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it. On the facts stated in the complaint there was, therefore, an implied contract for the direct payment of money, which brings the case within the very terms of the statute defining the cases in which an attachment may issue."

In the case of Willett & Burr v. Alpert, supra, the order of the trial court discharging the writ of attachment was affirmed. The action was brought as arising under a contract for sale of personal property to recover damages for the failure of the vendor to deliver the full quantity of property called for under the contract, and attachment issued upon an affidavit alleging a contract on part of vendor, the defendant, for direct payment of money. In sustaining the discharge of the attachment, the court says: "But where, as in the present case, there is neither an entire failure of consideration nor a rescission of the contract, so as to entitle the vendee to recover back his money, with the result that he is limited to his remedy of damages, or where there has been an entire failure of consideration and the vendee yet elects not to recover his money, but to recover damages, the action does not proceed upon any theory of the defendant having received money which he should return to plaintiff, and which the law can therefore imply a promise on his part to return, and so indebitatus assumpsit will not lie."

[3] In the instant case there cannot be said to have been an entire failure of consideration. The plaintiff received 63 of the 64 rabbits contracted for, of the designated sex, and, while they had not, up to date of suit, fulfilled their family obligations, there is nothing to indicate any organic disability. It would seem a case for damages.

[4] Neither has there been a rescission of the contract. It is true plaintiff offered to return the rabbits on condition he was repaid his money and compensated in damages, but defendant refused to agree to such settlement. If he had, it might reasonably be argued that there would be an implied promise, as well as obligation, to refund the purchase money, as well as to respond in damages for other expenses incurred by plaintiff in an attempt to realize on his contract.

[5] There are two ways of effecting a rescission—one is by consent and agreement of the parties; the other is by serving notice of rescission and action in court to place the parties in status quo.

[6-8] The original contract here involved no promise on the part of defendant to pay money. The breach of the contract by failure of defendant to perform his obligations thereunder, had there been an entire failure of consideration, would under the decisions, have established an implied contract to refund the purchase money. The failure of consideration, however, being only partial, plaintiff's remedy was either to affirm the contract and sue for damages, or give timely notice of rescission, and enforce the same by proper action. Neither of these would imply an agreement on the part of defendant for the direct payment of money. Where there is a mutual rescission it may be reasonably held that such settlement involves a promise on the part of the defaulting party to refund any amount in money he may have received on the contract.

[9] Appellant probably is also right in his contention that the mere fact that he has joined in his action to recover the purchase price of these rabbits, damages for expenses incurred in housing and caring for the same, for which he concedes that an attachment lien will not lie, does not affect his right to attach for any part of the demand which is based on a contract to repay the money advanced.

In Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 P. 238, the Supreme Court has said that where, in an action to recover for breach of a contract, the affidavit for attachment is predicated on an implied promise to refund money paid on a purchase price, which amount is set out in the affidavit, the fact that the complaint seeks to recover other elements of damage not subject to attachment, does not defeat the attachment for the specified cash repayment. To quote from the opinion:

"The affidavit for attachment states 'that in addition to certain claims for damages for breach of contract hereinafter referred to, defendant in said action is indebted to her in the sum of three hundred and seventy-five ($375) dollars * * * upon an implied contract for the direct payment of money.' * * *

"The first ground of defendant's motion to dissolve the attachment is that the affidavit does not state the amount of defendant's indebtedness, as required by section 538 of the Code of Civil Procedure, because of the inclusion in the affidavit of the words 'in addition to certain claims for damages for breach of contract hereinafter referred to.' It is claimed that this renders the amount of the indebtedness uncertain. The contention is without merit. The affidavit itself shows very clearly that the sum for which the attachment is sought is $375. The intimation that the plaintiff is also claiming additional damages, for which no attachment is asked. is mere surplusage, and in no way throws any doubt upon the amount for which the attachment is requested."

[10] The affidavit in the present case contains no such segregrating clause. It alleges that "defendant is indebted to him in the sum of one thousand three hundred seventy five ($1,375.00) dollars of the United States, over and above all legal setoffs and counterclaims, upon a contract for the direct payment of money"; thus including in the alleged implied contract, not only the $640 in money paid for the rabbits, but the unliquidated expense incurred, of $360 for hutches and $375 for care and feed.

This subjects the affidavit for attachment under consideration to the objection that the amount of the alleged indebtedness which might be claimed as arising on an implied contract for the direct payment of money is not stated as required by section 538 of the Code of Civil Procedure.

As the Supreme Court says in the opinion in Willett & Burr v. Alpert, supra: "If this distinction between actions for the recovery of money paid because of failure of consideration or of rescission resulting from a breach of contract, and actions for damages for a breach of contract be not sound, it would follow that indebitatus assumpsit would lie in every case of a breach of contract."

[11, 12] The point suggested by respondent on oral argument, that the attachment lien had in any event lapsed by failure to file undertaking on appeal under section 946 of the Code of Civil Procedure, becomes immaterial on the affirmance of the order dissolving the attachment, and in any event applies to an appeal from a judgment on the merits when an attachment is involved.

The order appealed from is affirmed.

We concur: MARKS, J.; BARNARD, J.

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102 Cal. App. 793

G. C. EWER, Plaintiff and Appellant, v. Robert JACKSON, Defendant and Respondent. (Civ. 4.)

District Court of Appeal, Fourth District, California. Nov. 27, 1929.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

A. E. Maloney and Chas. Bagg, both of San Bernardino, for appellant.

Le Roy B. Lorenz, of Los Angeles, for respondent.

SLOANE, P. J. The facts and issues involved in this appeal are practically identical with those in civil action No. 3, in the case of W. H. Doud, Plaintiff and Appellant, v. Robert Jackson, Defendant and Respondent, 92 Cal. App. page —, 283 P. 107 the opinion in which is filed of this date.

The cause of action arises on a complaint alleging a contract entered into between plaintiff and defendant on the 5th day of May, 1926, for the purchase of fur-bearing rabbits, for a cash consideration of $400; said contract also providing that plaintiff, under the supervision of defendant, should provide for the hutches and care and feed of the rabbits, for which plaintiff alleges that he expended the sum of $490, making a total claim of $890.

A writ of attachment was issued in this action, based on an affidavit identical in its terms, except as to dates and amount, with that in the Doud Case. The same action was taken in the matter of dissolving said attachment, and on the same grounds.

There being no difference in the nature of the liability of the parties, or of the legal questions involved, between the two cases, the order of the court appealed from, dissolving attachment, is affirmed, on the grounds set out in the decision of the preceding case.

We concur: MARKS, J.; BARNARD, J.

102 Cal. App. 461

HARRIS & HULL, Inc., v. McCARTY-VAUGHAN-EVANS CORPORATION et al. (Civ. 3956.)

District Court of Appeal, Third District, California. Dec. 10, 1929.

1. Principal and agent 🔑171(7)—Seller's acceptance of payments under contract with knowledge of its terms constitutes "ratification," and precludes defense of execution by person not having authority to bind seller.

Objection that contract for sale of realty was not executed by person having authority to bind seller is not available in an action on the contract, where such contract was delivered to defendants, who with knowledge of the terms accepted payment thereon, which they still retained, such conduct constituting "ratification."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Ratification.]

2. Vendor and purchaser 🔑39—Purchaser is entitled to recover money paid under contract void because of description with reference to unrecorded map.

Notwithstanding a contract for sale of realty is void by reason of description of the lots with reference to unrecorded map, purchaser under such contract is entitled to recover money paid thereon, it being immaterial that purchaser knew map was unrecorded.

3. Specific performance 🔑127(3)—Complaint seeking specific performance of void contract held to state cause of action for recovery of money paid thereunder.

Notwithstanding purchaser's prayer for specific performance of contract for sale of realty by reference to unrecorded map, complaint stated cause of action for recovery of purchase money paid under the void contract; it not being essential that complaint state cause of action for particular relief demanded.

4. Vendor and purchaser 🔑341(5)—Plaintiff, recovering judgment for money paid under void contract for sale of realty, held entitled to interest at least from time of entry of judgment.

Purchaser in action to recover money paid under void contract for sale of realty is entitled to interest on amount so paid from time of entry of judgment at least.

Appeal from Superior Court, Los Angeles County; Franklin A. Griffin, Judge.

Action by Harris & Hull, Inc., against McCarty-Vaughan-Evans Corporation and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Abrahams & Sadicoff, of Los Angeles (Paul J. Ziegler, of Los Angeles, of counsel), for appellant.

Kemp, Partridge & Kemp and Douglas D. Crystal, all of Los Angeles, for respondent.

FINCH, P. J. This is an action for specific performance of an alleged contract for the sale to the plaintiff of a number of lots in Los Angeles county. The defendants were given judgment for costs, and the plaintiff has appealed.

The alleged contract is attached to the complaint and made a part thereof. The lots are therein described by reference to an unrecorded map, which the contract recites is not recorded. It is signed on the part of the seller as follows: "McCarty-Vaughan-Evans Corporation, Sellers, Fred T. Linstrum." The prayer of the complaint is for judgment "for specific performance of said contract, * * * or for damages in case specific performance cannot be had, * * * and for such other and further relief in the premises as may be equitable." The answer denies the execution of the alleged contract, and, among other defenses, alleges that it "is illegal and void," because the map referred to therein had not been filed for record.

[1] Respondents contend that the contract was not executed by any person having authority to bind the seller. This may be conceded for the purposes of this opinion, but the alleged contract was delivered to the defendants, and, admittedly, the plaintiff paid them, and, with knowledge of the terms of the contract, they accepted four payments thereon, aggregating $1,960.12, which they still retain. This was such a ratification of the contract as to bar any defense on the ground of want of authority to execute it.

[2] It is equally clear that the alleged contract is void by reason of the description of the lots by reference to the unrecorded map, but the plaintiff had the right to recover the money paid on the contract. Smith v. Bach, 183 Cal. 259, 191 P. 14; Hartzell v. Doolittle (Cal. Sup.) 269 P. 527; Letteau v. Dumas (Cal. App.) 278 P. 459; Shortell v. Evans-Ferguson Corporation (Cal. App.) 277 P. 519; Krause v. Marine Trust & Savings Bank (Cal. App.) 270 P. 246. The fact that the plaintiff knew that the map was unrecorded is not a bar to its recovery of the money paid on the contract. White v. Jacobs (Cal. Sup.) 267 P. 1087.

[3] The effect of the judgment is to leave the defendants in the ownership of the lots and also the money which the plaintiff paid them therefor. An action by the plaintiff for the recovery of such money, filed after the entry of judgment herein, would have been barred by the statute of limitations, in part at least. The complaint herein alleges that "the plaintiff made certain payments of principal and interest under the aforesaid contract to the defendants, and that said payments have been accepted by the defendants." It appears from the face of the complaint that the alleged contract is void and the answer expressly so alleges. Since the complaint shows that the contract is void, it does not state a cause of action for specific performance, but it does state sufficient facts to constitute a cause of action for the recovery of

the purchase money paid to the defendants. "It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled." Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84, 87; Estate of Brown, 196 Cal. 114. 126, 236 P. 144; Von Schrader v. Milton (Cal. App.) 273 P. 1074; Masero v. Bessolo, 87 Cal. App. 262, 262 P. 61; Gregg v. Carey, 4 Cal. App. 354, 88 P. 282.

[4] Since the court found that the alleged contract is void, but that the plaintiff paid thereon and the defendant accepted the sum of $1,960.12, it appears unnecessary to send the case back for a retrial. The appellant is entitled to interest on the amount so paid from the time of the entry of judgment at least. The court found that the "McCarty-Vaughan-Evans Corporation was succeeded in its property rights by the defendant John A. Vaughan Corporation, and that said last-named defendant assumed all of the obligations of the said McCarty-Vaughan-Evans Corporation with respect to the property described" in the contract.

The judgment is reversed, and the trial court is directed to enter judgment on the findings in favor of the plaintiff against the defendants McCarty-Vaughan-Evans Corporation, a corporation, and the John A. Vaughan Corporation, a corporation, for the sum of $1,960.12, together with interest thereon at 7 per cent. per annum from the day of the entry of the judgment appealed from, and for costs of suit.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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102 Cal. App. 445

In re BENSFIELD'S GUARDIANSHIP.★
(Civ. 78.)

District Court of Appeal, Fourth District, California. Dec. 9, 1929.

Rehearing Denied Dec. 20, 1929. Hearing Denied by Supreme Court Feb. 6, 1930.

1. Guardian and ward 🔑13(7)—Order appointing guardian must be based on fact findings essential to sustain order.

Order appointing guardian must be based on findings on facts essential to sustain such order.

2. Guardian and ward 🔑13(7)—Order appointing guardian which recited supporting findings held based on sufficient findings, findings not being required to be in separate document.

Order appointing guardian, which recited that said guardian was a fit and proper person to be appointed guardian of minor and that child's father, who appeared in opposition to appointment, was not a fit and proper person to have child's care and custody, *held* based on sufficient findings; there being no rule requiring findings and judgment to be incorporated in separate documents.

3. Appeal and error 🔑1071(1)—Trial 🔑393(1)—Adverse party is entitled to service of copy of findings ordered by court, but, in absence of showing of prejudice, failure to serve copy will be disregarded on appeal.

Where findings are ordered by the court, adverse party is entitled to service of a copy before they are signed by the judge; but even then, in absence of showing of prejudice from failure to serve a copy, the error will be disregarded on appeal.

4. Trial 🔑393(1)—In absence of record showing that trial court directed preparation of findings, service of findings was not required.

Service of findings was not required, where record failed to show that trial court gave any directions for preparation of findings.

5. Parent and child 🔑2(4)—Law presumes child's interest will be best subserved by awarding its care to parent, unless parent be unfit.

Unless the parent be unfit, the law presumes the interest of child will be best subserved by awarding its care to such parent.

6. Parent and child 🔑2(4)—Prima facie presumption is that parent is fit and competent to have child's care and custody.

There is a prima facie presumption that parent is fit and competent to have care and custody of child.

7. Parent and child 🔑2(3)—Parent's present fitness determines his right to child's care and custody.

Question of parent's fitness to have custody and care of child is one of the present time, and parent, if now competent, does not lose his right to child's custody because his conduct may have at one time fallen short of being ideal.

8. Parent and child 🔑2(3)—Question of parent's fitness, rather than child's welfare, determines right to its care and custody.

In determining right to custody and care of child, question is as to fitness of parent, rather than as to welfare of child.

9. Parent and child 🔑2(3)—Where question of child's health is one that may affect its life, court may consider this in determining parent's fitness to have its custody and care.

Where question of health of child is not one of its general welfare, but one that may quite possibly affect its life, court may properly take this into consideration in awarding its custody and care as having a bearing on fitness of parent who is willing to risk a change in order to sustain his legal right.

10. Parent and child 🔑2(4)—Evidence held to warrant inference that any change in care of three months' old girl in delicate health by giving her custody to father would be unsafe.

In proceeding by maternal aunt to be appointed guardian of person of three months' old girl, in which child's father asserted his legal right to child's custody, evidence *held* sufficient

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★Rehearing denied. Hearing denied by Supreme Court.

to warrant inference that any change in care of infant would be unsafe for her well-being because of the very delicate condition of her health which required special care.

11. Parent and child ⟹2(4)—Where there is substantial evidence that father is not fit to have child's custody, trial court's determination is largely discretionary and will not be set aside except for abuse.

When there is substantial evidence sustaining finding that father is not fit and proper person to have care and custody of his minor child, determination of question is largely in trial court's discretion, which will not be interfered with except for abuse of discretion.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Proceeding by Jessie Lynn to be appointed guardian of Lyda Lynn Bensfield, a minor, opposed by H. F. Bensfield, contestant. From an order appointing petitioner as guardian of his minor child, contestant appeals. Affirmed.

Golden & Kaufman, for appellant.

Duckworth & Harrison, of San Bernardino, for respondent.

BARNARD, J. The facts as shown by the evidence, are as follows:

Early in January, 1929, appellant and his wife were living in San Diego. The wife was subject to epileptic spells, and because of her ill health, her brother, H. C. Lynn, husband of respondent, brought them to San Bernardino, took them into his home, and gave appellant employment as an automobile salesman. Thereafter, on January 29, 1929, the minor, Lyda Lynn Bensfield, was born, and on February 20, 1929, the mother died. The child was a weakling and needed special care. The respondent, with the consent of appellant, took charge of the infant and, under the advice of a child specialist, fed the baby partially from her own breast and partially on a special formula of prepared food. Under the care given, the child had come up to normal weight. For nearly two months after the birth of the child the appellant made his home with respondent and her family. Difficulties having arisen over the alleged conduct of appellant, he left respondent's home. His demand for the possession of the child was refused. Respondent filed this action, asking to be appointed guardian of the child, alleging that to remove the child from her care and custody would have a tendency to endanger the life of the minor, and that the father was not a fit and proper person to have the care, control, and custody thereof. After a trial, the court entered an order appointing the respondent guardian of the person of said minor, and the father has appealed. While he concedes that the child would be well cared for by respondent, he insists upon his natural and legal right as a parent to the custody of his offspring.

It is insisted by appellant that the court made no findings of fact of any kind, and thereby erred. It is conceded that no findings were made by the court, other than the following:

In the Superior Court of the State of
California, in and for the County of San Bernardino.

"In the Matter of the Guardianship of
Lyda Lynn Bensfield,
a minor.

"Order Appointing Guardian.

"The petition of Jessie Lynn for the appointment of herself as the Guardian of the person of Lyda Lynn Bensfield, said minor, coming on regularly the 8th day of May, 1929, to be heard, said petitioner appearing with her attorneys, Duckworth and Harrison, and H. F. Bensfield, objector to the appointment of said Jessie Lynn, and petitioner for the appointment of himself as guardian of said minor, appearing in person and with his attorneys, Golden and Kaufman, and after the introduction of evidence by the respective parties, the matter was submitted to the Court for decision, and after due deliberation, the Court finds that all the allegations of the petition of Jessie Lynn are true, and that all the allegations of the petition and objections of H. F. Bensfield, in conflict with the petition of Jessie Lynn, are untrue, and that Jessie Lynn is a fit and proper person to be appointed guardian of the person of said minor, and is a fit and proper person to have the care and custody of said minor, and that said H. F. Bensfield is not a fit and proper person to have the care and custody of said minor, and is not a fit and proper person to be appointed guardian of the person of said minor.

"It is Therefore Hereby Ordered, that said Jessie Lynn be and she is hereby appointed Guardian of the person of said minor, Lyda Lynn Bensfield, and that Letters of Guardianship of the person of said minor be issued to her upon her giving a personal bond to Lyda Lynn Bensfield, said minor, in the penal sum of One Hundred and no/100 Dollars, and upon her taking and subscribing an oath according to law.

"Dated May 10th, 1929.

"Chas. L. Allison, Judge."

Indorsed:
"Filed May 10, 1929.
"Harry L. Allison, Clerk.
"By M. L. Aldridge, Deputy."

[1, 2] Beyond question an order appointing a guardian must be based upon findings on the facts essential to sustain such an order. Frascona v. Los Angeles Ry. Corp., 48 Cal. App. 135, 191 P. 968; In re Campbell, 130 Cal.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

380, 62 P. 613. And equally beyond question, we think, such findings are contained in the above instrument. There is no rule requiring the findings and the judgment to be incorporated in separate documents. Hopkins v. Warner, 109 Cal. 139, 41 P. 868.

[3, 4] It is further argued that, even if the document set forth be deemed to include findings on the facts, appellant was entitled to a copy thereof before the same were signed by the court. Where findings are ordered by the court, the adverse party is entitled to service of a copy before they are signed by the judge. Even then, in the absence of a showing of prejudice from such failure to serve a copy, the error will be disregarded on appeal. Miller v. Murphy, 186 Cal. 344, 199 P. 525, and citations therein. It does not appear from the record herein that the trial court gave any direction for the preparation of findings. Service of the findings was therefore not required. Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 P. 177.

[5-8] The only remaining question is as to whether there is sufficient evidence to support the findings of the court that appellant is not a fit and proper person to have the care and custody of said minor. The fitness and the competency of the father is the controlling question in a case of this kind. Matter of Galleher, 2 Cal. App. 364, 84 P. 352. Unless the parent be unfit, the law presumes the interest of a child will best be subserved by awarding its care to such parent. Newby v. Newby, 55 Cal. App. 114, 202 P. 891. There is a prima facie presumption that the parent is fit and competent. In re Campbell, supra. The question of fitness is one of the present time, and a parent, if now competent, does not lose his right because his conduct may have at one time fallen short of being ideal. In re Green, 192 Cal. 714, 221 P. 903. The question is as to the fitness of the parent, rather than as to the welfare of the child. Estate of Moore, 179 Cal. 302, 176 P. 461. It has been held that where the father is found to be a fit and proper person to have the care and custody of the child, he may not be deprived thereof, although another home, with more opportunity for fresh air and exercise, might be more beneficial to the delicate health of the child. In re Salter, 142 Cal. 412, 76 P. 51.

[9, 10] However, where the question of the health of the child is not one of its general welfare, but one that may quite possibly affect the life of the child, the court may properly take this into consideration as having a bearing upon the fitness of a parent, who is willing to risk a change in order to sustain his legal right. There was some evidence in this case along that line. The child was about three months old at the time of the trial; it had been in a very bad condition and required special care; and it had been found necessary to institute partial breast feeding, since it had not thrived on the other formula prescribed by the child specialist. Respondent was dividing her own baby's milk with this child. It was also in the evidence that the mother of the child had been, in her lifetime, subject to epileptic fits. The doctor testified that epilepsy is hereditary, that it is now known that those with a tendency to that disease should have a special diet, and that this was being considered in feeding the baby. Upon the question of making any change in the care of the child, the doctor testified in part as follows:

"Q. Doctor, in your opinion, having had charge of this baby and the treatment of it, do you consider in your opinion, that it would be to the best interest of the baby for it to be taken away from its present course of treatment and care? A. That is a very hard question to answer. If the present condition can be maintained without change, that child can be taken care of anywhere.

"Q. In other words, if the same course of feeding and care the child now receives is given to it? A. If the child is maintained on its present feeding and hygiene without any change whatsoever, that child could get along.

"Q. And that takes into consideration the type of food it is getting at this time? A. The type of food and management, and the sacrifices that are entailed with the nurse, such as Mrs. Lynn is giving."

The inference could reasonably be drawn by the court, from this evidence, that any change in the care of the infant would be unsafe for its well-being. This could be taken into consideration in reference to the fitness of the father, especially in the absence of any evidence that he could furnish the same care and treatment.

There was other evidence that supports the finding of the trial court. Several witnesses testified that appellant usually had the smell of liquor on his breath; one fellow employee testified he saw him daily and that there were only a few times he ever talked to him when he did not have liquor on his breath; and another fellow worker testified he drank too much. There was evidence that some nights he did not come home at all; that once he came home between 8 and 9 o'clock in the morning, stating he had been on a wild party until 4 o'clock; that he usually was out nights until 2 or 3 or 4 o'clock in the morning; that because of his habit of keeping late hours, he did not attend to business; and that at times (how many is not clear) he went home and went to bed in the daytime. Another fellow employee testified to seeing him drunk on at least one occasion.

The evidence also shows that at another time he came home intoxicated at about 10 o'clock at night, talked to his sister-in-law for about two hours, and then told her he had left a friend outside in his automobile, whom he must take home. He presently returned with the friend, who was so drunk he could hardly stand up and had his coat on cross-ways. While talking with the sister-in-law, she turned around and saw appellant with his shirt open, and his friend standing there with his clothes off. Upon her remonstrating, and demanding that he get the man out of the house, appellant refused to do so.

There was also evidence that he took no interest in the baby whatsoever; that he himself had stated that he never wanted her, that he had tried to get rid of her before she came, and that he wished the baby had died; and that one day he asked where the fool baby was. And that this is his general attitude toward the baby.

[11] When there is substantial evidence that sustains the finding that the father is not a fit and proper person to have the care and custody of his minor child, the determination of the question is largely in the discretion of the trial court. Estate of Bedford, 158 Cal. 145, 110 P. 302. Unless this discretion is abused, the action of the court will not be set aside. We think there was sufficient evidence here to sustain the finding complained of.

The order appealed from is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

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102 Cal. App. 345

MORANDA et ux. v. MAPES et al.★
(Civ. 3831.)

District Court of Appeal, Third District, California. Dec. 4, 1929.

Rehearing Denied Jan. 3, 1930. Hearing Denied by Supreme Court Jan. 30, 1930.

1. Appeal and error ⟹1002, 1011(1)—Appellate court will not disturb verdict or findings based on conflicting evidence, where there is some evidence in support thereof.

Judgment cannot be reversed because evidence is conflicting, but, on the contrary, appellate court will not disturb verdict of jury or findings of court where there is substantial conflict of evidence on material points and where there is some evidence to support verdict or findings.

2. Damages ⟹188(1)—Evidence held to support finding that no damage was done to any of plaintiffs' property by fires negligently permitted to burn over plaintiffs' lands.

In action for damages for negligently setting out fire on defendants' lands and permitting it to burn over plaintiffs' lands, evidence *held* to support finding that no damage was done to any property of plaintiffs by fires.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Barthol Moranda and wife against Sophia Mapes and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. H. Carpenter and Charles Andersen, both of Stockton, for appellants.

Woodward, Briggs & Blewett and Von Detten, Henry & Goodrum, all of Stockton, for respondents.

JAMISON, Justice pro tem. This action was brought by appellants against respondents, as set forth in the first count of their complaint, for negligently, intentionally, and maliciously setting out fire on the lands of defendants within 20 yards of plaintiffs' lands, and on plaintiffs' land, and for negligently permitting same to be communicated to, and to burn over, the lands of plaintiffs, thereby destroying fruit, nut, and shade trees, fences, wood, etc., to plaintiffs' damage. And in the second count of said complaint appellants further allege that by reason of the destruction wrought by said fire in burning the said fences and driftwood and drift, the levees protecting the land of plaintiffs broke and washed out, and as a result thereof plaintiffs' said land was flooded and trees and vines thereon were destroyed to plaintiffs' damage.

The action was tried by the court without a jury, and at the close of plaintiffs' evidence the court granted a nonsuit as to defendants Sophia Mapes, Sophia Bollinger, and Nanette Bollinger, and at the close of defendants' evidence, and upon submission of the case, the court rendered judgment in favor of defendants, and from this judgment plaintiffs have appealed.

It appears from the evidence that in the fall of 1925 respondent Clarence Wells Mapes was the owner of land lying near that owned by appellants, and that on the 25th day of October, or the 15th day of November, 1925, respondent Carroll Mapes, who was acting for his brother Clarence Mapes, went upon his brother's said land and burned off some 20 acres of stubble. He completed this burning about 4 o'clock p. m., and then went to a shallow slough, same being a fork or prong of the slough known as the Mormon slough, and started a fire on an island that lies between the shallow slough and the deep water of the said Mormon slough. Carroll Mapes testified that the purpose of starting the fire on the island was to burn off the drift and driftwood that had accumulated thereon and obstructed the flow of water in said slough; that the accumulation of drift and driftwood on said island obstructed the flow of the waters of said slough, and thereby endangered the levees that protected his brother's land. This same witness further testified that a few minutes after he had started the fire on the island, appellant Barthol Moranda came from his home and demanded of said Mapes why he had started the fire; that some conversation took place between them; and that said Moranda then said, "I will fix you," and started for his house. Witness, then fearing that said Moranda was going after a gun, retreated to the other end of the island some

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★Rehearing denied. Hearing denied by Supreme Court.

400 feet distant; that he remained there until 6 o'clock p. m. watching the fire and then went home; that when he left the fire it was practically out; that it was just smoldering; that he returned about 9 o'clock p. m. that same evening to look after the fire, and found that it was no longer burning. Appellant Barthol Moranda denied that he had threatened the said Carroll Mapes in any way. He further testified that in spite of his efforts to prevent it, the fire crossed the slough and burned over a strip of his land a thousand feet long and 60 feet wide and destroyed a large number of his nut and fruit trees and grapevines. He also claimed it burned a lot of driftwood and a large oak tree on the island. It appears that the boundary line between appellant's land and that of respondent Clarence Wells Mapes is in dispute, and was in dispute at the time of the fire, and since then each of them was claiming this island. This dispute finally ended in a lawsuit in which judgment went for Clarence Wells Mapes, and from said judgment the said Moranda and wife appealed, and this appeal is still pending. Respondent Clarence Wells Mapes testified that on several occasions after the fires he held consultations with appellants, and that one of these was with their attorney, in which the boundary dispute was discussed, but that at none of these times was any mention made that appellants had suffered any damage from said fires. Respondents Clarence Wells Mapes and Carroll Mapes testified that the fires never crossed over upon appellants' land, or any part thereof, nor did said fires burn or injure any of appellants' nut or fruit trees or grapevines, or other property, or do any injury to any property of appellants, and this testimony was corroborated by the testimony of other witnesses. Respondents further produced testimony to the effect that the burning of the drift, driftwood, and riff-raff on the island did not cause appellant's levees to break or wash out, or cause appellants' fruit trees or vines to be damaged by flooding.

[1, 2] The trial court found in substance that appellants did not own the said island, and had never owned it; that said fires were not negligently set, nor did they burn over the lands of appellants; that said fires did not burn, damage, or destroy the property, or any part thereof, set forth in appellants' complaint, or any other property belonging to appellants; that the levees of appellants were not broken or washed out as a result of said fires, or of any act of respondents, or of either of them, nor were the fruit trees or vines of appellants flooded or damaged or destroyed because of said fires or by any acts of respondents, or either of them. Appellants claim that the finding of the court to the effect that they did not own the island is not supported by the evidence. In support of their claim that they owned the island, appellants introduced in evidence a deed which conveyed to them a certain tract of land described as "all of that portion of the east half of the southeast quarter of section 32 and the west half of the southwest quarter of section 33 in township 2 North of Range 8 E., M. D. M., containing 15.25 acres and lying southeast of the southeast bank of Mormon Slough." Appellant Allie Moranda was on the witness stand when this deed was offered in evidence, and to the following questions she gave the following answers:

"Q. This (referring to the above description) is the description of the property marked on the board? A. Yes.

"Q. And that is the property on which the fire was set? A. Yes.

"Q. And where the trees were burned? A. Yes."

Maps were used in questioning the witnesses, but none appear in the transcript. A careful examination of the evidence, as same appears in the transcript, fails to reveal any other evidence tending to show that the island is included in the above description. However, admitting that the finding of the court that the island was not the property of appellants is not supported by the evidence, yet if, as a matter of fact, no damage was done to the property of appellants by the setting out of said fires, there can be no recovery in this action. Upon the question of whether or not the fires set out by respondent Carroll Mapes damaged the property of appellants, there is a decided and irreconcilable conflict. A judgment cannot be reversed because the evidence is conflicting. On the contrary, the rule is established by a host of decisions that an appellate court will not disturb a verdict of the jury or findings of the court where there is substantial conflict of evidence on material points and where there is some evidence to support the verdict or findings. 2 Cal. Juris. 921, and authorities cited. There is ample evidence to support the finding of the court that no damage whatever was done to any property of appellants by said fires, or either of them.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

102 Cal. App. 400

SAN JOAQUIN FINANCE CORPORATION v. ALLEN. (Civ. 3859.)

District Court of Appeal, Third District, California. Dec. 7, 1929.

1. Usury 🔑66—Conditional sales contract in lieu of original, including amount in excess of legal interest, held usurious.

Conditional sales contract in lieu of original contract, which acknowledged receipt of payments made under original contract and required payment in monthly payments of the balance due in a total amount which included a sum greatly in excess of the legal rate of interest, was usurious, where the evidence established no services rendered for which such charges would have been proper.

2. Usury 🔑117—Evidence held to establish usury in conditional sales contract, including amount exceeding balance due on original contract.

Evidence *held* to establish usury by inclusion in conditional sales contract of amount in excess of legal rate of interest beyond balance due on original contract.

3. Usury 🔑55—Amount in excess of legal interest included in conditional automobile sales contract cannot be justified as brokerage charges, where no broker participated in transaction.

Where no broker participated in assignment of conditional sales contract for purchase of automobile, amount included in payment in excess of legal rate of interest cannot be justified as brokerage charges.

4. Usury 🔑128—Purchaser of automobile under conditional contract held not estopped to set up usury as against assignee, notwithstanding provisions of contract which showed on its face charges beyond legal interest.

Purchaser of automobile under conditional contract, providing that on assignment of contract money payable shall be paid to assignee without recoupment, set-off, or counterclaim, *held* not estopped to set up the defense of usury as against an assignee of contract, where on its face the contract showed that it included an amount beyond the balance due in excess of the legal rate of interest.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the San Joaquin Finance Corporation against T. E. Allen. Judgment for plaintiff, and defendant appeals. Reversed.

William Logan, of Patterson, and G. A. Whitehurst, of Newman, for appellant.

Ray W. Hays and Fenston & Williams, all of Fresno, for respondent.

FINCH, C. J. The plaintiff brought this action to recover an automobile which the defendant held under a conditional sale contract. The answer alleges that the defendant has paid the full purchase price of the automobile; that the contract provides for the payment of $220 in addition to the purchase price "as interest thereon, and as a fee and bonus" for making a loan to the defendant; and that the "agreement to pay said sum of $220 * * * was and is illegal and void under the provisions of the usury law of the state of California." The plaintiff was given judgment for the recovery of the automobile and the defendant has appealed.

There is no substantial conflict in the evidence. It appears therefrom that the defendant purchased the automobile from Robertson & Robertson under a rough memorandum agreement for $1,900, payments to be made at the rate of "$50 a month for 11 months, payment to be extended for another year if wanted." A few days after this agreement was signed Kenneth Robertson, one of the sellers, told the defendant "he would like to assign this contract to the Weaver Company, but he said the Weaver Company would not accept the contract * * * and he would have to make a new one," and said: "If you will do this, I will stand back of you, so that it won't cost you anything to refinance it." A conditional sale contract, in the usual form, dated March 10, 1926, was thereupon executed by the parties, providing for the payment of monthly installments for 11 months and the balance of $979.09 on March 15, 1927. Robertson & Robertson immediately assigned all their right, title, and interest in the automobile and the contract to L. F. Weaver Company. The defendant paid that company all installments as they fell due, except the final one of $979.09. The defendant had possession of the automobile at all times after the first contract was executed.

March 22, 1927, without any change of possession, Kenneth Robertson and the defendant executed a conditional sale contract, by the terms of which the former purported to sell to the latter the same automobile. At that time the defendant made a payment of $49.09, thereby reducing the balance due to the sum of $930. In this contract the automobile is described as "new." The contract provided for payment of "the total purchase price of $1,840 as follows: $910 upon the signing of this contract, the receipt of which is hereby acknowledged, and the balance of $930 plus interest and service charges, as follows." Then follows a list of 18 monthly payments to be made, beginning with May 1, 1927, aggregating $1,150. On the day the contract was executed, Robertson assigned it to the Merced Loan & Insurance Agency, and, on the following day, that company assigned it to the plaintiff.

The defendant testified that he did not at any time receive any "money or anything of value under this contract"; that after its execution he received from the L. F. Weaver Company the contract which had been assigned to it, marked "Paid," and "the certificate of ownership" of the automobile; that he "simply kept the car"; that he thereafter delivered the certificate to the plaintiff at its request; that at the time the last contract was executed there were present Robertson and W. Mill Brown, the latter apparently being the person who subscribed the name of the Merced Loan & Insurance Agency to the assignment of the contract to the plaintiff; that the defendant there stated that the amount due was $930, and that he "was taking care of the insurance on the car, * * * full coverage," and that in fact he had paid for such insurance; that Brown said that $1,150 would be "the face of the new contract." The defendant's testimony continues: "I was very much enraged at the idea of charging me * * * $220 for the use of $930. * * * We argued back and forth for probably a couple of hours. I told Mr. Robertson I had just as well leave the car there, as I couldn't meet the terms of the contract of that kind. * * * I told Mr. Robertson that my understanding was with him, the reason I bought the car from him, he was to finance me till I got it paid for at $50 a a month, without further consideration. * * * That was why I went to Merced to buy the car from Mr. Robertson. * * * I had to agree to [the terms of the proposed contract] or leave my car." The defendant paid the plaintiff the full sum of $930 in monthly installments as provided for in the contract, informing the plaintiff, at the time of paying the first installment, that it was his intention "to claim the benefits of the usury law."

[1, 2] Neither Robertson nor Brown testified in the case, though it appears that the latter was present at the trial, and the defendant's testimony stands uncontradicted. No attempt was made by the plaintiff to show any justification for the addition of $220 to the balance due on the contract price. Neither of the contracts made any provision for interest, except on overdue installments, and it is fair to presume that, as is usual in such contracts, the interest on deferred payments was included in the contract price. If it be assumed that the additional sum of $220 was intended to cover interest charges on the contract of March 22, 1927, that sum is greatly in excess of interest at any lawful rate. If the defendant's testimony is true, then there were no services performed or to be performed for which any part of the $220 was intended to be compensation. Giving due consideration to the failure of the plaintiff to introduce any evidence in rebuttal of the defendant's testimony, there appears to be no escape from the conclusion that the defense of usury was thoroughly established. To frustrate evasions of the usury law "the courts have been compelled to look beyond the form of a transaction to its substance." 27 R. C. L. 211; Van Noy v. Goldberg (Cal. App.) 277 P. 538.

[3] Respondent says: "If $68.89, as computed by counsel, represents interest, then $151.11 was paid to the Merced Loan & Insurance Company as a service charge or commission." But the contract was made by defendant directly with Robertson, who then assigned to the Merced Loan & Insurance Agency, which, in turn, assigned to the plaintiff. No broker participated in the transactions, and the excess amount provided for by the contract cannot be justified on the ground that it was a brokerage charge. Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P. 674. This excess was to be paid to Robertson or his assigns, and no one of them acted in the capacity of broker.

[4] Respondent contends that the appellant is estopped by the terms of the contract to set up the usurious nature thereof. The contract provides: "As a part of the conditional sales contract, it is agreed that in the event the seller shall assign this contract and the moneys payable thereunder to a third party, then all moneys payable under this contract by the buyer shall be paid to such assignee without recoupment, set-off or counterclaim of any sort whatsoever. * * * It is agreed by the buyer and seller or his assigns that this contract contains the entire agreement made between them."

Appellant cites American National Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 216 P. 376, 378, as an authority in support of the contention that the defendant is estopped. The terms of the contract involved in that case were more sweeping in favor of the assignee of the seller than those here under consideration, but the court held that there was no estoppel shown. That case holds that "conditional contracts of sale are nonnegotiable instruments in this state," and that it is always open to a party to dispute a recital of consideration contained in such a contract. The provision in the contract in the instant case to the effect that the buyer was to pay the additional sum of $220 for "interest and service charges" relates to the consideration for the defendant's promise and, at most, is only prima facie evidence of a consideration.

It is true that the contract purports to be an original contract of sale of a "new" automobile, and, had it recited that the purchase price was $1,150, it might be argued with much force, on the authority of the case cited, that such recital constituted an estoppel in pais, available to a purchaser of the contract for value and without knowledge of the true purchase price, but the contract in this case recites that $1,840, is "the total purchase price," of which $910 was paid on the execution of the contract, leaving only $930 of such purchase price unpaid. It appears, therefore, that the respondent's claim of estoppel is without support in the record.

The judgment is reversed.

We concur: JAMISON, Judge pro tem.; R. L. THOMPSON, J.

PEOPLE v. MARSHALL. (Cr. 7.)★

District Court of Appeal, Fourth District, California. Dec. 6, 1929.

Rehearing Denied Dec. 20, 1929. Hearing Granted by Supreme Court Jan. 2, 1930.

1. Criminal law 🔑1180—Ruling of appellate court on point distinctly made on previous appeal is, in all subsequent proceedings in same case, "law of case."

Ruling of appellate court on a point distinctly made on previous appeal is, in all subsequent proceedings in the same case, law of the case, from consequences of which court cannot depart nor parties relieve themselves.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Law of the Case.]

2. Criminal law 🔑624—Waiver of right to trial within statutory period applies to hearing on insanity plea after conviction on plea of not guilty (Pen. Code, §§ 681a, 686, 1026, 1050, 1382).

In prosecution for grand theft, defendant filed pleas of not guilty and not guilty by reason of insanity, and when arraigned waived right to trial within statutory period. From conviction on first plea, defendant appealed, and, after remittitur for trial on second plea, contended that he was entitled to dismissal under authority of Pen. Code, §§ 681a, 686, 1050, and 1382, because trial on plea of insanity was not held within statutory period. *Held*, that waiver of right to trial within statutory period applied to hearings on separate pleas, since under section 1026 such separate hearings constitute but one trial.

3. Criminal law 🔑624—Another 60-day period, within which accused was required to be tried on insanity plea, was begun by order of appellate court remanding case (Pen. Code, § 1382).

In prosecution for grand theft, where defendant appealed after conviction on plea of not guilty, another period of 60 days, in which accused was required to be tried on insanity issue, under Pen. Code, § 1382, started in operation by order of appellate court remanding case for trial on such plea.

4. Criminal law 🔑624—Statute requiring trial within 60 days had no application to hearing on insanity plea following filing of remittitur on appeal from conviction (Pen. Code, § 1382).

Pen. Code, § 1382, requiring trial in 60 days after filing information, has no application to hearing on plea of not guilty by reason of insanity, provided for in section 1026, following the filing of remittitur, since such hearing was delayed by appeal from conviction on plea of not guilty.

5. Criminal law 🔑576(3)—Accused held not deprived of right to speedy trial by delay pending appeal from conviction, nor by failure to bring trial on insanity plea within 30 days after filing remittitur.

Where accused was convicted on January 14, 1929, on plea of not guilty to charge of grand theft, accused *held* not deprived of his constitutional and statutory right to speedy trial by delay pending appeal nor by failure to bring accused to trial on plea of not guilty by reason of insanity within 30 days after filing remittitur on July 1, 1929.

6. Judges 🔑47(2)—Judge sitting at hearing on plea of not guilty had authority, under assignment, to sit at insanity hearing after appeal from conviction (Pen. Code, § 1026).

Judge assigned to sit from January 2 to January 31, 1929, and thereafter to act until all matters heard by him should be disposed of, having heard trial on plea of not guilty to charge of grand theft, had authority to complete trial and hear trial on plea of not guilty by reason of insanity, since, under provisions of Pen. Code, § 1026, separate hearings on such issues constituted but one trial.

7. Criminal law 🔑1189—Reversing case for trial on special plea held to contemplate merely trial on insanity issue on which hearing had not been had.

Where, in prosecution for grand theft, defendant filed pleas of not guilty and not guilty by reason of insanity, and appealed from conviction on plea of not guilty, reversal for trial on special plea *held* to contemplate trial on plea of not guilty by reason of insanity and not retrial of all issues.

8. Criminal law 🔑1189—Reversal of conviction for trial on insanity issue held within power of appellate court (Pen. Code, § 1260).

Under Pen. Code, § 1260, which provides court may reverse, affirm, or modify judgment or order appealed from, appellate court, on appeal from conviction on plea of not guilty, could reverse case for trial on plea of not guilty by reason of insanity.

9. Criminal law 🔑1189—Reversing conviction for trial on insanity issue held not "reversal without ordering new trial," so as to discharge defendant (Pen. Code, § 1262).

Judgment reversing conviction on plea of not guilty to charge of grand theft, and remanding case for trial on issue of insanity, *held* not reversal without ordering new trial, within meaning of Pen. Code, § 1262, so as to discharge defendant.

10. Criminal law 🔑1186(4)—Sustaining objection to question on cross-examination of witness who testified as to defendant's sanity as to nature and manifestations of insanity held not prejudicial (Const. art. 6, § 4½; Code Civ. Proc. § 1870, subd. 10).

In prosecution for grand theft, where nonexpert witness had qualified as required by Code

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★Hearing granted. 289 P. 629.

Civ. Proc. § 1870, subd. 10, so as to be able to testify as to defendant's sanity, sustaining objection to question on cross-examination as to whether witness knew how insane person would act, what insanity was, difference between idiocy and insanity, and different manifestations of insanity, *held* not prejudicial so as to require reversal under Const. art. 6, § 4½.

11. Criminal law 🔑354—Where defense in prosecution for grand theft was insanity, defendant had right to prove insanity of his sister.

In prosecution for grand theft, where defense was not guilty by reason of insanity, defendant had right to prove insanity of his sister.

12. Criminal law 🔑452(2)—Before witness may be interrogated as to mental condition of relatives of defendant relying on insanity, witness must be qualified to testify in that regard.

Before witness in criminal prosecution, where defense is not guilty by reason of insanity, may be interrogated as to mental condition of members of defendant's family, witness must be qualified to testify to such matters.

13. Criminal law 🔑354—Exclusion of letters written by accused's sister for purpose of showing sister's insanity held not error, where witness, addressee of letters, had never met sister.

In prosecution for grand theft, where defense was not guilty by reason of insanity, exclusion of letters written by accused's sister, offered for purpose of showing sister's insanity, *held* not error, where witness to whom letters had been written had not seen sister, and there being nothing to show whether letters showed the real state of mind of their author.

14. Criminal law 🔑1186(4)—On appeal, accused must show that error in exclusion of evidence was prejudicial to him to obtain reversal (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, which provides that no judgment should be set aside on ground of improper rejection of evidence, it is incumbent on accused to show on appeal that any error in exclusion of evidence was prejudicial to him.

15. Criminal law 🔑829(1)—Refusing defendant's requested instructions in prosecution for grand theft held not error, where those given were full and complete.

Where instructions given in prosecution for grand theft were full and complete, refusing instructions asked for by defendant *held* not error.

Appeal from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

J. W. Marshall was convicted of grand theft, and he appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, J. This is an appeal from a judgment and sentence upon conviction of the crime of grand theft, and from an order denying a motion for a new trial.

The defendant entered a plea of not guilty and also one of not guilty by reason of insanity. The case went to trial on the plea of not guilty only, on January 11, 1929. After a verdict of guilty, the defendant was sentenced to the state prison at Folsom. Upon appeal, the judgment was reversed and the case remanded for trial upon the issue of insanity. People v. Marshall (Cal. App.) 278 P. 258. The remittitur was filed in the superior court on July 1, 1929. On August 1, 1929, the case went to trial on the issue raised by the plea of not guilty by reason of insanity. The jury having found that the defendant was sane at the time of the commission of the act charged in the information, judgment and sentence were pronounced, and the defendant appealed.

[1] The appellant first urges that we again review the assignments of error which were presented and argued on the former appeal. The claim is made that it was not necessary for the court to express an opinion on these points, other than the one upon which the reversal depended, and that all references to such other points in the opinion handed down are dicta only. The former appeal was based both upon errors of law alleged to have occurred at the trial on the plea of "not guilty," and on the contention that defendant had not been duly convicted, in that the trial court had no authority to pronounce sentence upon the defendant, without first having a jury pass upon the issue raised by his separate plea. Both of these contentions were urged by appellant, and both were passed upon by the appellate court. Without question, if errors of law had been found, the order of reversal would have directed a retrial on the plea of not guilty, as well as a trial upon the issue of insanity. The references in the opinion of the court to those matters, other than the failure of the trial court to submit the issue of the sanity of the defendant to a jury, were not dicta as claimed, but were necessary to the decision of questions properly before the court. It was held that there was no error prior to the time of judgment and sentence, but that the pronouncement of sentence was premature, the verdict not being complete until it should be determined whether or not the defendant was sane at the time the offense was committed.

In the case of People v. Hamilton, 103 Cal. at page 496, 37 P. 627, 630, the court said:

"It is not doubted but that a ruling by the appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case, a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves"—citing cases.

No further evidence was put in after the remittitur came down on any of the matters involved in the first hearing, and as to those matters the decision heretofore rendered by the District Court of Appeal, having become final, is the law of the case. Mitchell v. Davis, 23 Cal. 381; People v. Walker, 76 Cal. App. 192, 244 P. 94.

The next point raised is that the defendant was deprived of his right to a speedy trial. It is insisted that, having been convicted on his plea of not guilty on January 14, 1929, he was entitled to an immediate trial on his plea of not guilty by reason of insanity. Section 1026 of the Penal Code reads in part as follows:

"If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court."

[2-5] No mention of the plea of "not guilty by reason of insanity" was made at the time judgment was pronounced. When the defendant was asked if he had any cause to show why judgment should not be pronounced, he said that he had, but the record shows no objection made, other than his motion for a new trial. In due course, he himself instituted an appeal. The remittitur was filed July 1, 1929, thus restoring jurisdiction to the superior court. The trial on the issue of not guilty by reason of insanity began on August 1, 1929. It is urged that, by authority of sections 681a, 686, 1050, and 1382 of the Penal Code, the defendant was entitled to a dismissal of the case. The record shows, without contradiction, that, when the defendant was arraigned, he waived his right to trial within the statutory period provided by law. We are of the opinion that the entire proceeding provided for under section 1026 constitutes but one trial, and therefore this waiver applied to each of the respective hearings upon the separate pleas. Not only is this true, but, by the appeal following the first hearing, the superior court was divested of jurisdiction to proceed in the matter until that appeal was decided, and thereupon another period of 60 days was started in operation by the order of the appellate court. In re Scott, 81 Cal. App. 577, 254 P. 596. One reason why the provisions of section 1382 of the Penal Code do not apply is because the case was actually tried on the insanity issue within 60 days from the filing of the remittitur. Section 1050 of the Penal Code is directory only, and contains no provision for the dismissal of a case when its terms are not complied with. Ray v. Superior Court (Cal. Sup.) 281 P. 391. Section 1382 of the Penal Code has no application to a new trial following the filing of a remittitur. In re Alpine, 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500. We think the same thing is true of a hearing following the filing of a remittitur, in a case where the second hearing provided for in section 1026 of the Penal Code has been delayed, pending the determination of an appeal from the first hearing thereunder. The appellate court remanded this case to the trial court for the sole purpose of a trial upon the one remaining plea. Neither by the delay pending the appeal nor by the failure to bring him to trial on this plea within 30 days after the filing of the remittitur was the defendant deprived of his constitutional or statutory rights. People v. Walker, supra.

[6] It is next argued that the judge who presided at the hearing on the issue of insanity had no jurisdiction to act in the matter, because his assignment to the superior court had expired. The first hearing had been held before Eugene Daney, Jr., a duly elected, qualified, and acting justice of the peace, then sitting as a judge of the superior court of the county of San Diego under an assignment thereto by the judicial council of the state of California. His assignment was in the usual form, the pertinent part thereof reading as follows:

"* * * Good cause appearing therefor, you are hereby assigned to sit as Judge of the Superior Court in and for the County of San Diego, beginning January 2 to and including January 31, 1929, and thereafter to act as such until all matters heard or partially heard or submitted to you therein shall have been completed and disposed of by you, and also for the purpose of hearing and determining any motion after judgment in a case decided by you. * * *"

After the remittitur was filed, Judge Daney was called in by the presiding judge of said superior court to complete the hearing of this case. The hearing on the issue of insanity began on August 1, 1929, and no other assignment from the judicial council appears in the record. A trial on the issues presented by a plea of "not guilty" and a plea of "not guilty by reason of insanity," under the provisions of section 1026 of the Penal Code, constitutes but one trial. People v. Marshall (Cal. App.) 278 P. 258; People v. Leong Fook (Cal. Sup.) 273 P. 779. Having partially heard the matter in question, under the authority specifically given in the assignment as above set forth, the judge presiding had jurisdiction to complete the trial.

[7, 8] The next point urged is that the appellate court had no power to reverse this case without either ordering a retrial of all the issues or a dismissal of the case, and that there should have been a trial de novo. The order made on the previous appeal is as follows: "The judgment is reversed and the case remanded for trial upon the issue presented by the special plea." Appellant argues that, since no pleas are denominated special pleas by statute, all being equally general and equally special, the appellate court intended to order a trial de novo on all pleas.

We think it is clear that the order of that court was to have the case completed on the one issue only (the question of insanity), and not to have all of the issues retried. It is further argued that, if a new trial from the beginning was not ordered, the defendant must be discharged. Section 1260 of the Penal Code provides:

"The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial."

[9] Under the power here given to modify a judgment or order, the court may reverse in part and affirm in part, and may send the case back for a new trial on certain counts and not on other counts. People v. Dillon, 68 Cal. App. 457, 229 P. 974. It has been held that the court may set aside a judgment and sentence where erroneously pronounced without upsetting the verdict. People v. Hill, 36 Cal. App. 574, 172 P. 1114; People v. Votaw, 38 Cal. App. 714, 177 P. 485; In re Lee, 177 Cal. 690, 171 P. 958. The court here did not disturb the verdict in the first of two necessary steps which constitutes but one trial. On the contrary, the court held there were no errors of law in the proceedings up to and including that verdict. It was held that, since the verdict was not yet complete, the trial court had no power to pronounce judgment and sentence and the case was sent back to be completed. It was then the duty of the trial court to proceed as should have been done in the first instance, to a hearing on the remaining issue. The appellate court had the power to remand the case to the trial court for proper action. In re Lee, supra. The judgment was not "reversed without ordering a new trial" within the meaning of section 1262 of the Penal Code.

[10] The next two points raised relate to the sustaining by the trial court of objections to certain questions asked on cross-examination of two witnesses, who had testified that the defendant had appeared to them to be sane. Neither of these were expert witnesses, but both had testified as intimate acquaintances of the defendant. Each witness had given his opinion on the subject, and the reasons upon which his opinion was based. Section 1870, Code Civ. Proc. subd. 10. The questions to which objections were sustained were as to whether the witnesses knew how an insane person would act; what insanity is; the difference between idiocy and insanity; the different manifestations of insanity; and whether or not the witness knew the various types of insanity. All of these were questions which would have been more properly addressed to an expert witness than to one testifying only from the standpoint of an acquaintance. In any event, the witnesses not only stated the reason for their opinions, but the record shows a full and complete cross-examination allowed as to the facts on which they based their opinions, and as to their previous experience with insane people, including any reading on the subject. We have read the entire transcript of the testimony of these two witnesses and the same shows that the exclusion of the evidence sought to be brought out by these questions was without prejudice to the rights of the defendant. Const., art. 6, § 4½.

[11, 12] It is next insisted that the court erred in excluding evidence of the insanity of the defendant's sister. It must be conceded that the defendant had the right to prove such insanity by competent evidence. People v. Harris, 169 Cal. 53, 145 P. 520, 523. The wife of defendant was asked whether there was insanity in defendant's family. The court sustained an objection to this question on the ground that it was not the best evidence. The defendant then attempted to prove such insanity of the sister by introducing letters said to have been written to the wife of defendant by the sister, and which letters are claimed to show unmistakable signs of insanity. The court sustained objections to the introduction of these letters, on the ground that they were incompetent, irrelevant, and immaterial, hearsay, no proof of their genuineness, and no opportunity to cross-examine the writer as to whether they were written voluntarily or under instructions. Other than these letters, no evidence of the insanity of the sister was offered. The objection to the first question on the ground that it was not the best evidence was not good. However, before a witness may be interrogated as to the mental condition of other members of the family, he must first be qualified to testify in that regard. In People v. Harris, supra, the court said:

"* * * Undoubtedly, where insanity is a defense, the mental condition of any of the relatives of the defendant is material, and on that subject, as on all inquiries relating to insanity, a reasonable latitude should be allowed. But this does not mean that the rules as to the admissibility of evidence should be relaxed. The rule is that before the opinion of witnesses as to sanity of a person or a particular phase of it can be given—and the inquiries here were simply calling for the opinion of the witnesses on that subject—it must be preliminarily shown that the witness is qualified to express it, and clearly this was not shown here. * * *"

[13, 14] No foundation was here laid as to the qualification of the witness to express an opinion on the subject. The witness admitted she had never met the sister, and had never seen her write. She testified that she believed the letters were written and signed by the sister, as she had received a number of letters from her. Apparently all of these letters were written after the commission of the offense charged in the information. Aside from the objectionable features of such evi-

dence standing alone, without further proof tending to show the insanity of the writer, and with nothing to show whether the letters showed the real state of mind of their author, or were purposely written to create an impression in that regard, the qualification of this particular witness to testify as to the genuineness of the letters was very weak to say the least. Under the circumstances, the ruling of the court on the admission of the letters was correct. In addition to this, it is incumbent upon the appellant to show upon appeal that any error, if such there was, was prejudicial to him. Article 6, section 4½, of the Constitution, provides that no judgment shall be set aside on the ground of improper rejection of evidence, unless after the examination of the evidence the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Our attention has not been called in any of the briefs to the letters claimed to have been written by the sister and offered in evidence, and, after searching through the more than six hundred pages of the transcript, we are unable to find them. We do not know whether there was anything in them tending to bear out appellant's contention or not.

[15] Complaint is also made of the refusal of the court to give a number of specific instructions asked for by defendant. While we do not consider it necessary to set these forth in detail, we have examined them all. Nearly all of them were instructions that the jury should take into consideration particular facts. The record shows that the court did instruct the jury that every fact showing the mental condition of the defendant at the time and all things bearing on the subject of his capacity to distinguish right from wrong, at that time, must be considered by them. The instructions given were full and complete, and in our opinion nothing would have been added to them by the inclusion of those asked for, and refused.

No error appearing in the record, the judgment and order appealed from are affirmed.

We concur: SLOANE, P. J.; MARKS, J.

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102 Cal. App. 545

EDGAR et ux. v. CITRARO et al. (Civ. 7069.)

District Court of Appeal, First District, Division 1, California. Dec. 16, 1929.

1. Appeal and error 🔑607(1)—Transcript having been certified more than year before hearing of motion to terminate proceeding to obtain transcript, termination order was ineffectual (Code Civ. Proc. § 953a).

Where transcript had been duly certified by trial judge more than year prior to hearing and granting of respondents' motion in superior court to terminate appellant's proceeding for written demand for transcript under Code Civ. Proc. § 953a, on ground that appellant had been guilty of laches in his efforts to procure transcript, superior court's order terminating proceeding was ineffectual for purpose for which it was intended, irrespective of whereabouts of transcript during such period, since such a motion is maintainable only where transcript has not yet been certified by judge.

2. Appeal and error 🔑800—Motion to dismiss appeal for not timely filing transcript was denied, where transcript was on file when notice of motion was given (Code Civ. Proc. § 953a).

Under Code Civ. Proc. § 953a, and Rules of Supreme Court and District Courts of Appeal, rule I, § 1, rule V, § 1, motion to dismiss appeal on ground of appellant's failure to file transcript within 40 days after transcript was certified by trial judge could not be granted, where transcript was on file when notice of motion to dismiss was given and delay in filing transcript did not operate to respondents' prejudice.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by John F. Edgar and wife against Frank Citraro and another. From the judgment, named defendant appeals. On motion to dismiss appeal. Denied.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondents.

KNIGHT, J. On August 9, 1929, a transcript on appeal in the above-entitled cause, bearing a certificate of approval and authentication by the trial judge, dated June 28, 1928, in conformity with the provisions of section 953a of the Code of Civil Procedure, was filed with the clerk of this court; and on August 19, 1929, appellant filed his opening brief. Thereafter, and on August 24, 1929, respondents served and filed a notice of motion to strike said transcript and brief from the files and to dismiss the appeal upon the ground that the transcript was transmitted to this court in violation of an order theretofore made by the superior court terminating the proceedings on appeal.

It appears that four actions for damages arose out of one automobile accident, and that judgments therein were rendered against the appellant Citraro and one C. D. Pratt, jointly, each of whom took separate appeals. Consequently, there are eight appeals. In this particular appeal the appellant Citraro, in January, 1928, filed a written demand for a transcript, in accordance with the requirements of said section 953a of the Code of Civil Procedure, and in July, 1929, respondents moved the superior court to terminate the proceedings taken in that behalf upon the ground that appellant had been guilty of laches in his efforts to procure the transcript. The action had been tried on the merits in department 5 of said court, but respondents' motion to terminate the proceedings on appeal came on for hearing in another department, and on July 31, 1929, was heard and determined by a judge other than the one who had presided at the trial; and, according to the statement of counsel for appellant, the accuracy of which was not seriously disputed, at the time the said motion was heard and determined every one connected with the proceeding, including the phonographic reporter who reported the several trials, believed that the transcript in this particular appeal had not yet been completed. Shortly after the order was made, however, terminating the proceedings, the reporter found the transcript, which apparently had been misplaced, and which had been duly certified by the trial judge as to truth and correctness on June 28, 1928, more than a year prior to the hearing of the motion to terminate the appeal proceedings; and thereupon the transcript was filed with the county clerk and a few days thereafter was transmitted to this court. The whereabouts of the transcript from the time it was certified by the trial judge, in June, 1928, until it was produced and filed, in August, 1929, has not been made clear. Presumably, however, it was in the possession of the reporter, and appellant attributed the confusion in the matter to the fact that the reporter was obliged to prepare a number of transcripts in furtherance of the several appeals.

[1] Irrespective of the question as to the whereabouts of the transcript, however, it is certain that it was duly certified by the trial judge more than a year prior to the hearing and determination of the motion to terminate the proceeding to obtain it, and, that being so, the order made by the superior court in that behalf was evidently ineffectual for the purpose for which it was sought and intended, because such a motion is maintainable only where the transcript has not yet been certified by the judge. Crocker v. Crocker, 76 Cal. App. 606, 245 P. 438; Mill Valley v. Massachusetts, etc., Co., 189 Cal. 52, 207 P. 253; Smith v. Jaccard, 20 Cal. App. 280, 128 P. 1023, 1026.

[2] The rules of the Supreme Court and District Courts of Appeal provide that the transcript must be filed within 40 days after the appeal is perfected, but that the time prescribed for filing a transcript to be prepared pursuant to said code section 953a shall not begin to run until the transcript is approved and certified by the trial judge, or until the proceeding to obtain it has been terminated in the court below by dismissal or otherwise (Rule I, § 1); also, that if the transcript be not filed within the time prescribed, the appeal may be dismissed, upon notice given, etc. (Rule V, § 1). The latter rule further provides, however, that if "the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice (to dismiss) is given, that fact shall be sufficient answer to the motion." Even assuming, therefore, that the present motion to dismiss be treated as one made upon the ground of failure to file the transcript within the 40-day period after being certified by the trial judge, it could not be granted, because, as will be observed, the transcript was on file at the time the notice of motion to dismiss was given. Furthermore, it would appear that the delay in filing the transcript has not operated to respondents' prejudice, because none of the other appeals, including the one taken from this particular judgment by appellant's codefendant Pratt, has yet been determined.

For the reasons stated, respondents' motion to strike the transcript and the brief from the files and to dismiss the appeal is denied.

We concur: TYLER, P. J.; CASHIN, J.

102 Cal. App. 795

John F. EDGAR and Rose Edgar (his Wife), Plaintiffs and Respondents, v. Frank CITRARO and C. D. Pratt, Defendants; Frank Citraro, Defendant and Appellant. (Civ. 7070.)

District Court of Appeal, First District, Division 1, California. Dec. 16, 1929.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondents.

PER CURIAM. Respondents move this court to strike the transcript on appeal and appellant's opening brief from the files of this court and to dismiss the appeal upon the ground that said transcript was transmitted to this court in violation of an order theretofore made by the superior court terminating the proceedings to procure the transcript. The motion is based upon the identical facts and circumstances involved in a similar motion made by respondents in a companion case, and which motion has this day been denied. Edgar et al. v. Citraro et al. (No. 7069) 283 P. 123. Therefore, upon the grounds and for the reasons set forth in the decision in the companion proceeding, the motion herein is denied.

102 Cal. App. 548

EDGAR et ux. v. CITRARO et al. (Civ. 7224.)

District Court of Appeal, First District, Division 1, California. Dec. 16, 1929.

Costs ⚷260(4)—Abandoning appeal from order terminating proceeding to procure transcript after certified transcript was found and filed did not authorize penalty for frivolous appeal.

Where defendant's appeal from order terminating proceeding to procure a transcript on appeal was taken in good faith at a time when defendant could fairly assume that, if order appealed from was allowed to become final, appellant would be deprived of his right to appeal from judgment, but thereafter duly certified transcript was found and filed within a few days thereafter in appellate jurisdiction, and appellant abandoned appeal from order terminating proceedings because it would have served no useful purpose, motion to dismiss said appeal was granted without imposing penalty on ground that appeal was frivolous.

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Action by John F. Edgar and wife against Frank Citraro and another. From an order terminating proceedings to procure a transcript on appeal from a judgment, named defendant appeals. On motion to dismiss appeal. Granted.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondents.

PER CURIAM. This is a proceeding based on respondents' motion to dismiss an appeal upon the ground that the transcript has not been filed within the 40-day period allowed therefor by the rules of the Supreme Court and District Courts of Appeal (section 1, rule V), and furthermore, claiming that the appeal is frivolous, respondents ask that they be awarded damages. Appellant makes no opposition to the granting of the order of dismissal, but resists respondents' application for the imposition of a penalty.

The appeal was taken from an order made on July 31, 1929, terminating the proceedings to procure a transcript on the appeal which had been taken from the judgment in the action. The facts and circumstances attending the making of said order are set forth in an opinion this day filed in a proceeding wherein respondents sought to have dismissed the appeal from the judgment (Edgar et al. v. Citraro et al. [No. 7069] 283 P. 123); and as will appear from the facts stated in that opinion, the present appeal was doubtless taken in good faith at a time when it could be fairly assumed that if the order appealed from was allowed to become final appellant would be deprived of his right of appeal from the judgment. The situation was relieved, however, when the transcript on the appeal from the judgment, duly certified, was found; and which, within a few days thereafter, was filed in the appellate jurisdiction. Obviously, therefore, after the transcript was filed with this court, it would have served no useful purpose to prosecute the appeal from the order terminating the proceedings in the superior court, and therefore such appeal was abandoned. But under the circumstances existing at the time the appeal was taken it cannot be said that the appeal was frivolous.

The motion to dismiss the appeal is therefore granted without the imposition of a penalty.

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102 Cal. App. 796

John F. EDGAR and Rose Edgar (his Wife), Plaintiffs and Respondents, v. Frank CITRARO, Defendant and Appellant; C. D. Pratt, Defendant and Respondent. (Civ. 7225.)

District Court of Appeal, First District, Division 1, California. Dec. 16, 1929.

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondents.

PER CURIAM. This motion to dismiss an appeal taken from an order made by the superior court terminating certain proceedings to procure a transcript on an appeal from the judgment in the action upon the ground that the transcript was not filed within the period allowed by section 1, rule V, of the Supreme Court and District Courts of Appeal, and to award damages for a frivolous appeal, is a companion motion to one this day decided in Edgar et al. v. Citraro et al. (No. 7224) 283 P. 125, and is based upon the identical facts involved therein. As in that proceeding, appellant does not oppose the dismissal of the appeal, but resists respondents' application for damages.

For the reasons stated in that opinion, it must be held here that the appeal was not frivolous, and therefore the motion to dismiss is granted without awarding damages.

102 Cal. App. 457

BRUSH et al. v. E. R. BOHAN & CO. et al.
(Civ. 3954.)

District Court of Appeal, Third District, California. Dec. 10, 1929.

1. Mortgages 🔑186(3)—Fraudulent transaction destroying rights of lien claimant could not be presumed, in absence of evidence.

Fraudulent transaction by owners for purpose of destroying rights of lien claimant by conveying property for purpose of financing erection of flat building and then causing property to be sold under deed of trust and buying it back could not be presumed, in absence of evidence.

2. Mortgages 🔑151(3)—Where recorded before work is done or materials furnished, mortgage is in ordinary course of things prior to mechanics' liens.

Where it is recorded before any work is done or materials are commenced to be furnished, a mortgage is, in ordinary course of things, prior to mechanics' liens.

3. Mortgages 🔑151(3)—Mechanic's lien was not prior to mortgage, where whole of amount for which mortgage was given was advanced and applied in construction of building.

Mechanic's lien was not prior to mortgage put on premises to aid the financing of dwelling, where whole of amount for which mortgage was given was advanced and applied in construction of building.

4. Mortgages 🔑151(3)—Mechanic's lien for materials did not have priority as to building over mortgage given to aid financing of building (Civ. Code, § 1013).

Where owner placed mortgage on premises to aid financing of dwelling thereon, mechanic's lien for materials did not have priority as to building over mortgage, since building placed upon land became part thereof and belonged to owner, under Civ. Code, § 1013.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by J. Platt Brush and another against E. R. Bohan & Co. and others to quiet title. From a judgment for plaintiff, defendant Blue Diamond Company appeals. Affirmed.

Black, Hammack & Black and Carey McWilliams, all of Los Angeles, and R. S. Harrington, of Sawtelle, for appellant.

Owen C. Emery, of Glendale, and John F. Poole, of Los Angeles, for respondents.

FINCH, P. J. This is an action to quiet title. Judgment was entered in favor of the plaintiffs, and defendant Blue Diamond Company has appealed. The following statement of facts is taken substantially from the appellant's opening brief:

Respondents were originally the equitable owners of the premises, "having purchased them on contract from G. Allen Hancock." Thereafter the respondents "assigned said contract of sale to Seth Cheesman," to whom Hancock conveyed the premises. "Cheesman then put a first mortgage of $10,000 upon the premises * * * to aid the financing of a dwelling thereon." The consideration for the assignment by respondents to Cheesman was the sum of $3,250, to secure the payment of which Cheesman executed a deed of trust, conveying the premises to a trustee, which instrument contained the following: "This deed of trust is second and subject to a mortgage filed concurrently herewith, in amount of $10,000." Cheesman informed the respondents "that he was buying the lot to build a flat on, and that he was borrowing $10,000 for the purpose of building this flat." Cheesman did not let a contract for the erection of the building, but built it himself. The appellant furnished materials which were used in the construction of the building and duly filed a lien for the amount of its claim for such materials. Cheesman defaulted in payment to the plaintiffs, and the trustee sold the property to them to satisfy the indebtedness.

[1, 2] From the foregoing facts, appellant contends that an inference arises that Cheesman was merely the respondents' contractor, that they conveyed the property to him "for the purpose of financing the erection of a flat building thereon" and then causing the property to be sold under the deed of trust and buying it themselves, thereby destroying the rights of lien claimants. If the facts are as stated, it is to be regretted that the appellant did not produce some proof thereof at the trial, for there is no evidence in the record to warrant such an inference. Fraud and bad faith are not to be presumed in the absence of evidence thereof.

"If recorded before any work is done or materials are commenced to be furnished, a trust deed is in the ordinary course of things prior to mechanics' liens." 25 Cal. Jur. 52; Smith v. Anglo-California Trust Co. (Cal. Sup.) 271 P. 898; Fickling v. Jackman, 203 Cal. 657, 265 P. 810; San Francisco Lumber Co. v. Yates, 54 Cal. App. 109, 111, 204 P. 423.

[3] Appellant relies on a statement in 40 Corpus Juris, 295, that "it has been held that a second mortgage, although prior in point of time to mechanics' liens, is inferior thereto where it was taken subject to a first mortgage, the proceeds of which were to be applied in paying for labor and materials, and not all of the money was advanced and applied as agreed"—citing Andersonian Inv. Co. v. Jones, 104 Wash. 142, 176 P. 17. An examination of that case shows that the money which was not advanced and applied as agreed exceeded the amount of the liens. The effect of the decision, therefore, is mere-

ly that the second mortgage was inferior to the mechanics' liens only to the extent of the money not advanced and applied as agreed. As so understood, the decision is in harmony with that in W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 197, 191 P. 1027. No claim is made by the appellant that the whole of the $10,000 for which the mortgage was given by Cheesman was not advanced and applied in the construction of the building.

[4] It is urged that the appellant's lien for materials has "priority over that of the trust deed as to the building" at least, citing 40 Corpus Juris, 476. The rule there stated is that, "in a majority of jurisdictions, the building or improvement, as distinct from the land, may be subjected to the lien under certain circumstances," citing, among other cases, McGreary v. Osborne, 9 Cal. 119, and Linck v. Meikeljohn, 2 Cal. App. 506, 84 P. 309. No circumstance has been pointed out, however, which would warrant the application of the rule in this case. Respondents took the property under the trustee's deed, enhanced in value, it is true, by the improvement made by Cheesman, but also subject to the mortgage for $10,000. The building placed upon the land became a part thereof and belongs to the owner of the land. Civ. Code, § 1013; Watterson v. Cruse, 179 Cal. 379, 383, 176 P. 870; Pomeroy v. Bell, 118 Cal. 635, 638, 50 P. 683; Conde v. Sweeney, 16 Cal. App. 157, 160, 116 P. 319.

Other points made by the appellant are so manifestly untenable as not to merit a discussion thereof.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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102 Cal. App. 503

BOGARDUS v. BOGARDUS. (Civ. 3961.)

District Court of Appeal, Third District, California. Dec. 11, 1929.

1. Divorce ⚷303(1)—Improper order relative to custody of children may be corrected by trial court (Civ. Code, § 138).

Where improper order relative to custody of children has been made in divorce case, trial court has power thereafter to modify and correct it, and enter such order as it should properly make, under Civ. Code, § 138.

2. Divorce ⚷312—Trial court's ruling as to whether parent should be denied permission to see minor child is conclusive, in absence of abuse of discretion.

Whether such conditions exist as to warrant trial court in divorce case in refusing to permit one of parents to see minor child is primarily question for trial court to determine, and, unless it abuses its discretion, appellate courts should not interfere.

3. Divorce ⚷303(3)—Modification of orders respecting custody of minor child to permit father to visit child held not error (Civ. Code, § 138).

In divorce case, trial court's modification of orders relative to custody of minor child, so as to permit father to visit child, who was seven years of age, *held* not erroneous, under Civ. Code, § 138.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Geneva M. Bogardus against Russell B. Bogardus. From orders relative to the custody of a minor child, plaintiff appeals. Affirmed.

S. C. Schaefer and E. H. Woodard, both of Los Angeles, for appellant.

Mose Katzey and Paul Friedman, both of Los Angeles, for respondent.

PLUMMER, J. This cause is before us upon an appeal by the plaintiff from certain orders of the court relative to the custody of Russell Bogardus, Jr., the issue of the marriage between plaintiff and defendant. The record shows that at the time of the beginning of the action above named, in 1924, Russell Bogardus, Jr., was of the age of 21 months. The action above named was for a decree of divorce, adjustment of community property rights, and the awarding of the custody of the minor child above named. In April, 1925, an interlocutory decree of divorce was entered in said cause, and the custody of said minor child awarded to the plaintiff. Thereafter, and on the 24th day of May, 1926, a final decree of divorce was entered in said cause. The final decree of divorce likewise awarded the custody of said minor child to the plaintiff, making no mention whatever as to the right or privilege of the defendant to see or visit said minor child.

In May, 1927, the defendant herein filed a notice of motion and affidavit in the said cause, praying that the decree of divorce heretofore referred to be amended, so as to permit the defendant to visit said minor at certain specified times. This motion was contested by the plaintiff, and after hearing the said motion, the court made an order specifying that the defendant might visit said child, and might take said child to his home, being the home of the grandparents of said child, from 5 o'clock in the evening preceding the day when the defendant would be off duty, to 7 o'clock of the following day; the affidavit of the defendant showing that he was employed as a deputy sheriff of the county of Los Angeles, and the time when he was off duty was subject to the orders he might receive from the undersheriff of said county. After the making of this order the plaintiff moved that the order be vacated and set aside, following which the court made an order to the effect that the defendant might see the child at the home of the plaintiff when the defendant was off duty, but only during the daylight hours, and not more than once each week, and that the defendant might take the minor child to the home of his parents during the daylight hours, not more than once each week, and further that said child should not be removed from the county of Los Angeles without the permission of the court. From these orders the plaintiff appeals.

The only ground for appeal is that the affidavit of the defendant shows no changed circumstances after the entry of the final decree of divorce, and that the court had no jurisdiction to make any order modifying the final decree of divorce relative to the custody of the child or the right of the defendant to see or visit said child, unless based upon changed circumstances and conditions which did not exist at the date of the entry of the final decree. Section 138 of the Civil Code contains no such requirement. The court is specifically authorized to make such change relative to the custody of minor children as may seem necessary or proper at any time, and may modify or vacate the same. There is no contention made that it was not proper for the court to make an order permitting the defendant to see the minor child, and take the said child, during the daylight hours, to the home of its grandparents. At the time of the beginning of the action Russell Bogardus, Jr., was only 21 months old, and during his period of infancy the exclusive care, custody, and control of the minor may be said to be very properly vested in the mother; but as the child grew older and time elapsed the circumstances of themselves would necessarily be so changed, by reason of the advancing age of the child, as to warrant the court in permitting the defendant to visit the child during daylight hours, and to take him to the home of his grandparents during such hours. There seems to be no contention between counsel for appellant and counsel for respondent that orders affecting the custody of minor children should not be changed by the court, unless based upon changed conditions and circumstances. While the section of the Code makes no such provision, the decisions of the courts having to do with such questions generally adopt the rule that such modifications or alterations of the orders relative to the custody of children should not be made, unless based upon testimony showing changed circumstances or conditions. These decisions, however, are not uniform in holding that the court has no jurisdiction to make such change, unless the affidavits show changed conditions. They do not deny the power of the court to make such modification of its orders relative to the custody of children as may seem proper.

[1-3] We do not think that, if an improper order relative to the custody of children has been made by a trial court, the court has no power thereafter to modify and correct the same and enter such order as it should properly make. There can be no question that under ordinary circumstances, where the court has failed to permit one of the parents the right to see a minor child, that it is proper to modify the order so as to permit such parent to see the child. Only very aggravating circumstances and conditions would warrant a court in denying such privilege, and whether such conditions exist is primarily a question for the trial court to determine, and, unless it is shown that the trial court has abused its discretion in this particular, appellate courts, we think, should not interfere. The affidavit of the defendant in this case does not show circumstances and conditions which did not exist at the time of the trial of the action, to wit, the increased age of the minor child, the effort, on the part of the plaintiff, to prevent affiant from visiting his child, the sending of the child away on days when the defendant was off duty, and the taking of the child from the county of Los Angeles.

In the case of Moore v. Superior Court (Cal. App.) 255 P. 852, 853, we find this statement: "In divorce * * * the statute expressly provides that a decree for the custody and maintenance of minors may be modified or vacated at any time as may seem necessary or proper. * * * The propriety of modification in this particular, as well as the extent thereof, because of a change in the circumstances of the parties, rests largely in the discretion of the trial court. A decree need not reserve this right of modification." A hearing in this case was granted by the Supreme Court, and the opinion is reported in 203 Cal. 238, 263 P. 1009, but the same result was arrived at as was reached in the District Court of Appeal, and what we have quoted from the decision of the appellate court was not modified.

Being of the opinion that the trial court had jurisdiction of this cause by reason of section 138 of the Civil Code to modify its orders relative to the custody of the minor child, and nothing appearing to show any abuse of discretion on the part of the trial court, and the orders made permitting the father to visit the child, who is now seven years of age, being in accordance with natural justice, and eminently proper, the orders appealed from are affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

102 Cal. App. 527

PEOPLE v. COLLINS. (Cr. No. 9.)

District Court of Appeal, Fourth District, California. Dec. 11, 1929.

1. Intoxicating liquors 🔑213—Information for maintaining common nuisance, alleging maintenance thereof in certain building located in named city, sufficiently designated and described premises (Pen. Code, §§ 959, 960).

Information for maintaining a common nuisance under the state liquor law, charging a maintenance of nuisance in a building located in the city of Needles, sufficiently designated and described premises in accordance with requirement of Pen. Code, § 959, particularly in view of section 960, to effect that no indictment, or information, is insufficient by reason of any defect or imperfection in matter of form which does not tend to prejudice of a substantial right of defendant upon its merits.

2. Intoxicating liquors 🔑236(9)—Evidence held to sustain conviction for maintaining common nuisance.

Evidence in prosecution on charge of maintaining a common nuisance under the state liquor law *held* sufficient to sustain conviction.

3. Criminal law 🔑1159(4)—Verdicts are not to be discredited and set aside merely because based upon testimony of officers.

Verdicts are not to be discredited and set aside merely because based on testimony of officers of the law, though certain degree of bias may be presumed on the part of arresting and prosecuting officers growing out of their zeal to justify an arrest.

4. Criminal law 🔑829(12)—Refusal of instruction that possession of liquor was insufficient for conviction of maintaining common nuisance held not erroneous in view of other instructions.

In prosecution on a charge of maintaining a common nuisance under the state liquor law the refusal of instruction that possession of liquor alone would not be sufficient to sustain conviction *held* not erroneous, in view of other instructions of court incorporating the same rule.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Joe Collins was convicted of maintaining a common nuisance, and he appeals. Affirmed.

R. E. Hodge and Frank T. Bates, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and George H. Johnson, Dist. Atty., of San Bernardino, for the People.

SLOANE, P. J. This is a criminal action brought in the county of San Bernardino against the defendant Joe Collins on the charge of maintaining a common nuisance under the Volstead Act.

The information charges that the said Joe Collins, on or about the 26th day of May, 1929, and prior thereto, in the said county of San Bernardino, state of California, did willfully and unlawfully maintain a common nuisance, to wit, a certain building located in the city of Needles, in said county and state, where intoxicating liquors were unlawfully kept and unlawfully sold and kept for sale; said intoxicating liquor containing one-half of one per cent. or more of alcohol by volume and being fit for use for beverage purposes. Defendant was found guilty and convicted before a jury, and the appeal was taken from the judgment rendered on the verdict and from the order of the court denying defendant's motion for a new trial.

Appellant assigns as grounds for reversal of the judgment and order of the court:

(1) That the information fails to state the commission of a public offense because of uncertainty.

(2) That the evidence as a whole does not establish or support the verdict of guilty of the maintenance of a nuisance as defined by law and the act in question.

(3) The evidence does not establish sufficient connection between the offense charged and the property described and the defendant.

(4) Errors of law resulting from rulings of the court of such character as to deprive the defendant of a fair trial.

(5) Misconduct of the district attorney during the course of the trial affecting the substantial rights of the defendant.

(6) Refusal of the court to grant a certain instruction submitted by the defendant.

[1] The point made as to the insufficiency of the information is that it does not sufficiently designate and describe the premises where the nuisance in question is alleged to have been maintained. It is true that the particular location of the offense charged might have properly been more specifically set out. It is only designated in the information as "a certain building located in the City of Needles, said County and State." This seems to be sufficient under section 959 of the Penal Code. This section provides that: "The indictment, information, or complaint is sufficient if it can be understood therefrom: * * * (4) That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein."

Appellant points out no specific requirement for any different rule in the matter of prosecution for nuisance than would apply to any other offense. This is a personal action, and not one which affects the property where the nuisance is alleged to have been committed. All that would seem to be required is that the defendant should be informed of the venue of the offense sufficiently to enable him to prepare his defense, and

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to protect him from further prosecution for the particular offense charged.

Section 960 of the Penal Code declares that: "No indictment, or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

It is quite apparent that the defendant, in preparing his defense, had no difficulty in locating the precise building referred to in the information.

In People v. Mazzola, 80 Cal. App. 583, 251 P. 222, 223, this language is used: "It is also urged by appellant that the information is defective, in that it fails to state the particular place in the county of San Bernardino where the alleged offense was committed. But it appears that such a statement is unnecessary. People v. Geiger, 116 Cal. 441, 48 P. 389; People v. Sheldon, 68 Cal. 434, 9 P. 457; People v. Wooley, 44 Cal. 494; People v. Eveart, 1 Cal. Unrep. 217; People v. Redman, 39 Cal. App. 566, 179 P. 725; People v. Burke, 18 Cal. App. 72, 122 P. 435."

In People v. Burke, 18 Cal. App. at page 81, 122 P. 435, 440, discussing the point raised here of indefiniteness as to the precise location of the crime, the court says: "Looking at the matter in its practical aspect, it is manifest that no substantial right of the defendant was invaded or imperiled. He knew whether the offense charged was committed by him in any part of Sonoma county. This knowledge would enable him to prepare and present his defense. And, as far as any future prosecution is concerned, the indictment would protect him in his answer to any charge of the same offense committed at the time set forth at any place within the jurisdiction of said superior court. If there should be any doubt as to this, his plea 'of once in jeopardy' could be supported by extraneous evidence to identify the particular offense for which he has been tried, and thus he would be amply protected."

[2] As to the sufficiency of the evidence to support the verdict and judgment, we do not deem it necessary to review the testimony in detail. The entire transcript has been carefully read, and the impression left thereby is that there was ample evidence to justify the verdict of the jury, both as to the maintenance of the building in question as a place where intoxicating liquors were unlawfully kept and unlawfully sold, but also in support of the allegation that the defendant was at the time of his arrest on or about the 26th day of May and prior thereto, in charge thereof and maintaining the same. It is true, as defendant complains, that the witnesses for the prosecution were all officers of the law; M. J. Jenkins being a police officer of the city of Needles and a deputy sheriff of the county of San Bernardino; Jerry Davis an investigator for the sheriff of San Bernardino county; John Alles a federal prohibition agent; C. F. Smithson a special officer for the Santa Fé Railroad, who lived in Needles; C. C. Poe a deputy sheriff of San Bernardino county, and J. A. Larson deputy sheriff of San Bernardino county; Emmons Arnold special agent for the Santa Fé Railroad and deputy sheriff of San Bernardino county, and J. H. Lucas a constable, and J. E. Farley a deputy sheriff. Two or three of these witnesses testified to being present on the night of May 26th when the house was raided and the defendant arrested, and stated that the defendant was present and came to the door, and on being notified that the visitors were officers of the law, immediately ran from the front door back into the kitchen, where he was detected in pouring liquor from a pitcher into the kitchen sink. Portions of this liquor salvaged by the officers proved to be alcoholic liquor, containing as high as 40 per cent. in volume of alcoholic content. There was other evidence of the presence of intoxicating liquor, in the way of jugs and demijohns, whisky glasses, and other paraphernalia, empty at the time, but bearing the odor of whisky. The witness Jenkins stated that he had been in the house in the month of December, 1928, and on several other occasions within a year prior to May 26th, and on each occasion he found bottles, jugs, funnels, etc., on the premises bearing the odor of liquor, and on the 16th of September, 1928, he saw a man coming from the house, who, on the approach of the officer, broke two pint bottles of whisky which he was carrying, on the water meter on the premises. He also testified that at other times he had arrested people immediately after they came out of the house, who either had liquor in their possession, or were in a drunken condition, and that between May 26, 1928, and 1929, he had been in the house at least five times when the defendant was there present and apparently in possession.

Jerry Davis testified that in January, 1929, he bought whisky from the defendant at this place; that there were three or four in the house besides himself, and that he bought a round of drinks for everybody, including himself, and that then one of the other parties bought a round from the defendant before he left, and that they were served by the defendant in person. John Alles testified that in the early part of 1929 he visited this house in company with another investigator and bought four drinks of whisky there and a pint of whisky. The defendant was not present on this occasion and the liquor was served by some other party. His only information at that time that this was defendant's house was from hearsay.

C. F. Smithson testified that he was on the premises in September, 1928, and saw there a man by the name of Barbour, who poured something down the sink which smelled like whisky. On another occasion in the same month he saw some liquor in a pitcher. He testified that he had seen several intoxicated persons around the place, and that he often saw the defendant in and about the house.

C. C. Poe testified that the defendant had lived in this particular house for 18 months or 2 years; he had seen drunken people come from the house. On the evening of May 26th he tasted some of the liquor taken from the sink and declared that it was whisky. Asked how he knew that the defendant Collins lived in this particular house, he stated that he knew it from seeing Collins there, and that he had Collins' word for it. The defendant had once told him it was his place.

It was testified to by several witnesses that this place was commonly reputed to be occupied by the defendant; that he was frequently there, and that it was a customary thing for persons associated with, or having business with the defendant when they wanted to see him to look for him at this place; that he kept an automobile in a garage adjoining the house in question; that he was frequently seen sitting on the porch there. While defendant himself denied that he was in possession of or maintaining this house, he admitted that he had a key to it, and was exercising a general oversight of it, in the absence of the owner; that he had a key to it in the absence of the owner on and some time prior to the date of the raid and the arrest. His own testimony that he dropped around there frequently to see that the premises were not being invaded by trespassers, or otherwise interfered with, indicates that he considered himself for the time being the custodian of this house. While a good deal of the evidence was circumstantial, it can scarcely be doubted, taken in its entirety, that whatever business was being maintained there, was carried on by the defendant.

Counsel for defendant does not dispute that there was evidence before the jury that this place was being maintained for the illegal sale of intoxicating liquor and that the defendant was in charge of the same. He admits that the evidence is more or less conflicting, but seeks to discredit the testimony in behalf of the prosecution on the ground that all of the witnesses for the state were officers of one kind or another, and that there is absolutely no evidence of any witness whatever, or of any person other than officers, whom the testimony must show were in Needles, and at these premises, for the purpose of obtaining liquor, and at least part of them, for the stated purpose of arresting this defendant.

[3] While it may be true that a certain degree of bias may be presumed on the part of arresting and prosecuting officers growing out of their zeal to justify an arrest, this is a matter which may be, and usually is, called to the attention of the jury, and in any event we have not yet reached a point where verdicts are to be discredited and set aside because based upon the testimony of officers of the law, and particularly in the matter of enforcement of the Volstead Act, there has not been noticed such a degree of zeal on the part of the state constabulary at large as to raise any presumption of perjury in sustaining public prosecutions. We are satisfied that the evidence was sufficient to sustain the verdict.

As to the specifications of error of law occurring at the trial, we do not think anything is shown that was prejudicial to the defendant. There were some questions and comments by the district attorney which were perhaps improper, but any prejudice that might have resulted from this source was removed by the voluntary rebuke of the court at the time, and by ample instructions to the jury to disregard these matters of misconduct on the part of the prosecution, to which exception had been taken.

[4] Defendant's final specification of error is the refusal by the court to grant the following instruction: "You are hereby instructed that if you should believe from all the evidence beyond a reasonable doubt that there was found in the home or dwelling house of this defendant liquor containing more than one-half of one per cent of alcohol by volume, and that the same was fit for beverage purposes, such possession alone would not be sufficient to convict this defendant of the crime charged, to-wit, that of maintaining a common nuisance."

This instruction might properly have been given, and its refusal might be charged as error had not other instructions of the court incorporated the same rule. We think that the jury was fully informed by the instructions given that the mere presence of prohibited liquor in the dwelling occupied by defendant would not be sufficient evidence to justify his conviction of maintaining the place as a common nuisance.

Instruction No. 9 given by the court informs the jury "that mere possession of intoxicating liquors in one's house or place of business does not raise the presumption that such intoxicating liquor is possessed for the purpose of unlawful sale or disposition, nor does it raise the presumption that the place or establishment in which the liquor is kept is conducted as a common nuisance, or is maintained as a place for the unlawful sale of intoxicating liquor."

Instruction No. 7 as given contains the statement of the law as to what constitutes a common nuisance, and in this connection informs the jury that the word "kept," as used in this statute, means liquor "kept for sale or barter, or other commercial purpose." And that "while possession of intoxicating liquor in and of itself may be unlawful, unless the possession is coupled with the purpose of selling, bartering or other commercial uses, the offense of maintaining a common nuisance is not committed."

Instruction No. 10 also informs the jury that if they should believe from all the evidence "that there was one occasion when intoxicating liquors were either sold or given away by this defendant to be used as a beverage, such single act is not sufficient to constitute the crime of maintaining a common nuisance."

We deem the instructions taken as a whole quite favorable to the defendant and as covering all of the essential points necessary to fairly submit the case to the jury.

The judgment and order appealed from are affirmed.

We concur: BARNARD, J.; MARKS, J.

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102 Cal. App. 477

SMITH v. BROWN. (Civ. 6255.)

District Court of Appeal, Second District, Division 2, California. Dec. 10, 1929.

1. Automobiles 🔑244(10)—Evidence in action for personal injuries sustained in automobile collision held to sustain verdict finding defendant negligent.

In action for personal injuries sustained in automobile collision, evidence *held* sufficient to support verdict finding defendant was negligent.

2. Appeal and error 🔑1170(9)—Giving instruction on contributory negligence, not issue in case, held not prejudicial so as to justify reversal on defendant's appeal from judgment (Const. art. 6, § 4½).

In action for personal injuries sustained in automobile collision, giving instruction on contributory negligence which was not issue in case *held* not prejudicial so as to justify reversal on defendant's appeal, in view of Const. art. 6, § 4½, providing that no judgment can be set aside unless alleged error resulted in miscarriage of justice.

3. Trial 🔑304—Jurors must not discuss case prior to its submission to them.

It is improper for jurors to discuss case prior to its submission to them.

4. New trial 🔑55—Defendant, knowing of jury's unfavorable comments and suggestions at time of their occurrence, could not take chance of favorable verdict and keep point in reserve until motion for new trial.

In action for personal injuries sustained in automobile collision, defendant, knowing of jury's unfavorable comments and suggestions during course of trial, constituting misconduct, but making no objection, could not thus remain quiet and take chance of favorable verdict, and keep point in reserve until motion for new trial.

5. New trial 🔑30—Denying new trial in personal injury action based upon incident of witness fainting and her husband's comments held not abuse of discretion.

In action for personal injuries sustained in automobile collision, denying new trial based upon incident of witness fainting at trial and her husband's comments at time *held* not abuse of discretion, especially where defendant remained quiet and took chance of favorable verdict and attempted to hold point in reserve.

6. New trial 🔑29—Denying new trial in personal injury action based on conduct of plaintiff's counsel over question of evidence held not abuse of discretion.

In action for personal injuries sustained in automobile collision, denying defendant's motion for new trial based on alleged misconduct of counsel for plaintiff, where counsel on both sides indulged in unseemly wrangle over question of evidence in which each was guilty of interrupting the other, *held* not abuse of discretion.

7. New trial 🔑162(1)—Remission of portion of verdict under court's order places case in same position as though verdict for reduced amount had been originally returned.

Remission under order of court of portion of verdict in personal injury action places case, so far as propriety of jury's action is concerned, in same condition as if verdict had been returned in first instance for reduced amount.

8. Damages 🔑132(1)—$7,500 for injuries to hand, foot, nose, neck, back, breast, and black and blue marks disabling interior decorator and of permanent nature, held not excessive.

In action for personal injuries sustained in automobile collision, consisting of injuries to hand, foot, nose, neck, back, breast, and black and blue marks on various parts of body rendering plaintiff unable to perform usual occupation of interior decorating and resulting in injuries of permanent nature, verdict for $7,500 *held* not excessive.

Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge pro tem.

Action by Effie W. Smith against E. B. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

Sarau & Thompson, of Riverside, and B. P. Gibbs, of Los Angeles, for appellant.

Bertrand J. Wellman, of Los Angeles, for respondent.

BURNELL, Justice pro tem. This case arises out of the same accident as that involved in Davis v. Brown, reported in 92 Cal. App. 20, 267 P. 754. The plaintiff in that case was a passenger in the automobile driven by the defendant, while the plaintiff in the instant case was riding in her own car when it was struck by that of the defendant. The accident occurred January 19, 1925, at about 11:30 a. m., and the scene was the North Broadway tunnel which runs north and south between Temple street and Sunset boulevard, in the city of Los Angeles. The case was tried before a jury, which rendered a verdict of $10,250 in favor of the plaintiff. This verdict was reduced on motion for a new trial to $7,500.

[1] Appealing from the judgment based on

the verdict as thus reduced in amount, the defendant first contends that the verdict was contrary to the evidence and the law, in that "the proof discloses no negligence on the part of the defendant." With this contention we cannot agree, feeling that the evidence disclosed a set of circumstances under which the question of defendant's negligence was properly submitted to the jury and determined by it on somewhat conflicting testimony. As to most of the facts there is a substantial agreement on the part of the witnesses for the respective parties. Thus all agree as to the time and place of the collision, that the grade of the roadway in the tunnel was down hill from south to north, that the tunnel was 765 feet in length, and that the width of the roadway therein, from curb to curb, was 30 feet 6 inches. There is no conflict as to the fact that it had been raining outside of the tunnel, and that the surface of the roadway therein was wet and slippery by reason of water from the street having been "tracked in." It was not disputed that the Chevrolet car in which the plaintiff was riding was proceeding from north to south, on the west or right-hand side of the tunnel, nor that it was struck and practically demolished by the Lincoln car owned by the defendant, operated as a taxicab and driven by his employee, and which was proceeding in the opposite direction. The defendant, however, urges that the evidence shows the accident to have been unavoidable, in that, to avoid collision with another automobile which skidded just ahead of his car, he was forced to suddenly apply his brakes, with the result that the Lincoln car itself skidded in such a manner as to strike plaintiff's car. There was testimony on behalf of the plaintiff that the defendant's car was traveling at a rate of between 20 and 25 miles per hour when it skidded into plaintiff's vehicle. Witness Balderston testified that he was driving an automobile through the tunnel in the same direction as that in which plaintiff's car was proceeding and about 40 to 50 feet behind the latter, and that, when he first observed the Lincoln taxicab, it appeared to be on the west or wrong side of the tunnel, about 150 to 160 feet from the plaintiff's car; that there were other cars proceeding in the line of traffic on the east side of the tunnel in a northerly direction, and "the taxicab was on my side of the street coming toward us. What I mean by that is meeting us, and he appeared to skid sideways like he was going to turn back into his line of traffic, and he skidded sideways I should judge about 100 feet, coming down against the Smith [plaintiff's] car, striking the Smith car and driving it against my car." Mrs. Curran, a passenger in the Lincoln car, said that before it started to skid it was "traveling toward the middle" of the tunnel, and that prior thereto it had been traveling on the right-hand side going north. Mrs. Smith, the plaintiff, testified: "It sort of looked to me as if it started to pass the car in front of it and came towards the center of the tunnel and at that time it seemed to me as though he turned and started to turn back into his line again, and at that time his car skidded and slid I should say about 100 feet and struck my car." Further analysis of the evidence would serve no useful purpose; suffice it to say that it did not differ in any material respect from that reviewed in Davis v. Brown, supra. The case is clearly one of conflicting evidence, with sufficient testimony before the jury to support its verdict in favor of the plaintiff; and on this phase of the case no points of law are presented which were not disposed of in the former case growing out of the same accident.

[2] Appellant next contends that the trial court erred in instructing the jury upon the question of contributory negligence. There is no merit in this contention. It is true that, although contributory negligence was pleaded as a defense, no evidence was introduced with regard thereto, and it was stipulated before the close of the trial that it should be deemed not an issue in the case. The instruction complained of was therefore rendered unnecessary and should not have been given, but it is difficult to imagine in what manner appellant could have been prejudiced by the giving of it; it was an instruction favorable to appellant rather than to respondent. Section 4½ of article 6 of the Constitution completely disposes of this point.

The further point is made that the court erred in denying defendant's motion for a new trial for the following reasons: First, misconduct on the part of members of the jury; second, "accident which ordinary prudence could not have guarded against, emanating from the fainting of a witness while on the witness stand, and the violent remarks of the husband of said witness made in the presence of the jury, tending and calculating to bias and prejudice the jury against the defendant"; and, third, various alleged acts of misconduct upon the part of counsel for the plaintiff.

Upon the first of these points appellant relies upon two affidavits, one of which was sworn to by one of his attorneys while the other was by an "adjuster and investigator" working under the direction and supervision of the attorney. The first of these affidavits recites that, during the forenoon of the second day of the trial Mr. Wellman, the attorney representing the plaintiff-respondent, requested the affiant to approach the bench with him, and told the trial judge that two of the jurors "had been conversing together and commenting upon the testimony that was being introduced," and that affiant then advised the court "that he had also observed the two mentioned jurors conversing but was not close enough to them to be able to tell as to what they were talking about." The affidavit then goes on to recite the conclusion of the affiant that Mr. Wellman "was in a position to be able to tell whether these jurors were commenting on the testimony that was being introduced." The other affidavit states that the affiant was seated "approximately ten feet from where the jury was sitting," and that he observed the two jurors in question "conversing during the taking of the testimony and specially observed them make unfavorable comments and suggestions to each other regarding testimony that was being offered by defendant, or comments being made by defendant's counsel, to objections being raised by them to introduction of certain testimony or certain questions that were being asked on cross-examination by plaintiff's counsel." After reciting that, following the conference between court and counsel referred to in the first affidavit, the court "again admonished the jury that they must not talk to any person or any member of the jury or form or express any opinion concerning the case until the case had been finally submitted to them," the affidavit goes on to state that "on our return to the courtroom at 2:00 p. m., I again occupied a position to the right of the jury box and approximately 10 feet from the jury; that during the afternoon session, I paid particular attention to the actions of the two jurors herein mentioned; that I did, on several occasions, observe these two jurors conversing with each other during taking of testimony and during the time that any objection was made by either counsel for the defendant or counsel for plaintiff and I could plainly see from their actions and manner of conversing that they were very unfavorable to the defense in this action; that whenever any objection was overruled by the court that had been introduced by the defense they appeared to be satisfied, smiled and said something to each other; that I could plainly tell from their manner that they were talking together about this case and that their actions indicated clearly that they were unfavorable to the defense; that I was present in the courtroom when there was considerable argument pro and con by the counsel for defendant and counsel for the plaintiff concerning the testimony of Mrs. Curran, who was then on the witness stand; that I personally observed the actions of Mrs. Curran when she was recalled to the witness stand and in attempting to go back to the witness stand fell in a faint in front of the jury; that her husband who was present in the courtroom rushed to her assistance and I heard him make a remark in the presence of the jury and in a loud voice, as he assisted in picking up his wife and placing her on a table in front of the jury he remarked: 'I hope now you are satisfied, she was in no condition to return to the courtroom, she has never been the same since that accident. I wish they had put me on the stand, I will tell them something.' That Judge Galbreth stated from the bench, 'That will be enough from you.' That I could plainly tell by the actions of the two jurors mentioned that they appeared to be more opposed to the defense of this action, indicating to me that they had formed an opinion before the case was submitted to them."

[3, 4] It is to be observed that in neither of these affidavits is there any statement of the language used by the jurors or of the nature of the actions on their part which the affiant concluded constituted the "unfavorable comments and suggestions." The first affidavit may be eliminated from consideration as merely a recital of a conversation between court and counsel containing no direct statement of what any juror had either said or done; the second must also be disregarded as merely a recital of the conclusions arising in the mind of the affiant. It is significant that no improper conduct on the part of any of the jurors appears to have been noted by the judge, had it been he would undoubtedly have sternly reprimanded the offenders, and, if the gravity of the offense warranted such action, would have declared a mistrial upon his own motion or that of one or both of the parties. No such motion was made by the defendant-appellant, nor does the record disclose any objection on his part to the submission of the case to the jury, although the incident referred to in the affidavits was known to him prior to the completion of the taking of testimony. It is of course improper for jurors to discuss a case prior to its submission to them, but, even assuming that the conclusions expressed in the affidavit of the "investigator" were warranted by the facts which it fails to disclose, "this circumstance was known to appellant at the time of its occurrence, and no objection was made; and he could not thus remain quiet and take the chance of a favorable verdict, and keep this point in reserve." Monaghan v. Pacific Rolling-Mill Co., 81 Cal. 190, 22 P. 590. A somewhat similar situation arose in the case of People v. Lawler, 79 Cal. App. 207, 249 P. 18, except that there the affidavits on motion for a new trial set forth the language used by the juror whose conduct was attacked. In that case a page from a hotel register and an exemplar of the defendant's handwriting, both introduced as his exhibits, was being shown to the jury, when one of the jurors remarked, "That isn't the same writing, you can't make me believe these are the same signatures," and "taking a small book and pencil from his pocket, did write therein and attempt to draw (another juror) into conversation, saying 'just look at this.'" Disposing of the contention that a new trial should have been granted because of this misconduct, and noting that "no objection was interposed and no application was made to the trial court asking any relief of any kind," the court used the identical language above quoted from the Monaghan Case. See, also, Sherwin v. South-

ern Pacific Co., 168 Cal. 722, 145 P. 92, and Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538, 540.

[5] Appellant's contention as to "accident which ordinary prudence could not have guarded against" is based upon the incident of the fainting witness referred to in the latter portion of the affidavit of the "investigator." Here again the appellant remained quiet, took the chance of a favorable verdict, and attempted to hold the point in reserve. A somewhat similar incident occurred during the trial in Swendsen v. Pacific Electric Ry. Co., 175 Cal. 502, 166 P. 21, 22, although there the defendant acted promptly and asked that the jury be discharged and a mistrial declared, and renewed his objection by way of a motion for a new trial. The court there said, as we do here: "The motion for new trial was addressed to the sound discretion of the court, and it cannot be said that there was any abuse of discretion in refusing to disturb the verdict on the ground of this trivial occurrence."

[6] We are not impressed by appellant's point that a new trial should have been granted because of the misconduct of counsel. Counsel on both sides of the case indulged at one point in the trial in what the record shows to have been an unseemly wrangle over a question of evidence in which each was guilty of interrupting the other, the witness under examination, and the court, but there is nothing to indicate that this ungentlemanly conduct was calculated to prejudice the jury against the appellant. In Lafargue v. United Railroads, supra, much the same sort of controversy was relied on as ground for a new trial which the court denied. Upholding this action of the trial court, the Supreme Court said: "In doing this the court must be deemed to have concluded that no prejudice was suffered by defendant by reason of any of the matters to which we have referred. Conceding some of the statements made by counsel, whatever the provocation thought by him to exist therefor, were improper, we are satisfied that this conclusion of the trial judge should not be disturbed by an appellate court. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. This, we think, may not fairly be said here. We certainly cannot say that there was any intent on the part of counsel to get before the jury matters which he knew were inadmissible. It seems to us from the record that he was acting in perfect good faith. * * *" Here the controversy arose over the effort of counsel for the plaintiff to question a witness as to statements made by him at another trial in which the same accident was involved, without exhibiting to the witness the transcript of his testimony at such former trial, a transcript of which plaintiff's counsel had no copy. It is unfortunate that the court did not, as it should have done, firmly and decisively call both counsel to order at the very inception of a course of conduct in which each was guilty of a breach of that decorum and courtesy to be expected and demanded of those who appear in the temple of justice and particularly of those whose position at the bar makes them officers of the court, but we cannot say that there was any abuse of discretion on the part of the court below in determining, as it did in denying the motion for a new trial, that the conduct of counsel was not calculated to prejudice the jury against the defendant.

[7, 8] Finally, appellant urges that the damages awarded are so excessive as to appear to have been given under the influence of passion or prejudice. As has been noted, the jury brought in a verdict in the sum of $10,250, which was reduced by the court on the hearing of the motion for a new trial to $7,500. The plaintiff testified that, as a result of the impact, her right hand was injured, and "I was pretty near black and blue all over, and my ankle was cut and bruised and swollen, and the top of my foot had a hole pretty nearly through the top of my foot. My nose was all swollen and bleeding terribly. I was blood all over and the car, I expect, had a cup of blood in the bottom of the car. * * * The back of my neck hurt very badly, and such terrible pain in it, and in the middle of my back was a place that was hurt that was black and blue, too, and this one bone here (indicating the breast bone) was all black and blue." She further testified that prior to the accident she was in very good health and working as an interior decorator, an occupation which necessitated climbing around on ladders, and that ever since the accident she had been unable to do any of that sort of work, and that the injury to her right hand prevented her from holding a pen or a brush in it. The accident was in January, 1925, the trial was in October, 1926, and there was testimony that during all of the intervening period the plaintiff had suffered pain as the result of her injuries. As one witness put it: "She has never been the same since the accident and she has had to be under the care of a doctor at least once or twice a week and she has been nervous and complained of her back and of her ankle hurting her and terrible headaches at night." X-ray photographs taken eleven months after the accident disclosed "a condition * * * of the lower three vertebræ of mild osteo arthritis or inflammation of the joints between the vertebræ"; also "inflammation or osteo arthritis between the fifth, sixth and seventh cervicals (vertebræs of the neck), and a fallen arch," a condition which might be caused either by trauma or by disease. Dr. Alden

Jones was positive that plaintiff's condition was due to trauma, and that her injuries were of a permanent nature, and that her condition would gradually become worse. There was other testimony corroborative of the above which it would serve no useful purpose to review. The remission under order of the court, of a portion of the sum specified in the verdict, placed the case, so far as the propriety of the jury's action was concerned, in the same condition as if a verdict had been returned in the first instance for the reduced amount. Lynch v. Southern Pacific Co., 24 Cal. App. 108, 140 P. 298. It was said in Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76, 81: "Unless we are able to say that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision. 8 Cal. Jur. 834; Holmes v. California Crushed Fruit Co., 69 Cal. App. 779, 232 P. 178; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513."

Under the circumstances disclosed by the evidence in this case, we are unable to say that the verdict, as reduced by the court, was unwarranted by the evidence as to the nature, extent, and probable permanence of the injuries suffered by the plaintiff.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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102 Cal. App. 237

PEOPLE v. SANDERS et al. (Cr. 1835.)

District Court of Appeal, Second District, Division 1, California. Nov. 29, 1929.

1. **Constitutional law 🔑55—Legislature has power to regulate procedure in criminal cases.**

Legislature has power to regulate procedure in criminal cases.

2. **Constitutional law 🔑106—There is no vested right in remedy.**

There is no vested right in remedy in criminal cases.

3. **Indictment and information 🔑36—Statute directing district attorney to file information charging offense named in order of commitment, or shown by evidence before magistrate, does not violate constitutional provision relating to prosecution by information after commitment by magistrate (Pen. Code, § 809, as amended by St. 1927, p. 1045; Const. art 1, § 8).**

Pen. Code, § 809, as amended by St. 1927, p. 1045, providing that it shall be duty of district attorney to file information charging defendant with offense named in order of commitment, or any offense shown by evidence taken before magistrate, *held* not to violate Const. art. 1, § 8, providing that offenses theretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate.

4. **Constitutional law 🔑67—Where judicial act authorized is incidental to main function of legislative body or administrative office, it is not void because of constitutional limitations (Const. art. 3, § 1).**

Where judicial act authorized is merely incidental to main function of legislative body or administrative office, grant is not void, as in violation of Const. art. 3, § 1, dividing powers of government into three separate departments, legislative, executive, and judicial.

5. **Constitutional law 🔑80(3)—Statute authorizing district attorney to charge offense named in order of commitment, or any offense shown by evidence before magistrate, is not void as attempt to clothe ministerial officer with judicial power (Pen. Code, § 809, as amended by St. 1927, § 1045; Const. art. 3, § 1).**

Pen. Code, § 809, as amended by St. 1927, p. 1045, providing that it shall be duty of district attorney to file information charging defendant with offense named in order of commitment, or any offense shown by evidence taken before magistrate, *held* not unconstitutional as attempt to clothe district attorney, a ministerial officer, with judicial power, in contravention of Const. art. 3, § 1, providing that powers of government shall be divided into three separate departments.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Prosecution by the People against James Sanders and another for the crimes of attempting to rob and of burglary. From an order granting a motion of defendant Sanders in arrest of judgment, the People appeal. Reversed and remanded.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Wm. R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, for respondent.

HAHN, Justice pro tem. The people of the state of California prosecute this appeal from an order of the superior court in and for the county of Los Angeles granting defendant's motion in arrest of judgment. It appears from the record that the defendant and respondent was bound over to the superior court by commitment issued by the committing magistrate for the crime of "attempt to commit robbery" from the person and presence of one Lawrence Knezvich. The district attorney in due course filed an information in the superior court, charging the defendant and respondent in count I with the crime of "attempting to rob" one Lawrence Knezvich, in count II with the crime of "attempting to rob" one Jack Summers, and in count III with the crime of "burglary."

The defendant filed a demurrer to the information, particularly attacking counts II and III, on the ground that the court had no jurisdiction to try the defendant for the offenses therein set forth, for the reason that the commitment designated only the crime set forth in count I. The record does not indicate what ruling, if any, was made by the court on this demurrer. It appears, however, that the defendant pleaded "not guilty" to each of the counts and went to trial upon the information, as drawn, before the court without a jury, a jury trial having been waived. During the trial count I was dismissed. Upon completion of the trial the defendant was found guilty of the crimes charged in counts II and III. Subsequent to the conviction, and prior to passing of sentence, the defendant again filed a demurrer to the information, attacking counts II and III on the ground that the court had no jurisdiction of the offense therein charged, for the reason that the defendant had not been accorded a preliminary examination upon these charges, and that the commitment, upon which he was bound over for trial, did not designate the crimes set forth in counts II and III. This demurrer was overruled by the court, whereupon the defendant made a motion in arrest of judgment, basing his motion upon the same grounds as set forth in his demurrer, and particularly alleging that the latter portion of section 809 of the Penal Code, which it was contended by the district attorney authorized the inclusion of counts II and III in the information, was unconstitutional. The court agreed with the view of defendant and respondent, and granted his motion in arrest of judgment.

It is agreed by counsel on both sides that the determination of this appeal is dependent upon the question of the constitutionality of the latter portion of section 809 of the Penal Code, which was added as an amendment to section 809 by the Legislature in 1927. St. 1927, p. 1045. For the sake of brevity, we will refer to the disputed portion of the section as the amendment.

Section 809 of the Penal Code reads as follows (the amendment being set out in heavy type):

"*Filing Information After Examination and Commitment.* When a defendant has been examined and committed, as provided in section 872 of this code, it shall be the duty of the district attorney, within fifteen days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense. The information shall be in the name of the people of the State of California, and subscribed by the district attorney, and shall be in form like an indictment for the same offense. **It may charge the offense, or offenses, named in the order of commitment, or any offense, or offenses, shown by the evidence taken before the magistrate to have been committed.**"

It is respondent's contention, first, that the amendment is in contravention of section 8 of article 1 of the Constitution of California, in that by said section the committing magistrate is alone vested with the power of designating the particular crime with which a defendant may be charged in an information, and upon which he may be put to trial before a jury; and, second, that the amendment attempts to clothe the district attorney, an executive officer, with judicial functions, and this is in contravention of section 1 of article 3, of the state Constitution.

Section 8 of article 1 of the Constitution of California reads as follows:

"Sec. 8. Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

The question as to the power of the district attorney in drawing an information to change, amend or add to the offense designated in a commitment issued by the committing magistrate, has long been a matter for discussion by courts of appellate jurisdiction in California. The early decisions, prior to the case of People v. Nogiri, 142 Cal. 596, 76 P. 490, handed down in March, 1904, uniformly sustained the right of the district attorney in drawing an information to charge any offense that appeared from the depositions taken in the preliminary examination to have been committed, whether the offense was designated in the commitment or not. In the Nogiri Case the Supreme Court definitely held that the district attorney did not have such power, thus reversing the previous holding of the court on that point. Inasmuch as respondent in his brief dwells at length upon the Nogiri Case in support of his contentions, it will be helpful to review the case in detail.

The defendant Nogiri was committed by the magistrate to the superior court for trial for the crime of "assault with a deadly weapon." The information filed by the district attorney charged defendant "with an assault with a deadly weapon with intent to commit murder." After referring to the previous decisions upholding the right of the district attorney to include in the information offenses not designated in the commitment, the court, speaking through Mr. Justice Henshaw, says:

"The result of these decisions is to vest in a ministerial and executive officer, the district attorney, supervisorial, appellate, and judicial powers controlling the judgment of a judicial magistrate who alone, under the Constitution, is empowered to hold the examination, and who alone is empowered to declare by his commitment the offense for which the accused person shall be put upon trial. This, we think, the law neither contemplates nor permits. The Constitution of this state (article 1, § 8) provides that 'offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate.' Section 872 of the Penal Code declares, in effect, that if the magistrate after examination shall determine that the offense charged, or some other offense, shall have been committed, he is to make an order declaring that the offender shall be held to answer '*to the same*' and stand committed to the sheriff. Section 809 of the Penal Code, defining and prescribing the duties of the district attorney under the circumstances, declares that 'When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable, an information charging the defendant *with such offense.*' *There is thus neither in the Constitution nor in the laws enacted in furtherance of it the slightest vestige of judicial, discretionary, or appellate power given to the district attorney in controlling the action of the committing magistrate.* His functions are ministerial purely. He is told to file an information charging the defendant with the offense for which, after judicial inquiry, he has been held to answer." (Italics ours.)

Mr. Justice Henshaw, with the purpose of enforcing the conclusion arrived at, quotes a portion of the dissenting opinion written by Mr. Justice Harlan of the United States Supreme Court in the case of Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232, wherein was considered and determined the question as to whether or not the amendment to the Constitution of California of 1879, which provided for prosecution of public offenses by information as well as by indictment, was in conflict with the Constitution of the United States. The language quoted is as follows: "Under the local statutes in question even the district attorney of the county is deprived of any discretion in the premises, for if, in the judgment of the magistrate before whom the accused is brought—and generally he is only a justice of the peace—a public offense has been committed, it becomes the duty of the district attorney to proceed against him by information for the offense indicated by the committing magistrate."

It will be noted that the conclusion of the court in the Nogiri Case was based primarily upon the view that "neither in the constitution nor in the laws enacted in furtherance of it the slightest vestige of judicial, discretionary, or appellate power given to the district attorney in controlling the action of the committing magistrate." Undoubtedly, the Legislature, moved by the holding in the Nogiri Case, and subsequent cases where the Nogiri Case was cited as authority for the same ruling, that there was no provision in the statutes authorizing the district attorney to include in an information any crime or crimes not designated in the commitment, and being convinced that the investing of such power under limited conditions in the district attorney would tend to make more efficient, prompt, and less expensive the trials of those charged with crime, determined to enact legislation that would clearly give to the district attorney this power; hence the amendment in question to section 809 of the Penal Code.

It is respondent's contention, first, that, under section 8 of article 1 of the Constitution, the committing magistrate is clothed with the exclusive power to designate the offense that the defendant should be charged with in the superior court, and the Legislature is therefore without power to delegate to the district attorney the discretion provided in the amendment; and, second, that the amendment is an attempt to clothe an administrative officer with judicial powers, which, it is urged, is in contravention of section 1, article 3, of the Constitution, which divides the powers of government into three separate departments and prohibits the exercise by one department of powers properly belonging to another.

[1, 2] It has been firmly established that there is no vested right in a remedy and that the Legislature has the power to regulate procedure in criminal cases. People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257. Indeed, counsel for respondent in his brief concedes this proposition. The question in the Campbell Case under consideration was whether or not, subsequent to the adoption of the Constitution of 1879, wherein it was provided that those charged with public offenses might be proceeded against by information as well as indictment, the district attorney could by information charge an offense that had been committed prior to the adoption of the Constitution. The opinion quotes from Cooley on Constitutional Limitations, wherein it is held that "remedies must always be under the control of the Legislature." Also, the conclusions of the Supreme Judicial Court of Massachusetts in Conn. ex rel. Springfield v. Hampden Commissioners of Highways, 6 Pick. 508, where the court said: "But there is no such thing as a vested right to a particular remedy. The Legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another." This doctrine is supported by Mr. Bishop in his work on Statutory Crimes, § 178. Indeed, article 1, § 8, of the Constitution by its very language authorizes the Legislature to provide the detailed procedure to be followed in bringing to trial those charged with public offenses, for it says: "Offenses * * * shall be prosecuted by information, * * * or by indictment, * * * *as may be prescribed by law.*" (Italics ours.)

Pursuant to the authority thus prescribed by the Constitution the Legislature has provided for the various steps in bringing one charged with a public offense before a magistrate for examination, and also the powers and duties of the magistrate in conducting the examination and binding the defendant over to the superior court for trial. The legislative grant of these powers has been uniformly sustained and particularly those provided in section 872 of the Penal Code. People v. Staples, 91 Cal. 23, 27 P. 523; People v. Lee Look, 143 Cal. 216, 76 P. 1028; People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Foster, 198 Cal. 112, 243 P. 667, 671.

So, too, the Legislature has prescribed the duties and powers of the district attorney in the necessary steps after the preliminary examination up to the trial before a jury in the superior court, and also the powers of the district attorney and the court during the trial. These powers have generally been sustained as within the scope of legislative enactment. People v. Foster, supra.

Since the Nogiri Case, the amendment of an information has repeatedly been before our courts, but in every instance where this question has been discussed and the limitation of the power of the district attorney in filing an amended information upheld, the ruling has been predicated upon the lack of authority prescribed by the Legislature and not because of the inhibitions of the Constitution. In People v. Hinshaw, 194 Cal. 1, 227 P. 156, 161, the court, in discussing the validity of an amended indictment filed by the district attorney under the direction of the court said: "Appellant has cited a number of authorities to the effect that the district attorney has no authority to file an information for a different offense than the one shown by the commitment [citing cases]. These authorities involve section 809 of the Penal Code; but the distinction must be observed between charging a different offense and charging the same offense differently."

In People v. Foster, supra, the action of the trial court in permitting the district attorney to amend an information changing the name of the person alleged in the commitment and in the information to have been robbed was under attack. The court said: "Conceding that the district attorney, by virtue of section 809 of the Penal Code, is confined to the same crime in framing the information as the one designated by the magistrate in the commitment, such an exaction would not strip the Legislature of the power to authorize the correction of an error by an amendment of the information so as to correctly identify the peson who was actually injured by the robbery, if the evidence taken at the preliminary examination justifies the amendment. The whole system of procedure by information is subject to control and regulation by the Legislature."

Language of similar import from other California cases might be quoted, but to do so would extend this opinion to an unwarranted length. It will suffice to observe that we have been cited to no case decided since the Nogiri decision where our Supreme Court has held, or even indicated, that the limitation of the power of the district attorney in filing an amended information, including offenses not designated in the commitment, was due to any constitutional inhibitions. The case of People v. Foster, supra, involves facts similar to those in the instant case, and presents an interesting discussion of the constitutional rights of one charged with a crime, in so far as the procedure in bringing him to trial is concerned. The original information charged the defendant with robbery, specifying that the sum of $46 was feloniously and forcibly taken from the person, possession, and immediate presence of one Mrs. Agnes Funke. During the trial it appeared from the evidence that the money was not taken from the possession and immediate presence of Agnes Funke, but was taken from the possession and immediate presence of one Freda Knuebel, another person. The defendant, upon appeal, urged that his constitutional rights were violated in the filing of the amended information without a preliminary examination upon the charge of robbing Freda Knuebel. In discussing this question, the court construed section 1008 of the Penal Code and comments thus:

"The procedure by indictment and information are so vastly different as to justify the distinction observed by section 1008 of the Penal Code, which prohibits the amendment of an indictment in such form as to change the offense charged therein and permits the amendment of an information so long as the crime stated by the amendment is supported by the evidence which was taken at the preliminary examination. By pursuing this course, the due process clauses of the federal and state Constitutions are not violated by such an amendment, for the reason that the defendant was present and was given an opportunity to defend himself throughout the entire proceedings. Hurtado v. California, 4 S. Ct. 111, 110 U. S. 516, 28 L. Ed. 232. Under our system of criminal procedure the committing magistrate is not limited in making his order of commitment to the allegations of the complaint or the crime named therein. It is his duty to commit the accused for trial for the offense disclosed by the evidence, even though it be a different offense than the one laid in the complaint [citing authorities]. In this case the accused was held to answer to the charge of robbery committed in the county of Los Angeles on a stated day. The kind of property taken is described as money and the amount thereof was $23. The crime charged in the complaint and found by the magistrate to have been committed by the defendant was robbery, with the time, place, and amount of money taken specifically stated. * * * If no constitutional right of personal liberty is violated by amended section 1008, Penal Code—and we are not aware of such violation, nor have we been cited to any authority in this state which challenges the authority of the Legislature to so regulate criminal procedure—all of the objections made by appellant as to the identity of the crime are swept aside by the amendment."

In the case of People v. Shope, 77 Cal. App. 427, 245 P. 998, section 1008 of the Penal Code was declared the authority for amending an information under direction of the court, citing the case of People v. Foster, supra, as authority for the ruling.

In the case of People v. Milligan, 77 Cal. App. 745, 247 P. 580, 581, this court had under review the action of the trial court in permitting the district attorney to amend an information during the trial of the case. This court, after quoting section 1008 of the Penal Code, says: "The language of the statute, while stated negatively, would seem to warrant an amendment such as is here involved, provided that the substantial rights of the defendant were not prejudiced thereby and that the charge preferred by the information as amended constitutes an offense shown by the evidence taken at the preliminary examination, People v. Foster, 198 Cal. 112, 243 P. 667."

[3] If, then, the power granted under section 1008 of the Penal Code to amend an information is not in conflict with constitutional provisions, and the authorities from which we have quoted as well as others which we might cite abundantly sustain the validity of this section, we are unable to conclude that the grant of power to the district attorney by the amendment to section 809 of the Penal Code is in conflict with any provision of the Constitution. All that has been and can be said from the standpoint of constitutional interpretation, reason, and logic to support the validity of section 1008 of the Penal Code may be urged with like force to sustain the amendment under consideration.

The opinion in Ex parte Nicholas, 91 Cal. 640, 28 P. 47, although written prior to the Nogiri Case, presents a well-reasoned and forceful argument in support of the conclusion we have arrived at in the instant case. Indeed, the language so succinctly and clearly stated the reasons for granting the district attorney the powers provided in the amendment that when the same question was before the court in the case of In re Severin, 188 Cal. 348, 205 P. 101, Chief Justice Shaw in writing the opinion of the court, which supports the views we here express, quoted freely from the opinion in the Nicholas Case.

In the case of People v. Barnett (Cal. App.) 278 P. 885, which, so far as we are informed is the only case decided since the adoption of the amendment in which the question of the validity of an information containing a charge not included in the commitment has been considered, the court upheld as valid the power of the district attorney to include such an offense in the information. While it is true the constitutionality of the amendment was not directly attacked, it does appear that the principal contention urged by appellant for a reversal of the judgment of conviction was that his constitutional rights were invaded by reason of the fact that a charge was included in the information that was not included in the original complaint. The court, in overruling appellant's contention, referred to the amendment to section 809 of the Penal Code as fully justifying the court's conclusion.

[4, 5] Respondent also urges that the amendment in question is void in that it attempts to clothe the district attorney, a ministerial officer with judicial power and that this is in contravention of section 1, article 3, of the Constitution, which reads as follows: "The powers of the government of the state of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted."

There is abundant authority in California giving support to legislation that vests in a legislative body, or administrative officer, judicial functions, when such acts are merely incidental to the performance of a legislative or executive function. The cases are not uniform in fixing the line of demarcation between the valid grant of such authority, and legislation which improperly intrudes upon judicial functions which are by the Constitution reserved to the judicial branch of the government. There is authority, however, for the general rule that, where the judicial act authorized is merely incidental to the main function of the legislative body, or administrative office, the grant is not void because of constitutional limitations. In fact, the exercise of this incidental judicial power by administrative officers and municipal bodies has become so common that citation of authority seems hardly necessary.

It may suffice to suggest that, in the matter of public improvements, various boards and officials clearly classified as legislative bodies and administrative officers are constantly performing judicial functions in fixing the boundaries of assessment districts;

in determining whether property affected is either damaged or benefited thereby, and in fixing the amounts of such damage or benefit; in equalizing special assessments and taxes. Then, too, there are various boards and commissions which function as a part of the executive branch of the government that are frequently required to make decisions, which call for the exercise of judicial functions. Legislative enactments, authorizing the exercise of judicial functions in the various lines of activities indicated, have been in the main sustained as not invading the judicial branch of the government.

In the case of People v. Sacramento Drainage District, 155 Cal. 373, 103 P. 207, the court, answering the criticism that the act of the Legislature in creating the Sacramento drainage district was unconsitutional, for the reason, among others, that it conferred judicial powers on the board of drainage commissioners in contravention of the provisions of the Constitution delegating to the courts the exercise of judicial functions, says:

"It is insisted that this [act] either creates a court or confers judicial powers upon executive and administrative officers, in violation of the constitutional provision of sections 1 and 5 of article VI of the Constitution. That the board sitting to equalize the assessments acts judicially, must be conceded. The very purpose for which it sits is to act judicially for the correction of errors and abuses in the orignal assessment. But to say that for this reason the Legislature has attempted to create a court in violation of the Constitution is a proposition to whch assent must be denied. Many acts, judicial in their nature, must of necessity be performed by the executive and administrative officers of the government. The decisions of such officers upon any controverted question, upon any question even in which there is play for discretion, are in their nature judicial. But because this is so, and necessarily so, it does not follow that they are usurping the exclusive functions of the courts of the land, and if they are not doing so, the power which they exercise may not be questioned. City councils and boards of supervisors annually fix the rates which water consumers within their territories shall pay to quasi public corporations furnishing such water. Here, these boards are called upon to consider and decide controverted questions of fact of great moment and of much nicety. Their decrees fixing rates contain many of the elements of a judgment. They are binding determinations upon the water company upon the one hand, and upon the consumer upon the other; yet, the power of these boards to exercise such quasi judicial functions has been upheld."

In the case of Robinson v. Kerrigan, 151 Cal. 40, 90 P. 129, 132, 121 Am. St. Rep. 90, 12 Ann. Cas. 829, the court had under consideration the constitutionality of the "Torrens Title Act." Answering an assertion that the act was unconstitutional in that it conferred upon the county recorder, an administrative officer, judicial powers, the court said:

"The claim is made, although not argued that by sections 48, 49, 55, 58, 59, 60, 61, 64, 67, and 68 of the act the registrar is given judicial powers. These sections require the registrar to note upon the duplicate certificate of title in his office the existence and general character of instruments creating liens, incumbrances, trusts, powers, or leases affecting the land described in the certificate. The point is that the registrar is required to determine the legal effect of these instruments, and that this is a judicial function which can be given only to a judicial officer. There is no force to the objection. Every administrative officer is frequently called upon in the discharge of his duties, to decide questions of law relating thereto. The recorder is required to determine whether an instrument presented for record is a deed, a mortgage, a lease, a notice of action, or what not, so as to record it in its proper book. The sheriff must often determine, for his own guidance in making a levy, the ownership of property. The clerk must determine the nature and legal effect of papers filed with him, and perform the appropriate duty respecting them. The duties required of the registrar by these sections are of the same nature. His decision in the matter is not conclusive. If he decides wrongfully and refuses to perform the appropriate duty in the premises, he may be compelled to act properly by means of a writ of mandamus, the same as any other ministerial officer who mistakes his duty under the law and refuses to perform it. The exercise of such powers by ministerial officers is a necessary function of the executive department, and, although it may require similar deliberation to that involved in the exercise of judicial power, the bestowal of such powers upon the executive department does not violate the provisions of the Constitution forbidding that department to exercise the functions of any other department." People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; Land Owners v. People, 113 Ill. 296; 1 Story on Constitution (5th Ed.) § 525; Chinn v. Superior Court, 156 Cal. 478, 105 P. 580.

Many other authorities and judicial opinions holding to the same effect might be cited but we deem it unnecessary. Our conclusion, therefore, is that the amendment to section 809 of the Penal Code, passed by the Legislature in 1927, is not unconstitutional, but that the powers therein granted to the district attorney are within the power of the Legislature to authorize.

The fact that we have not discussed in detail all of the cases cited in the briefs filed herein does not indicate we have failed to give them consideration. The length of this opinion would seem to preclude further discussion of the authorities cited.

The judgment of the trial court in granting defendants' motion in arrest of judgment is reversed, and the case remanded to the trial court for pronouncement of judgment or such other proceedings as the court may be advised.

I concur: YORK, J.

HOUSER, Acting P. J. (dissenting). I dissent from the judgment. Particularly am I unable to agree that the questioned provisions of section 809 of the Penal Code are not in violation of section 8, article 1, of the Constitution of this state. By the terms of the statute, in the matter of preparing an information presumably based upon a commitment, the district attorney is authorized to exercise appellate jurisdiction over the judgment rendered by a committing magistrate. In the information the district attorney may charge not merely a lesser offense included within that for which the defendant was held to answer to the superior court, but may charge even a greater offense; or going still farther, as illustrated in the instant case, the district attorney may accuse the defendant with the commission of an offense entirely unrelated to that of which he was originally accused, or for which he was committed by the magistrate.

As a further illustration, suppose that in a given case a defendant were charged with the crime of burglary and the evidence adduced on the preliminary examination showed that after the defendant had broken into the house which was burglarized, he had suddenly been confronted by a young woman, whom he overpowered, and then, without stealing anything or further molesting the young woman, because of his fear of detection and arrest, he had made his escape from the house; and suppose that on the preliminary examination of the defendant, the committing magistrate had held the defendant to answer to the superior court for the crime of burglary: Under the provisions of section 809 of the Penal Code, the district attorney might wholly disregard the judgment of the magistrate, as evidenced by the terms of the commitment, substitute his own judgment for that of the magistrate, and file an information by which the defendant would be charged with the crime of attempted rape. Although, as remarked in some authorities, it may be that because of the fact that, with certain exceptions, owing to the fact that a justice of the peace, in order to hold his office, is not required to be licensed to practice law in all the courts of this state, and hence from a lawyer's standpoint ordinarily would not be as well qualified as a district attorney would be to correctly pass judgment upon the nature of the offense committed by the defendant, it should not be overlooked that within certain defined areas, the committing magistrate must be a qualified lawyer, and consequently in such case possibly may be a better lawyer than the district attorney. Further than that, by the provisions of section 808 of the Penal Code, besides justices of the peace, the judges of the municipal court, the judges of the superior court, and the justices of the Supreme Court are magistrates; and if, perchance, a justice of the Supreme Court should sit as a committing magistrate, perhaps it might appear incongruous that a district attorney of average ability and learning in the law should have the power to overrule the judgment of such a magistrate in the matter of the determination of the particular crime for which a defendant should be prosecuted. So much in answer to the assigned reason for the enactment of the statute in question.

In the case of People v. Anthony, 20 Cal. App. 586, 129 P. 968, 969, the provisions of section 1008 of the Penal Code were given consideration. By the terms of that statute, in force at that time, the district attorney was authorized to amend an indictment or an information "where it can be done without prejudice to the substantial rights of the defendant." In commenting upon the constitutionality of the statute, in part, the court said: "* * * If the Code section under discussion purported to permit an amendment to anything but the *mere formal allegations of an indictment, we would have no hesitation in holding such a procedure unconstitutional.* The Constitution contemplates that an indictment shall be found and presented by a grand jury (Const. art. 1, § 8); and to permit the district attorney to amend an indictment in matters of substance would in effect render the indictment no longer the finding of the grand jury. * * *"

The leading case in this state, which really considers the constitutionality of the statute by which a district attorney is authorized to substitute his judgment for that of the committing magistrate regarding the offense for which the defendant is to be placed on trial, is that of People v. Nogiri, 142 Cal. 596, 76 P. 490. Therein the following pertinent language appears: "* * * The result of these decisions [former adjudications by the Supreme Court of this state] is to vest in a ministerial and executive officer—the district attorney—supervisorial, appellate, and judicial powers controlling the judgment of a judicial magistrate, who *alone*, under the *Constitution*, is empowered to hold the examination, and who *alone* is empowered to declare *by his commitment* the offense for which the accused person shall be put upon trial. *This, we think, the law neither contemplates nor permits.* The Constitution of this state (article 1, § 8) provides that 'offenses heretofore required to be *prosecuted* by indictment shall be prosecuted by information after examination and *commitment by a magistrate.*' * * *" The opinion then proceeds to show that, even aside from the constitutionality of such a provision of such a statute, the statute there in question, then in force, and which before its recent amendment was the same statute here under consideration, was not broad enough in its terms to confer power on the district attorney to substantially alter a charge against a defendant as shown by the commitment of the magistrate.

The language used by the court, that "* * * there is thus neither in the Constitution nor in the laws enacted in furtherance of it *the slightest vestige of judicial, discretionary, or appellate power given to the district attorney in controlling the action of the committing magistrate*," certainly cannot be taken to mean that notwithstanding the constitutional inhibition, the Legislature might enact a legal statute that would permit the performance of an act in violation of the constitutional provision. It is most apparent that, if as clearly appears by the decision, a judicial magistrate "*alone*, under the *Constitution*, is empowered to hold the examination, and who *alone* is empowered to declare by his commitment the offense for which the accused person shall be put upon trial," any number of legislative enactments to the contrary could not legalize any act performed in pursuance of any such legislation. As supplementing the authority of People v. Nogiri, 142 Cal. 596, 76 P. 490, see Ex parte Fowler, 5 Cal. App. 549, 90 P. 958; People v. Hudson, 35 Cal. App. 234 169 P. 719; People v. Bomar, 73 Cal. App. 372, 238 P. 758.

In the case of People v. Foster, 198 Cal. 112, 243 P. 667, upon which principal reliance is placed for the conclusion reached in the majority opinion herein, the constitutionality of the statute was only incidentally mentioned and even then from a viewpoint entirely different from that here involved or under consideration. Although the effect of the decision is that by permitting the district attorney to amend the information so as to charge the defendant with robbing a person other than the one whom he was originally accused of robbing "violates no constitutional inhibition," from a reading of the entire opinion in the case, it is most apparent that the only constitutional provision which was being considered by the Supreme Court was that which relates to and which affects the "due process" rights of the defendant (section 13, art. 1) and had no relation whatsoever to section 8 of article 1, which, as pointed out by Mr. Justice Henshaw in the Nogiri Case, 142 Cal. 596, 76 P. 490, empowers the committing magistrate "*alone* * * * to hold the examination, and who *alone* is empowered to declare by his commitment the offense for which the accused person shall be put upon trial." It is manifest that in the instant case the "due process" provision of the Constitution (section 13, art. 1) might not only not be violated, but at the same time the rights accorded to the defendant in the case by virtue of the terms of section 8, article 1 of the Constitution might be seriously infringed.

Moreover, in the Foster Case, neither in the brief presented by the appellant nor by the respondent was the issue of the constitutionality of the statutory provisions discussed or even suggested, and such consideration of the constitutionality of the statute as was given it by the Supreme Court arose from its own initiative. The force of the Foster Case as an authority upon the constitutionality of the statute here in question, as applied to section 8 of article 1 of the Constitution, is much weakened. In none of the other cases, which are dependent upon the Foster Case and to which reference is had in the majority opinion herein, is the instant constitutional question given original consideration.

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102 Cal. App. 516

WOOD v. WATERMAN et al. (Civ. 30.)

District Court of Appeal, Fourth District, California. Dec. 11, 1929.

1. Partnership 🔑263—Partner's withdrawal and transfer of interest to copartner dissolved partnership (Civ. Code, § 2450).

Under Civ. Code, § 2450, partnership was dissolved when one partner withdrew and transferred his interest to other partner.

2. Partnership 🔑238—One associating himself with member of former partnership to continue business thereof is not liable for its obligations, unless definitely assumed.

Agreement between partner, to whom copartner transferred his interest, and third person to associate themselves together to continue business under same firm name created a new legal entity, and incoming partner is not liable for obligations of old partnership, unless he definitely assumes them in way to create a legal liability.

3. Partnership 🔑238—One holding himself out as member of partnership for performance of former partnership's contracts is not bound, in absence of new consideration or prejudice induced thereby.

That one agreeing to associate himself with partner, to whom copartner had transferred his interests, to continue business under same firm name, held himself out as partner with transferee for performance of old partnership's contractual obligations to purchasers of realty from it, orally assured them of new concern's intent to carry out agreements, or actually contributed time and means to that end, will not bind him, in absence of new consideration or some prejudice induced by his representations.

4. Partnership 🔑238—Incoming partner's obligation for old partnership's debts must be evidenced in writing, unless arising from and part of consideration of new partnership agreement (Civ. Code, § 2794, subd. 3).

Obligation of incoming partner to be responsible for debts of old partnership must be evidenced in writing under statute of frauds, unless assumption of liability grows out of and is part of consideration of new partnership agreement within exception stated in Civ. Code, § 2794, subd. 3.

5. Appeal and error 🔑927(3)—Every possible inference and presumption from plaintiff's evidence must be drawn in his favor on appeal from judgment of nonsuit.

On appeal from judgment of nonsuit, given at close of plaintiff's case with no rebutting evidence of defendants, every inference and presumption that can be drawn from plaintiff's evidence must be drawn in his favor.

6. Partnership 🔑242(7)—Whether defendant became codefendant's partner for performance of former partnership's contracts as part of consideration of new partnership agreement held for jury.

In action to recover partial payments made under contracts to purchase realty as damages for breach thereof, evidence *held* sufficient to take to jury question whether one defendant entered into partnership with codefendant after execution of contracts by former partnership, of which codefendant was member, for express purpose of taking over and carrying out such agreements, and assumed such obligation of new firm as part of consideration for partnership agreement.

7. Vendor and purchaser 🔑339—Partners discontinuing land improvements under former partnership's sale contracts which they assumed, and releasing vendees from future payments, waived tender thereof as condition precedent to recovery of installments paid (Civ. Code, § 1511, subds. 1, 3).

Partners discontinuing and abandoning work of planting and improving land after assuming sale contracts imposing such obligation on former partnership, notifying vendees that they could not perform, and expressly releasing vendees from default in future payments, waived further performance or tender thereof by vendees as condition precedent to recovery of installments paid under Civ. Code, § 1511, subds. 1, 3.

Appeal from Superior Court, Riverside County; William F. Ellis, Judge.

Action by Carrie D. Wood against G. A. Waterman and others, copartners doing business as California Fruit Land Association. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

C. Ibeson Sweet, of Los Angeles, for appellant.

Chambers & Lyman, of Los Angeles, for respondent Hill.

SLOANE, P. J. This appeal was originally taken to the Supreme Court of the state of California from a judgment of nonsuit against plaintiff in an action brought by plaintiff to recover damages in the amount of the partial payments made by plaintiff and her assignors on several contracts for the purchase of real estate.

Each and all of these contracts were entered into in the early part of 1923, and were the individual contracts of the plaintiff and her assignors, with and subscribed by "California Fruit Land Association, by John H. Wood, President, G. A. Waterman, Secretary." Each of the contracts is substantially the same as to its terms and conditions, in which the seller agrees to sell and convey certain specific tracts of land in the county of Riverside, and the vendee agrees to purchase the same at a stipulated price, payable in installments. Time is made of the essence of the contract, and the seller agrees to plant, at proper or customary planting season next following the execution of the agreement, 480 grapevines, interset with 28 fig trees, to each acre; to cultivate and care for the same for three years, and replant dead vines or trees, and to furnish water for domestic and irrigation purposes.

It is not claimed or contended that the defendant Charles F. Hill was, at the time of the execution of these contracts, a party thereto, or in any way connected or associated with the copartnership known as California Fruit Land Association.

It is alleged in the complaint, however, and the testimony in the record tends to substantiate such allegation, that on or about June 12, 1923, the defendant John H. Wood abandoned and withdrew from said copartnership, and transferred his interest therein to the defendant G. A. Waterman, and that on or about the same date the defendant Charles F. Hill and G. A. Waterman entered into some sort of a contract of copartnership, the terms of which are not in writing, and do not definitely appear, whereby they were to assume and carry out the contracts of the vendors sued on in this action. Mr. Waterman, on the trial, testified substantially as follows: "Mr. Wood left and abandoned the business, I think, on the 11th of June, 1923, and I took over his share. At that time when Mr. Wood went out, I made an oral agreement with Mr. Hill in regard to this business and as to these contracts. This was approximately the middle of June, 1923. I told him for a certain stipulated amount—I don't remember the exact amount—which would cover Mr. Wood's side of it, I would give him a half interest in the business on just the same basis as Wood and I had been working on previously. I told him I would like to have him take Mr. Wood's place by paying in a certain amount and becoming a half interest partner with me. I don't know just what Mr. Hill did say in reply, except that he agreed to come in with me, and went with me to see all these purchasers and talked matters over and found out just what the status of the business was, and expressed himself to the purchasers that he was in with me as a partner on this project. He told them that he was my partner.

Mr. Hill told Miss Wood (the plaintiff here), that we were going to take care of that situation, and told about his experience on work of this kind, and assured her that everything would be all right. I mean in regard to these contracts. I think we had the contracts with us. I can't say they were produced at the time; as I stated, Mr. Hill told Miss Wood that he had come into partnership with me, and that together we would carry out the contract and the plans for the work. With regard to carrying out these contracts, Mr. Hill went with me a great many times to Arlington, paid for wire and expenses and different things, and furnished the money, and we went on and also collected up—these were on a monthly payment basis—and the contract holders paid regularly and we carried on until—it was a very unfavorable season—until conditions got so that without irrigation we saw there was no use going on and spending the money, and we finally had to give up the work, and in the meantime Mr. Hill was going back and forth with me and advancing money for the project. We gave up that work about the first of September, 1923. The payments under the contract were made to me. Mr. Hill did not receive any of the money."

The witness Waterman also testified that about the first part of 1924 the contract holders were notified that this sale of these particular pieces of land described in the various contracts could not be carried out by the sellers, and that the conditions could not be met with that were incorporated in those contracts, and that he gave the contract holders a little agreement to the effect that the nonpayment of their installments would not jeopardize any interest they had there, and that since 1923 the sellers had done nothing to fulfill the contracts in regard to the cultivation of these lands, and the planting and keeping up of the same, and it appears that by reason of lack of irrigation and cultivation all improvements on the land were abandoned, and that the lands in question reverted to their barren and uncultivated state, and have ever since so remained. The facts, as set out in the foregoing synopsis of Mr. Waterman's testimony, afford the only evidence of any obligation on the part of Hill to carry out the terms of the written contracts or to respond to plaintiff or the other contracting parties in damages.

The total amount paid in by plaintiff and her assignors under these contracts toward the agreed purchase price is the sum of $6,937.70. The amount of the unpaid installments under the contracts in question is not set forth, but it is conceded that no payments thereon were made after January, 1924, and that no tender or offer to pay thereon was made thereafter and before the commencement of this action. The vendees continued installment payments after Hill came into the business, but in what amounts does not appear.

At the close of plaintiff's case a motion for nonsuit was made in behalf of defendant Hill on the grounds (1) that the complaint does not state a cause of action against Hill; (2) that the evidence is insufficient to show liability of defendant Hill on the contracts for purchase and sale, and that no agreement in writing assuming such liability, is alleged or shown in the evidence. The motion for nonsuit was granted, and the court made its judgment that said action "be and is hereby dismissed with prejudice as to the defendant Hill."

It is undisputed that Hill was not a party to the execution of the contracts in question, and that, if he can be held for any liability for the subsequent failure of performance on the part of the vendors, such liability must arise upon an enforceable assumption of such liability in the subsequent partnership arrangement with defendant Waterman.

[1] The original partnership doing business as the California Fruit Land Association consisted of J. A. Waterman and John H. Wood. When Wood withdrew and transferred his interest to Waterman in January, 1923, this partnership was dissolved. 20 Cal. Jur. 794; Shuken v. Cohen, 179 Cal. 279, 176 P. 447; Civ. Code, § 2450.

[2, 3] If Waterman and the defendant Hill entered into an agreement to associate themselves together to continue the business under the same name, it nevertheless created a new legal entity. (Painter's Executors v. Painter, 6 Cal. Unrep. 677, 65 P. 135), in which the incoming partner would not be liable for the obligations of the old partnership, unless he definitely assumed such obligations in a way to create a legal liability. The fact that he may have held himself out as a partner with Waterman for carrying on this contractual business, and even orally assured the vendees that it was the intention of the new concern to carry out the terms of the agreements, or that he actually contributed of his time and means to that end, will not bind him in the absence of a new consideration, or some prejudice suffered by the contract holders induced by his representations.

In the suit of First National Bank v. Simmons, 98 Cal. 287, 33 P. 197, 198, an action on a promissory note executed by the copartnership, where it was attempted to hold a third party, who had subsequently come into the partnership, for liability on a note, the court says: "Assuming, for the purpose of this appeal, that the evidence tends to prove a transfer of the interest of Charles F. to E. M. Hall between August 1, and October 1, 1890, and also that Simmons accepted E. M. Hall as a partner at the time of the transfer, yet these facts alone did not make E. M. Hall responsible on the note upon which this action is brought, which had been made by the firm composed of Simmons and Charles F. Hall a year before E. M. Hall came into the firm. In order to make E. M. Hall liable on that note it must have been proved that in some way he assumed the obligation created by it. Smith v. Millard, 77 Cal. 440, 19 P. 824; Lindl. Partn. (2d Amer. Ed.) marg. p. 205 et seq. Of this, however, there is no evidence whatever."

[4] It is the recognized rule that, where an obligation of an incoming partner to be responsible for the debts of the old partnership is alleged, such obligation must be evidence in writing under the statute of frauds, unless the assumption of liability grows out of and is part of the consideration of the new partnership agreement.

Exceptions to this rule that a promise to answer for an obligation of another must be in writing is contained in section 2794 of the Civil Code. Subdivision 3 of this section provides, among other exceptions, that such promise need not be in writing when it is made "upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person."

[5, 6] In the instant case the evidence introduced on the trial tends to show that a partnership agreement was entered into between Waterman and Hill whereby, as part of the consideration, the new partnership was to take over and carry out the terms of these sales contracts.

The case of Stover v. Stevens, 21 Cal. App., 261, 131 P. 332, 333, presents a somewhat similar state of facts to that involved in this appeal. The plaintiff brought his action to recover for merchandise sold and delivered, and work and labor performed, against L. C. Stevens and S. F. Brown, copartners as Stevens & Brown, and on assigned contracts and liabilities of Stevens. The indebtedness was originally created as an obligation of Stevens, who had been carrying on the business prior to the alleged copartnership with Brown. The action was sought to be maintained against Brown on the ground that the new copartnership had assumed the Stevens indebtedness.

The court in the opinion says:

"Appellant addresses himself first to the personal claim of plaintiff, claiming that there is no evidence of any indebtedness of the firm of Stevens & Brown to plaintiff, and that the finding can only be sustained on the theory that Brown assumed the personal indebtedness of Stevens; that there is neither pleading, evidence, nor finding that defendant Brown agreed to pay or assumed the indebtedness of Stevens existing prior to the partnership. Cases are cited as holding that an incoming partner is not liable for the debts of the old firm, unless he agrees to become so. It is also contended 'that, in order to recover the debts of the old firm from an incoming partner, there must be some allegation in the complaint connecting him with the liability.' And that the court erred in overruling defendant's objection to evidence tending to prove an indebtedness existing prior to the formation of the partnership. In nearly all the claims the evidence related to the prior indebtedness of Stevens, as well as to the firm indebtedness. * * *

"The point raised as to the statute of frauds must be decided in view of the circumstances attending the transaction or formation of the partnership. There was evidence that some time prior to the formation of the partnership Stevens had been carrying on the butcher's business, selling meats and some other articles at the towns of Prattville and Greenville. A few days prior to June 27, 1910, he took defendant Brown over his delivery route and explained the business to him. He explained in a general way how the business stood, what his liabilities were, and what the book accounts receivable and other assets amounted to. Upon this showing Brown agreed to enter into partnership, which began June 27, 1910. Upon the terms of the agreement there is some conflict between the testimony of Stevens and Brown. Stevens testified:

"'Q. What, if any understanding was had between you and the defendant Brown as to the assumption by you and the defendant Brown or the partnership of the indebtedness existing at that time? A. Well, the only thing that was said about that, I figured up my indebtedness and my resources, and Mr. Brown agreed to put in as much money in the business as I had invested, over and above my liabilities, assuming a portion of the debt and also assuming the resources, his portion of the resources, and I took credit for the amount of the resources over and above my liabilities. * * *

"'Q. What was Brown to get for his in consideration of that agreement? What—Just state the whole agreement again. A. He was to get—he was to have one-half interest in my butcher business, personal property, and my book accounts, and he was to assume his one-half interest of the liabilities.

"'Q. What liabilities? A. That I owed at the time of the commencement of the partnership; debts that I owed to my creditors.

"'Q. What was he to get out of the produce of the business from that time on? A. He was to have half of the profits—I supposed he was a full partner—a half interest. * * *

"'Q. What was the consideration he was to pay you for that arrangement? A. I was to have credit for the difference between the resources and liabilities of the business and what I put into it.

"'Q. Was that arrangement made on a trip down to the river? A. I couldn't state what day that arrangement was made; it was made prior to the 26th day of June.

"'Q. * * * What did he say about the

agreement? A. He was satisfied with it; he didn't make any objection to me; went into the business and put his money into it.

"'Q. Was anything said about these old debts of yours should be paid? A. I told him at the time that I wouldn't take him in unless he would assume part of the debts and take his chances on the book accounts the same as I had to; I couldn't close the business out and start in new, carrying on the business as it was if he would.' * * *

"It appeared that the list of accounts was made up shortly after June 27, 1910, showing the liabilities and assets, which was shown to Brown. At the beginning of the copartnership the firm commenced to deal with its said creditors, paying off their indebtedness in money or supplying them with meat, and in some instances making purchases from them. The evidence tends to show that Brown entered upon and continued the relation upon the terms testified to by Stevens. * * *

"Appellant contends that Brown's assumption of Stevens' debts was after the formation of the partnership, and that this subsequent agreement would be an agreement to pay the debts of another, and must be established in compliance with the statute of frauds, citing Freeman v. Badgley, 105 Cal. 373, 38 P. 955. The evidence is that the assumption of Stevens' debts was part of the agreement and consideration in forming the partnership. It is true that the assets and liabilities or the names and amount due each creditor were not then definitely known, but the facts were to be made known by a statement being prepared, and was soon after made out and shown to Brown and acted upon by the firm as correct. * * *

"The facts here do not bring the case within the provisions of section 1624 of the Civil Code (the statute of frauds), but within the exception mentioned in subdivision 2 of that section, to wit, the provisions of section 2794 of the same Code."

12 California Jurisprudence, at page 869, under the title of "Statute of Frauds," states the rule thus: "Whenever a promise to answer to antecedent obligation of another, is made upon a fresh consideration beneficial to the promisor, no matter from what source it may move, the promise is an original one, and valid, though oral"—citing Civ. Code, § 2794, subd. 3; Garraway v. Jennings, 189 Cal. 97, 207 P. 554; Fuller v. Towne, 184 Cal. 89, 193 P. 88.

Promises following within this rule are based upon a multitude of highly varied circumstances, as shown by this and following sections, and include a promise to pay the debt of another, made as a part of the settlement of an indebtedness existing between the promisor and the creditor.

At page 871, supra, it is said: "The assumption of his proportionate share of the existing liabilities of a business by one entering into a partnership, as a part of the partnership agreement, is an original undertaking. It falls within the exceptions of section 2794 of the Civil Code, and may be sustained, though verbal, either as a promise made by one who has received property of another upon undertaking to apply it pursuant to the promise, or as a promise to pay the antecedent obligation of another, made upon a consideration beneficial to the promisor. But such a promise is within the statute, if it is made subsequently to the partnership agreement."

The case of Freeman v. Badgley, 105 Cal. 372, 38 P. 955, lays down this latter rule that an agreement made after the partnership is formed, whereby the new partner agrees to assume the debts of the old firm, is an agreement to pay the debt of another, and must be established in compliance with the provisions of the statute of frauds. But this same decision holds that, if the assumption of liability for the obligations of the old firm is part of the consideration given for an interest in the business, it is supported by the consideration of the original contracts.

The evidence relating to the partnership agreement between Waterman and Hill, and the assumption of the obligations of the old firm, is somewhat meager and indefinite, but it must be borne in mind that the judgment here is one of nonsuit, given at the close of plaintiff's case, and with no rebutting evidence on the part of defendant.

Under such condition, every inference and presumption that can be drawn from the evidence of plaintiff must be drawn in his favor. And it cannot be said in this case that the evidence of the defendant Waterman does not tend to support the contention that defendant Hill, subsequent to the execution of the sales contracts, entered into a partnership with Waterman for the express purpose of taking over and carrying out these sales agreements, and that as part of the consideration for the partnership agreement he assumed obligation on the part of the new firm to carry out the terms of these sales contracts. 9 Cal. Jur., p. 551, sec. 35, and citations.

[7] This liability being assumed, we think it is clear that it was unnecessary, under the circumstances of this case, for the plaintiff to allege or prove a tender of the unpaid installments on the purchase price of the lands before bringing suit to recover installments paid.

It appears from the undisputed evidence that, after Waterman and Hill had assumed and taken over these contracts and entered upon the work of planting and improving the lands, they discontinued and abandoned the same, notified the vendees that they could not carry out their agreement of sale, permitted the property to revert to its barren and uncultivated condition, and expressly released them from any default in future payments.

This constituted a waiver of further performance or tender of performance on the part of plaintiff. Civ. Code, § 1511, subds. 1 and 3; Merrill v. Merrill, 95 Cal. 334, 30 P. 542; Seals v. Davis, 25 Cal. App. 68, 142 P. 905; Duncanson v. Walton, 111 Cal. 516, 44 P. 174.

As the question of defendant Hill's personal liability to plaintiff in this action remains to be determined on a new trial, it is unnecessary to determine whether he holds the 40 acres of land, a part of the tract contracted to be conveyed to plaintiff and her assignors, in trust for the contract holders, or as an asset of the partnership.

The judgment of nonsuit is reversed, and the case remanded for a new trial.

We concur; BARNARD, J.; MARKS, J.

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102 Cal. App. 405

HASTY v. TREVILLIAN et al. (Civ. 7065.)★

District Court of Appeal, First District, Division 2, California. Dec. 9, 1929.

As Modified on Denial of Rehearing Jan. 8, 1930.

Hearing Denied by Supreme Court
Feb. 6, 1930.

1. Trial 🔑108½—In action for injuries in automobile accident, plaintiff held entitled to ask jurors whether they were interested in any indemnity insurance company or in particular indemnity company.

In action for injuries sustained in automobile accident, plaintiff *held* entitled to ask jurors whether they owned stock or bonds in any insurance company engaged in writing indemnity insurance, and whether they were similarly interested in particular indemnity company.

2. Trial 🔑133(6)—It cannot be said that trial court erred, or attorney was guilty of prejudicial misconduct, where objection was sustained to question involving hearsay, and jury admonished to disregard incident.

Where witness was asked question involving hearsay in action for injuries in automobile accident, and objection was sustained, and court admonished jury to disregard incident, it cannot be said that trial court erred, or that attorney was guilty of prejudicial misconduct, even admitting that question was erroneous.

3. Appeal and error 🔑1069(1)—That juror drew diagram of scene of accident and showed it to fellow juror held not prejudicial to defendant, in view of unanimous verdict.

That juror in personal injury action stopped at scene of accident and drew diagram of street, and later showed diagram to fellow juror, who could not see, because he did not have glasses on, *held* not prejudicial to defendant, in view of unanimous verdict for plaintiff.

4. Automobiles 🔑246(56)—Instruction respecting speed limit in intersection held not erroneous where it was controverted issue whether accident occurred in intersection.

In action for injuries sustained from being knocked down by defendant's automobile, instruction which was copy of statute respecting speed limit in intersection *held* not erroneous, as against contention that accident occurred 3 feet distant from intersection, where that was one of controverted issues.

5. Automobiles 🔑246(4)—In automobile case, instruction held not erroneous for using word "negligence," without such words as "if any."

In action for injuries from being knocked down by defendant's automobile, instructions *held* not erroneous for use of word "negligence," without following it by such words as "if any," where neither instruction, when read with others, may be said to instruct on question of fact.

6. Trial 🔑194(16)—Instruction that plaintiff, crossing street, must look in direction from which traffic might legally be approaching, did not trespass on jury's functions.

In action for injuries from being knocked down by defendant's automobile, instruction that plaintiff, starting to cross street, was bound to look in direction in which traffic might legally be approaching, *held* not to trespass on functions of jury.

7. Appeal and error 🔑1064(4)—Use in instruction of expression "injuries alleged," instead of "injuries proved," if erroneous, held not prejudicial under evidence.

In action for injuries received in automobile accident, instruction, if erroneous, *held* not prejudicial, for use of expression "injuries alleged," instead of "injuries proved," where plaintiff introduced some evidence to prove each alleged injury, and proved injuries not alleged, and proved certain injuries permanent, which were not alleged to be permanent.

8. Trial 🔑296(11)—In action for injuries in automobile accident, instruction on damages, though erroneous, held not prejudicial, in view of evidence and other instructions (Civ. Code, § 3283).

In action for injuries received in automobile accident, instruction on damages, though erroneous, under Civ. Code, § 3283, in not stating plaintiff entitled to recover amount certain to result in future, *held* not prejudicial, in view of other instructions and evidence.

9. Trial 🔑253(4)—Instruction on burden of proof held not erroneous for not including statement as to contributory negligence.

In action for injuries received in automobile accident, instruction on burden of proof *held* not erroneous for not including statement of how contributory negligence might be proved or inferred.

10. Damages 🔑132(14)—$10,700 held not excessive for fractured collar bone, leg, and ribs, lacerations, bruises, and injury to hearing.

$10,700 *held* not excessive for lacerations on scalp, elbow, and leg, fracture of collar bone and leg, three broken ribs, bruises, and injury to hearing, resulting in some permanent injury.

11. Appeal and error 🔑1002—Where evidence is conflicting, reviewing court cannot declare plaintiff guilty of contributory negligence as matter of law, and cannot disturb verdict.

Where there was conflict in evidence as to contributory negligence in action for injuri

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★Rehearing denied. Hearing denied by Supreme Court.

in automobile accident, reviewing court cannot say that plaintiff was guilty of contributory negligence as matter of law, and is not at liberty to disturb verdict of jury, based on such conflicting evidence.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Mary A. Hasty against Lois Trevillian and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles W. Haswell, of San Francisco, for appellants.

Vincent W. Hallinan and Edwin M. Otis, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover a judgment for damages for injuries sustained from being knocked down by an automobile driven by one of the defendants. The defendants answered, and a trial was had before the trial court sitting with a jury. The jury returned a verdict for $15,000 against the defendants. The defendants made a motion for a new trial. The court ordered the motion granted, unless the plaintiff consented to reduce the verdict to $10,700. The consent was given, and the motion was denied. From the judgment entered on the verdict as reduced, the defendants have appealed, and have brought up a typewritten record.

[1] The accident occurred about 8 p. m. on the 6th day of August, 1927, at the intersection of Nineteenth avenue and Noriega street in San Francisco. There was evidence that the night was clear and that it was not dark. When the jury was being selected, the plaintiff asked several of them whether they owned stock or bonds in any insurance company engaged in writing indemnity insurance. Objections were interposed by the defendants, but the objections were overruled. The rulings were not erroneous. Dougherty v. Ellingson (Cal. App.) 275 P. 456. Each of two other jurors was asked if he was similarly interested in the Independent Indemnity Company. Objections were made and overruled. It has also been held that the latter question, standing alone, is not error. Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646.

The defendants argue that, if the verdict is excessive or the case made by the plaintiff is weak, such questions constitute prejudicial error. An examination of the record will disclose that the instant case cannot be said to fall within the rule last stated. As we have shown below, the verdict was not excessive; and the plaintiff introduced evidence tending to show that at the time of the impact the defendant driver was driving on her left-hand side of the street at a speed of 45 miles per hour. If the jury believed that evidence, then it cannot be said the case of the plaintiff was weak.

While considering the alleged misconduct of the plaintiff's attorney it may be noted that certain statements, made by him while arguing the case, are also assigned as errors. We have examined them. The statements complained of were not errors, but were legitimate argument.

[2] When Mrs. Leonhardt, the mother of one of the defendants, was on the stand, plaintiff's attorney asked her a question involving hearsay. An objection was made and sustained, and the court admonished the jury to disregard the incident. Freely admitting that the question was erroneous under the circumstances delineated, we are unable to say that the trial court erred, or that the attorney for the plaintiff was guilty of prejudicial misconduct.

[3] After the jury was impaneled, and during a recess, one of the jurors, Mr. Rodini, on his way home, stopped at the scene of the accident and drew a diagram of the intersecting streets. He put the diagram in his pocket and later showed it to a fellow juror. However, that juror could not see, because he did not have his glasses on. The defendants assert that the juror was guilty of misconduct in drawing the diagram and of exhibiting it to a fellow juror. When the incident was called to the attention of the trial court, the trial court inquired into the whole matter with much care. It offered to send the entire jury to see the spot, but defendants objected. Assuming, for the purpose of this decision, that Mr. Rodini formed certain conclusions from what he saw at the scene of the accident, it is clear that such conclusions were not communicated to other jurors. The verdict of the jury was unanimous. Without the vote of Mr. Rodini there were eleven jurors who voted for the verdict. It is plain that the defendants were not prejudiced by the incident.

[4-9] The defendants attack many of the instructions given by the trial court. Instruction No. 37 was a copy of the statute regarding the speed limit in traversing intersections. The defendants claim that the accident did not occur in an intersection, but 3 feet distant therefrom. But that was one of the controverted issues involved in the case. The defendants objected to instructions 41 and 42, because those instructions used the word "negligence," without following the same by such words as "if any." It is sufficient to state that neither instruction, when read together with all of the other instructions, may be said to instruct on a question of fact. Smith v. Hollander, 85 Cal. App. 535, 259 P. 958.

In instruction No. 40 the trial court instructed the jury that, as the plaintiff started to cross Nineteenth avenue, she was bound to look in the direction in which traffic might legally be approaching, and that when she passed the median line that it was her duty to look in the opposite direction. Of that instruction the defendants may not complain. It did not trespass on the functions of the jury.

Instructions 12 and 27 used the expressions "injuries alleged," instead of "injuries proved." The plaintiff introduced some evidence to prove each alleged injury. Furthermore, she proved injuries not alleged, and she proved certain injuries to be permanent, which were not alleged to be permanent It cannot be seen that the error, if any, was in the least degree prejudicial to the defendants.

Instruction 28 was as follows: "The fact that she was not in the receipt of any salary or wages, but was attending to her own business, does not deprive her of the right to compensation for the loss of her earning capacity, since it was what she was capable of earning, rather than what she was actually earning, that is to be considered by the jury. If by reason of the injury she has become unable to perform the labor or transact the business which she was accustomed to transact or perform prior thereto, she is entitled to recover damages therefor, and, from the nature of the investigation, the amount of such recovery must be left to the wise discretion of the jury." The defendants claim, in effect, that the last clause should read, "* * * She is entitled to recover, as damages therefor, the amount that is *certain to result in the future*." Civ. Code, § 3283.

The contention is sound. Nevertheless, conceding that the instruction was erroneously worded, we think the defendants suffered no prejudice, for two distinct reasons. Elsewhere the trial court had given other instructions on cognate subjects, which fully advised the jury that it was not to indulge in conjecture or speculation, but should base its verdict solely on the law and the evidence. In the second place, when the trial court commenced to instruct the jury, it recited the allegations contained in plaintiff's complaint and the denials by the defendants. It recited the allegations that the plaintiff was 79 years of age; that she had been, down to the date of the accident, engaged as a housewife, receiving what amounted to $25 per month; that in the accident she suffered such injuries that, at the time of the trial, which was held about one year thereafter, the plaintiff was wholly disabled from earning anything, and that she "* * * will be damaged for the balance of her natural life in the sum of $25 per month." Mortality tables were introduced, showing that her expectancy was 5 years. The plaintiff introduced evidence to prove her allegations. The defendants did not attempt to rebut that proof. On this element of damage the plaintiff was, therefore, entitled to recover $1,500. The record wholly fails to show that the jury allowed more.

The defendants complain because instruction number 4 did not inform the jury that contributory negligence may be inferred from the testimony given on behalf of the plaintiff. The instruction dealt solely with a statement as to where the burden of proof rested. As to how contributory negligence may be proved or inferred was the subject-matter of other instructions. The trial court did not err in failing to combine all of its instructions into just one instruction.

[10] The defendants complain that the damages were excessive. An examination of the record discloses that the plaintiff suffered lacerations on the scalp, left elbow, and on one leg. The last was very slow in healing. She sustained a fracture of the left collar bone, which, in due time, properly knitted. She sustained a comminuted fracture of the upper end of the tibia and the lower end of the femur in the right leg. A poor setting was obtained, and the knitting has resulted in a deformed leg, on which the plaintiff will never be able to walk, but will be compelled to use crutches the rest of her life. The plaintiff also suffered three broken ribs and was also greatly bruised on her side. She was compelled to remain in hospitals over two months. Before the accident the plaintiff was hard of hearing. While at the hospital her hearing became much worse. At the time of the trial she testified that it was much worse than before the accident. Considering the injuries and the permanency of some of them, a judgment in the sum of $10,700 cannot be said, as a matter of law, to be excessive. Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 203 P. 768.

[11] Finally, in two different forms, the defendants assert that the plaintiff was guilty of contributory negligence. The defendants quote some of the evidence. They particularly stress the story as told by the plaintiff. As she was knocked unconscious, it is but reasonable to suppose that she may not be altogether clear regarding her statements of the facts. A disinterested eyewitness stood at his window, looking directly at her. The most that can be said is that there was a conflict in the evidence. Under those circumstances, we may not say that the plaintiff was guilty of contributory negligence as a matter of law, nor are we at liberty to disturb the verdict of the jury based on conflicting evidence.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

208 Cal. 596

SEABOARD SURETY CORPORATION OF AMERICA v. MUNICIPAL COURT OF CITY OF LOS ANGELES et al. (L. A. 11648.) ★

Supreme Court of California. Dec. 23, 1929.

Rehearing Denied Jan. 20, 1930.

Bail ⚷79(1)—Motion to set aside bail forfeiture held properly denied, where defendant's failure to appear was inexcusable though not with connivance of bail (Pen. Code, § 1305, as amended by St. 1927, p. 1386; Pen. Code, § 1306, as amended by St. 1929, p. 1872).

Where failure of defendant charged with petit theft to appear on day fixed for probation and sentence was inexcusable but not with connivance of bail, motion to set aside order forfeiting bail *held* properly denied under Pen. Code, § 1305, as amended by St. 1927, p. 1386, requiring not only that defendant be free from fault but that bail be likewise free from intentional interference on its part, especially in view of Pen. Code, § 1306, as amended by St. 1929, p. 1872, providing for return of bail money within year after entry of judgment of forfeiture under certain circumstances.

Shenk, J., dissenting.

In Bank.

Application by the Seaboard Surety Corporation of America for writ of mandamus prayed to be directed to the Municipal Court of the City of Los Angeles, County of Los Angeles, and Georgia P. Bullock, Judge of Division 6 thereof, to compel respondents to set aside order forfeiting bail. Writ denied.

Rehearing denied; SHENK, J., dissenting.

Arthur T. Stollmack, of Los Angeles, for petitioner.

Lloyd S. Nix, City Prosecutor, and Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for respondents.

PRESTON, J. The petition for writ of mandate herein is denied. The application involves solely a construction of section 1305 of the Penal Code, as amended in 1927 (St. 1927, p. 1386, c. 735). The Legislature at that time extended the period from 20 to 90 days within which the court may direct the forfeiture of the undertaking to be discharged, but at the same time added a provision respecting the surety upon the bail bond. After amendment, the language of the section in this connection was as follows: "But if at any time within ninety days after such entry in the minutes, the defendant and his bail appear and satisfactorily excuse his neglect, *and*

★Rehearing denied.

show to the satisfaction of the court that the absence of the defendant was not with the connivance of the bail, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just."

Petitioner asserts that we should ascribe to the word "and," as it appears before the word "show" in the above quotation, the meaning of "or." The effect of this construction, if allowed, would be, not to provide that both defendant and bail be without default, but to permit relief where defendant's absence was willful so long as the bail was acting in good faith. In other words, petitioner's contention is that a surety, if acting in good faith, has 90 days after the failure of a defendant, whether excusable or not, to appear, within which to produce him and be relieved from a forfeiture of the undertaking. We are pointed to such cases as Washburn v. Lyons, 97 Cal. 314, 32 P. 310, People v. Pool, 27 Cal. 573, 581, and Abbey v. Board of Directors, 58 Cal. App. 757, 760, 209 P. 709, as illustrating the fact that in construing some statutes the word "and" has been substituted for the word "or" and vice versa. But a consideration of the terms of this statute does not warrant such a construction of said word.

It is our view that the Legislature intended, not only that a defendant be free from fault, but that the bail be likewise free from intentional interference on his part. It is suggested that if a defendant be free from fault, the surety must of necessity be free also. But this does not necessarily follow, for it may be easily supposed that a defendant was acting in ignorance of his duty to appear and the surety on his bond was at the same time acting with design to prevent his appearance. The construction which we place on this section is illuminated by the more recent amendment to section 1306 of the Penal Code, enacted in 1929 (St. 1929, p. 1872, c. 849). This section provides that under certain specified conditions, a surety may, if acting in good faith, secure a return of the bail money if he produces the defendant within one year after the entry of the judgment of forfeiture, and this is followed by a conviction of the defendant of the highest charge embraced in the complaint or information or indictment. This would seem to be the full measure of relief that a surety in any case may have. It is true that the above provision was added since 1927, but nevertheless we see no reason to omit a consideration of its provisions in our effort to ascertain the true legislative intent at the time of the amendment here in question.

The facts of this case as shown by the record are as follows: Mamie Jacobs and John Morelli were complained against in the municipal court of the city of Los Angeles, presided over by Hon. Georgia P. Bullock, for the offense of petit theft. On February 14, 1929, after entering pleas of guilty, they applied for probation. The cause was continued to February 20, 1929, for hearing on the application for probation and sentence; bail in the sum of $500 was fixed to insure their appearance on said day. Defendants, however, failed and neglected to appear and, no cause being shown for said neglect, the bail was ordered forfeited. On March 13, 1929, defendants were surrendered into court by said Seaboard Surety Company, were sentenced by the court, and duly committed to the Los Angeles city jail. On April 12, 1929, said Seaboard Surety Company moved the court that said forfeiture be set aside and vacated and that the bail be exonerated. The motion was ordered submitted on briefs. The court thereafter, on June 5, 1929, found that the neglect of said defendants to appear was inexcusable, but that it was not with the connivance of the bail, and therefore, solely upon the ground that defendants could not excuse their said neglect to appear in court as ordered, and for no other reason, said court ordered that said motion to set aside the bail forfeiture be denied. Thereafter said surety filed its petition for writ of mandate herein, which we have been led to deny.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

SHENK, J. (dissenting). I take it to be self-evident that the purpose of bail is to insure the appearance of the defendant when required, and that the public interest is better subserved by having a fugitive or absconding defendant returned to the court to meet the requirements of justice than by swelling the public coffers with forfeited bail money. This was undoubtedly the underlying purpose and intent of the Legislature by the amendment in 1927 of section 1305 of the Penal Code. Prior to the amendment the surety on the bail bond was without the remedy of having the order forfeiting bail discharged even though he surrendered the defendant to the court within the 20-day period, where the neglect of the defendant was not satisfactorily excused. This was true with or without the connivance of the bail in the wrongdoing of the defendant. It is inconceivable that the Legislature intended, by the amendment of 1927, to do no more than enlarge the time when the defendant might return or be surrendered by the surety to the court from 20 to 90 days. But this is the effect of the main opinion and the amendment of 1927 is otherwise rendered meaningless and nugatory. The obvious purpose of the amendment was to offer an incentive or inducement to the surety to locate and apprehend the defaulting defendant and the time was enlarged to 90 days for that purpose. Under the main opinion the surety, without fault, is in no better position than he was under the old statute. He may exert much effort and go to much expense in locating the defendant and surrendering him to the court and, however blameless and free from connivance in the wrongdoing of the defendant he may be, he is entirely helpless unless the defendant satisfactorily excuse his failure to appear at the time appointed.

I cannot subscribe to the argument of the majority that a defendant may be found to be entirely blameless and still the bail be guilty of connivance with him. The word "connivance," as applied to one party (in this instance the surety), presupposes some unlawful or wrongful act or omission on the part of another (here the defaulting defendant); that is, some feigned ignorance or acquiescence or encouragement of the surety in the wrongdoing. All of the definitions of the term "connivance" are to this effect. Oakland Bank of Savings v. Wilcox, 60 Cal. 126, at page 137, approved an instruction that "connivance is an agreement or consent, directly or indirectly given, that something unlawful shall be done by another." One may not connive with himself any more than he may conspire with himself. It requires at least two persons to connive. Excusable neglect is incompatible with the existence of connivance and when a defendant has "connived" there can be no excusable neglect. The Legislature could have had no reason to extend the time for the appearance of the defendant from 20 to 90 days except to give the surety the opportunity and incentive to apprehend the defendant, return him to the court and, by showing that the default of the defendant, without excuse, was not with the connivance of the surety, enable the latter to save himself from the forfeiture. In no way may this manifestly intended and beneficial result be accomplished except by reading the word "and" as "or" in the amended section.

The amendment in 1929 of section 1306 of the Penal Code, in my opinion, throws no light at all favorable to the construction placed on section 1305 by the majority. Quite to the contrary, section 1306 is in complete harmony with the construction of section 1305 as contended for by the petitioner. The relief from the forfeiture provided for in section 1305 relates to a time within the 90-day period and before any judgment on the bail bond has or could be entered. The relief provided for in section 1306 relates to the time between the entry of the judgment on the bail bond and one year thereafter. Under the latter section the absence of connivance on the part of the surety may be shown by affidavit only, and the relief may be granted to the surety, however culpable the defendant may have been in his default. To say that a nonconniving surety may be relieved under section 1306 as against a grossly offending defendant provided such defendant be returned to court within one year after the entry of the judgment on the bond, and may not be relieved under section 1305 when such a defendant is returned to court within 90 days after the order of forfeiture, is to do violence to the plain meaning and intent of the Legislature in the amendment of section 1305 and reduce the law to an absurdity.

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208 Cal. 601

MACARIO v. MACARIO. (S. F. 13600.)

Supreme Court of California. Dec. 24, 1929.

Appeal and error ⚷458(2)—Supersedeas will issue, where plaintiff's insolvency reasonably necessitates stay of execution sale to protect defendant from serious injury if judgment is reversed.

Where it appears that plaintiff is insolvent and will not be able to respond should defendant's realty be sold under execution and judgment reversed on appeal, under Code Civ. Proc. § 963, subd. 2, from order denying motion to quash writ of execution, that appeal was taken in good faith, not merely for delay, and that a stay is reasonably necessary to protect defendant from serious injury in case of reversal, while it does not appear that plaintiff will sustain disproportionate injury in case of affirmance, writ of supersedeas to stay sale will issue on defendant's giving sufficient bond.

In Bank.

Suit by Margaret Macario against Giuseppe Macario. Judgment for plaintiff, and defendant applied for a writ of supersedeas to stay proceedings pending appeal from an order denying his motion to recall and quash a writ of execution. Writ granted.

D. C. Barrett and Barrett & Barrett, all of San Francisco, for plaintiff.

Edward J. Jose, of San Francisco, for defendant.

SHENK, J. The defendant and appellant filed his application for a writ of supersedeas to stay proceedings to enforce a judgment of the trial court, and particularly to stay the sale under a writ of execution levied on said judgment, pending the determination of his appeal from an order of the trial court denying his motion to recall and quash said writ of execution.

On July 31, 1919, the superior court, in and for the city and county of San Francisco, granted to Margaret Macario, the plaintiff and respondent above named, an interlocutory decree of divorce from Giuseppe Macario, the defendant and appellant, and, among other matters, granted to said Margaret Macario the custody of the minor child of said parties, who was then residing in the kingdom of Italy, and the sum of $10 per month for the support of said minor. A final decree of divorce including similar provisions was entered on August 3, 1920. On July 13, 1928, said Margaret Macario caused a writ of execution of said judgment to be issued out of said superior court. On motion of the petitioner herein, the superior court, on June 21, 1929, made an order recalling said writ of execution, but without prejudice to the issuance of a new writ. Thereafter and on the same day, on the ex parte application of Margaret Macario, a new writ of execution was issued out of said superior court, which was levied on real property of the petitioner located in the city and county of San Francisco. The petitioner moved to recall said writ of execution and for a perpetual stay of execution, on the ground that said superior court had no jurisdiction to order execution of the judgment in the divorce action which pertained to the custody of said minor or its support. The motion was denied, and said Giuseppe Macario has appealed from the order denying said motion, which appeal is now pending and undetermined.

It is not questioned that the order denying the motion to recall and quash the execution is an appealable order (Code Civ. Proc., § 963, subd. 2; see Parker v. Parker, 203 Cal. 787, 266 P. 283; Montgomery v. Meyerstein, 195 Cal. 37, 231 P. 730), nor that, where the appeal is not from the judgment, execution of which is sought to be stayed, but rather is from an order made after judgment denying a motion to recall and quash execution, an appeal from the latter and the giving of a bond thereon is not effective to stay execution of the judgment itself (Weldon v. Rogers, 154 Cal. 632, 98 P. 1070), and that this court may, if the circumstances justify the order, and in the exercise of its inherent jurisdiction, provide for a stay by the issuance of a writ of supersedeas (Halsted v. First Savings Bank, 173 Cal. 605, 160 P. 1075).

In the present proceeding it appears that the plaintiff has levied said writ of execution upon real property belonging to the defendant which is situate in the city and county of San Francisco; that the plaintiff is insolvent and will not be able to respond should the property be sold under execution and the judgment be reversed on the appeal; that therefore the present appeal, without a stay of execution of said judgment, would be wholly useless and ineffective as a remedy. It also appears that the appeal has been taken in good faith and not merely for purposes of delay, and that a stay is reasonably necessary to protect the defendant from serious injury in case of a reversal, ant it does not appear that the plaintiff will sustain disproportionate injury in case of affirmance. See 3 Cor. Jur. p. 1290; Halsted v. First Savings Bank, supra, page 610 of 173 Cal., 160 P. 1075.

It is therefore ordered that a writ of supersedeas issue as prayed for herein, upon the defendant's giving, within ten days from the date hereof, a good and sufficient bond in double the amount of the sum for which execution is sought; said bond to be approved by a judge of the superior court in and for the city and county of San Francisco.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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102 Cal. App. 493

PEOPLE v. LEUTHOLTZ. (Cr. 1848.)★

District Court of Appeal, Second District, Division 2, California. Dec. 11, 1929.

Rehearing Denied Dec. 26, 1929. Hearing Denied by Supreme Court Jan. 9, 1930.

1. Automobiles 🔑355(6, 8, 13)—Evidence held to warrant finding that defendant drove automobile which caused death, was intoxicated, and did not stop (California Vehicle Act, § 141).

In prosecution for manslaughter, driving automobile while intoxicated, and failing to stop and render aid, evidence *held* sufficient to warrant finding that defendant drove automobile which caused death, that he was intoxicated at time, and that he did not stop, as required by California Vehicle Act, § 141 (St. 1923, p. 562).

2. Criminal law 🔑1134(3)—Whether slackening and increase of defendant's speed was caused by sudden impact with decedent's body held not question of law for appellate court, on appeal from conviction for manslaughter (California Vehicle Act, § 141).

In prosecution for manslaughter, driving automobile while intoxicated, and failing to stop and render aid, as required by California Vehicle Act, § 141 (St. 1923, p. 562), whether from all evidence jury might conclude that slackening and immediate increase of speed of defendant's automobile was caused by sudden impact with decedent's body, followed by desire to escape, *held* not question of law for appellate court to decide on appeal from conviction.

3. Automobiles 🔑357—Instruction, in prosecution for manslaughter, driving automobile while intoxicated, and failing to stop, on proof required, held not error (California Vehicle Act, § 141).

In prosecution for manslaughter, driving while intoxicated, and failing to stop and render aid, as required by California Vehicle Act, § 141 (St. 1923, p. 562), instruction that jury, to find defendant guilty, must determine beyond reasonable doubt and to moral certainty that defendant knowingly struck decedent, and that he wilfully, knowingly, and feloniously failed to stop, give his name and address, and render necessary assistance, *held* not error.

4. Automobiles 🔑354—Admitting radiator emblem found near place of accident fitting into defendant's radiator in prosecution for manslaughter, driving while intoxicated, and failing to stop, held not error (California Vehicle Act, § 141).

In prosecution for manslaughter, driving automobile while intoxicated, and failing to stop and render assistance, as required by Cal-

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★Rehearing denied. Hearing denied by Supreme Court.

ifornia Vehicle Act, § 141 (St. 1923, p. 562), admitting in evidence emblem from automobile like defendant's found near place where decedent was struck, and which fitted into defendant's radiator, *held* not error, where defendant's radiator had been photographed after accident, and photographer identified pictures, and other witnesses testified positively that automobile shown in photograph was car which was in collision.

5. Criminal law 🔑829(4)—Refusing defendant's instruction that jury must be satisfied he knew his automobile struck some one, covered by instructions given, held not error (California Vehicle Act, § 141).

In prosecution for manslaughter, driving automobile while intoxicated, and failing to stop and render aid, as required by California Vehicle Act, § 141 (St. 1923, p. 562), refusing defendant's requested instruction that jury must be satisfied beyond reasonable doubt that defendant knew he had struck some person *held* not error, where proposed instructions had been substantially covered in other instructions given.

6. Automobiles 🔑336—Law requiring automobilist to stop and render aid held applicable only where automobilist knew accident happened.

Law requiring automobile driver in all cases to stop and render aid, whether accident resulted from carelessness of driver, pedestrian, or both, or was unavoidable, *held* applicable only where automobilist had knowledge that accident happened.

7. Automobiles 🔑356—Whether defendant, charged with manslaughter, driving while intoxicated, and failing to stop, knew accident happened, held for jury under evidence (California Vehicle Act, § 141).

In prosecution for manslaughter, driving automobile while intoxicated, and failing to stop and render aid, as required by California Vehicle Act, § 141 (St. 1923, p. 562), whether defendant knew accident had happened, so as to warrant instruction that law required driver in all cases to stop and render aid, *held* for jury under evidence.

8. Automobiles 🔑357—Instruction that contributory negligence of pedestrian, contributing to death when struck by automobile, was no defense in manslaughter prosecution, held not error.

In prosecution for manslaughter for killing pedestrian by striking him with automobile, instruction that contributory negligence by pedestrian, contributing to injury causing death, was no defense, *held* not error.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

H. J. Leutholtz was convicted of manslaughter, driving while intoxicated, and failing to stop and render aid, and he appeals. Affirmed.

B. O. Tinglof and T. P. Hogan, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, Acting P. J. The appellant was charged by information filed by the district attorney of Los Angeles county, consisting of three counts, with (1) having unlawfully killed one W. J. Drake without malice; (2) driving an automobile upon a public highway while under the influence of intoxicating liquor; and (3) failing and neglecting to stop and render aid after striking W. J. Drake, as required by section 141 of the California Vehicle Act (St. 1923, p. 562). A jury having found him guilty, the defendant appealed from each of the judgments entered accordingly, and from an order denying a motion for a new trial.

The first ground advanced by appellant for reversal is an asserted deficiency of the evidence to support the judgments. It is undisputed that on October 24, 1928, at about 7 o'clock p. m., Drake was walking across Huntington drive, at or near the intersection of Ferntop drive, when he was struck by an automobile proceeding at a rapid rate of speed in a northeasterly direction upon Huntington drive; that he was hurled against the curbing, receiving injuries from which he died; and that the driver increased the speed of the machine soon afterward. The defendant, testifying in his own behalf, admitted that at about the same time he was driving a gray Cadillac automobile in a northeasterly direction along Huntington drive, that he passed Ferntop drive, and that, when he arrived at the intersection of Eastern avenue, his machine collided with another car, and was overturned. He testified that his gray Cadillac had black fenders, two spare tires on the rear, each bearing a cover with a white strip in the center, tonneau shields, windshields on each side, and that he was driving at a speed between 30 and 35 miles per hour. Six witnesses identified an automobile of similar description as having passed the intersection of Ferntop drive in a northeasterly direction along Huntington drive at about the time mentioned.

Briefly stated, it was testified by T. H. Hunter that a gray or tan Cadillac passed him, that he heard a noise or impact near the pedestrian zone at Ferntop and Huntington drives, and that the Cadillac continued on. James A. Gilmer testified that a large gray car with black fenders passed him at about said point, at about 40 to 45 miles per hour; that it bore two spare tires, covered with white tops; that he saw something dark go out from the car toward the sidewalk. This witness drove to Eastern avenue, where he saw a Cadillac automobile which had been wrecked, as to which he swore: "I recognized it from the rear as being the car that passed me down on Huntington drive;"

"those spare tires on there, white strip around the tread of the cover." A Mrs. May Lynch, an attendant at a service station at the corner of Ferntop and Huntington drives, testified that Drake spoke to her at the station, started to cross the thoroughfare last mentioned, and was struck by a light or cream colored car, and thrown against the curbing; that the machine did not stop, but increased its speed. Frank Sharp, another attendant at said station, saw Drake struck down by a gray car as he entered the pedestrian zone; he swore that it had two spare tires on the rear, covered as the other witnesses described them, and was going at the rate of 35 to 40 miles per hour. He testified that he saw the same car at Eastern avenue that evening, and that it had been wrecked. Appellant testified that he was alone, and each of the witnesses testifying in this respect stated that there was but one person in the gray Cadillac car that fatally injured Drake and was soon afterward found at Eastern avenue in a damaged condition, when the defendant was injured in the collision which he admitted having encountered. Blood stains were found on the windshield, front bumper and front of the top, of the defendant's machine.

Seven witnesses, including a physician, two police officers, and the driver of the car with which appellant collided after the fatal accident to Drake, testified positively that in their opinions he was under the influence of intoxicating liquor at the time of the accidents in question. The doctor applied various technical tests, and one of the officers asked him if he had been drinking, but received no reply. Several of the witnesses smelled liquor upon the defendant's breath. It was contended during the trial that he had been dazed by the collision, yet the physician detected alcohol on his breath, noted that the pupils of his eyes were dilated, and that there were other evidences of his unfitness to drive an automobile; his walk and balance were both unsteady. The only physical injuries found were a one-half inch laceration and a one-half inch abrasion on the back of one hand.

[1-3] We think the evidence abundantly tends to warrant the finding of the jury that Leutholtz drove the gray car which caused the death of W. J. Drake, that he was intoxicated at the time, and that he did not stop. It is insisted that the evidence is consistent with the theory of unavoidable accident, since appellant swore that he saw no person on the street as he drove past the corner of Ferntop drive and Huntington drive. However, a witness who saw the accident testified that the car "slightly lowered the speed a little bit; you could just see it slacken, just perceptibly, and then go on faster." Whether, from all of the evidence before them, the jury might have concluded that a failure to observe pedestrians upon a public street was a mere oversight, or was due to the defendant's condition, and whether the slackening and immediate increase of speed was caused by the sudden impact with Drake's body, followed by a desire to escape, is not a question of law for this court to decide. They were instructed in effect that they should determine beyond a reasonable doubt and to a moral certainty that the defendant knowingly struck W. J. Drake, and that he willfully, knowingly, and feloniously failed, neglected, and refused to stop, give his name and address, and to render necessary assistance, in order to find him guilty. Upon the record before us we are not convinced that there was a miscarriage of justice in this respect, requiring a reversal of either judgment. People v. Watts, 198 Cal. 776, 247 P. 884. Appellant's criticism of the apparent inconsistency and improbable character of portions of the evidence is not of sufficiently serious import to require further discussion.

[4] A witness residing near the intersection at which Drake was struck found in the gutter a disc-shaped emblem from a Cadillac automobile, which fitted into the radiator which had been photographed after the accident in controversy. It is argued that the trial court erred in receiving the emblem in evidence, for the reason that it may have been "planted" for the purposes of the case, and was produced under suspicious circumstances. A photographer identified the pictures as having been made by himself, and other witnesses testified positively that the automobile shown in the photographs was the same Cadillac car which was in the collision. The witness who found the emblem delivered it to an officer at the coroner's inquest, who also identified it while on the stand, and swore that he had fitted it into the radiator of appellant's car, from which its emblem was missing. This evidence was submitted to the jury with other circumstances, and under the instructions of the court it lay within their province to afford it such weight, if any, as it should merit. We do not think error was committed in receiving the object in evidence.

[5] It is next asserted that the judgments should be reversed because the court refused to give to the jury a requested instruction. The defendant offered, an instruction to the effect that, before a verdict of guilty would be justified, it would be necessary that the jury be satisfied beyond a reasonable doubt that he knew that he had struck some person. An instruction having been given that, if the jury should find beyond a reasonable doubt and to a moral certainty that the defendant drove an automobile which struck and injured a human being, "all of which the said defendant H. J. Leutholtz then and there well knew," etc., they should find him guilty, the offered in-

struction was refused. We do not think that stating the same rule in the negative would have rendered it more intelligible, and it is not error to refuse a proposed instruction which has been substantially covered. People v. Garcia, 83 Cal. App. 463, 256 P. 876.

[6, 7] Appellant complains of an instruction reciting that the law requires drivers in all cases to stop and render aid, whether the accident result from carelessness of the driver, the pedestrian, or both, or was unavoidable. The Supreme Court has held that the statute does not contemplate the duty of rendering aid, unless it be shown that the defendant had knowledge of the accident. People v. Scofield, 203 Cal. 703, 265 P. 914. That an accident is indispensable to the application of the statutory mandate is axiomatic, and if a driver be not informed of its occurrence it seems clear that the Legislature did not intend that he should be classed among "all cases" wherein drivers knowingly injure persons with their automobiles. However, from the evidence adduced it became a question for the jury to determine as to whether or not this requisite to a conviction did in fact exist. A like instruction has under similar conditions been upheld as not injurious to the rights of the defendant. People v. Scofield, supra; People v. Graves, 74 Cal. App. 415, 240 P. 1019.

[8] Complaint is also made of an instruction that "contributory negligence, that is, negligence on the part of the deceased which contributed to the injury causing his death, is no defense." This instruction is clearly justified under the authority of People v. McKee, 80 Cal. App. 200, 251 P. 675.

The judgments and order denying a new trial are affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

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102 Cal. App. 600

PATANIA v. YELLOW-CHECKER CAB CO. et al. (Civ. 6880.)★

District Court of Appeal, First District, Division 1, California. Dec. 17, 1929.

Rehearing Denied Jan. 16, 1930. Hearing Denied by Supreme Court Feb. 13, 1930.

1. Automobiles 🔑217(5)—Pedestrian must look before starting to cross street.

It is the duty of a pedestrian to look before starting to cross a street.

2. Automobiles 🔑217(3, 7)—Pedestrian, crossing street between intersections or diagonally when struck by automobile, is not precluded from recovering for injuries, but must observe more care than in using established crosswalk.

Pedestrian struck by automobile, is not precluded from recovering for injuries sustained because he was crossing street between intersections or diagonally, but must observe greater degree of care than where established crosswalk is used.

3. Negligence 🔑85(2)—Contributory negligence may be invoked in action by or on behalf of child, or by parent for death of child, old enough to exercise discretion to avoid injury.

Defense of contributory negligence may be invoked in action by or on behalf of child, or by parent for child's death, where child was of sufficient age to exercise discretion for avoidance of injury.

4. Negligence 🔑85(2)—Child must exercise care ordinarily exercised by minors of like age, mentality, and discretion.

A child is not held to same degree of care as an adult, but is only required to exercise the degree of care ordinarily exercised by minors of like age, mental capacity, and discretion.

5. Negligence 🔑136(29)—Particular child's capacity at particular time to exercise care to avoid particular danger is fact question for jury.

The capacity of a particular child at a particular time to exercise care to avoid a particular danger is a question of fact, falling within the province of a jury to determine.

6. Negligence 🔑136(9)—Trial court is not bound to submit question of child's contributory negligence, where no other inference can be drawn from facts.

Trial court is not bound to submit question of child's contributory negligence to jury, where no other inference than that of negligence on child's part can be drawn from the facts.

7. Automobiles 🔑245(74)—Credibility of plaintiff's testimony as to whether child, killed by automobile, looked toward it, was for jury, notwithstanding inconsistencies therein.

Credibility of plaintiff's testimony, in action for death of child, struck by automobile, as to whether deceased looked in direction from which automobile approached, was a question for jury, notwithstanding inconsistencies in his testimony.

8. Automobiles 🔑242(8)—Presumption that child, killed by automobile, exercised requisite care, was evidence requiring such finding, until overcome by contrary proof (Code Civ. Proc. § 1963, subd. 4).

Presumption, under Code Civ. Proc. § 1963, subd. 4, that child, killed by automobile, exercised requisite amount of care for her own safety at all times, was evidence, in accordance with which jury was bound to decide, until overcome by proof to contrary.

9. Negligence 🔑136(9)—Negligence is for jury, where different inferences may reasonably be drawn from undisputed facts.

If different inferences may reasonably be drawn from undisputed facts, the question of negligence is one for the jury.

★Rehearing denied. Hearing denied by Supreme Court.

10. Automobiles 🔑245(74)—Contributory negligence of 11 year old girl, struck by automobile while crossing street diagonally behind street car, held for jury.

Contributory negligence of 11 year old girl, struck and killed by automobile while crossing street diagonally after passing to rear of street car, from which she had alighted, *held* for jury.

11. Death 🔑24—Parent, whose negligence proximately contributed to child's death, cannot recover damages therefor.

A parent cannot recover damages for child's wrongful death, if parent's negligence proximately contributed thereto.

12. Death 🔑24—Father held not negligent per se in permitting 11 year old daughter to cross street unattended several feet ahead of him.

It was not negligence per se for father to permit his 11 year old daughter to cross street unattended five or six feet ahead of him, after passing to rear of street car from which they had alighted.

13. Death 🔑103(3)—Father's contributory negligence in permitting 11 year old daughter, killed by automobile, to cross street ahead of him behind street car, held for jury.

Whether weak and partially paralyzed father, returning with his 11 year old daughter from hospital, failed to exercise due care in permitting her to cross street unattended five or six feet ahead of him, after passing to rear of street car, from which they had alighted, *held* for jury, in his action for her death as result of being struck by speeding automobile.

14. Automobiles 🔑244(37)—Evidence held to justify jury's finding that proximate cause of child's death was negligent operation of automobile at excessive speed.

Evidence *held* to justify jury's finding that proximate cause of death of 11 year old girl, struck by automobile while crossing street diagonally five or six feet ahead of her father, after passing to rear of street car, from which they had alighted, was negligent operation of automobile at excessive speed, and that neither deceased nor her father was contributorily negligent.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Guiseppe Patania against the Yellow-Checker Cab Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Courtney L. Moore, of San Francisco, for appellants.

Reisner & Deming, of San Francisco, for respondent.

PER CURIAM. The plaintiff in the above action was the father of Paulino Patania, a girl aged 11 years, who was struck and killed by an automobile owned by defendant Yellow-Checker Cab Company, a corporation, and operated by P. M. James, its servant. A jury returned a verdict against the defendants, and from the judgment entered thereon both have appealed. As grounds therefor it is contended that both the plaintiff and his daughter were guilty of contributory negligence as a matter of law.

At about 11 o'clock a. m. on May 20, 1926, the plaintiff and his daughter alighted from the rear exit of a street car which was proceeding north along the east side of Powell street in San Francisco, and which had stopped near the southeast corner of Powell and Greenwich streets to discharge passengers. The street car line is double-tracked and the plaintiff's home, which was his destination, was on the west side of Powell street, between 80 and 100 feet south of the southwest corner of the above streets. The evidence shows that the point where they alighted was approximately the length of the car south of the south property line of Greenwich street; that when the car proceeded both plaintiff and his daughter started from that point to cross to the west curb of Powell street, which was distant about 30 feet. The child, who was walking rapidly, preceded the plaintiff by 5 or 6 feet. Her course was not directly toward the curb, but diverged somewhat to the south toward the residence of the plaintiff. It further appears that the automobile reached the north line of Greenwich street at about the time the street car started, and that after the south line of the street was reached the brakes were applied. According to one witness the automobile was then running at a speed of about 35 miles per hour, and skidded a distance of 47 feet, the end of the skid mark being 75 feet south of the south property line of Greenwich street. When stopped, the machine was partially upon the westerly car track. The plaintiff was returning from a hospital, to which he had been accompanied by his daughter. He was weak and partially paralyzed, and for some months previous had been confined to his bed. According to the plaintiff the automobile was nearly in front of him when he passed the rear of the street car, and as soon as he observed it shouted a warning to the driver.

[1-5] It has been held that an adult, familiar with travel conditions, who alights from a street car in the daytime and, for the purpose of crossing the street, passes to the rear of the car, and before attempting to cross neglects to look for street cars approaching from the opposite direction, is guilty of contributory negligence as a matter of law. Klusman v. Pacific Electric Ry. Co., 190 Cal. 441, 213 P. 38; Ross v. Pacific Electric Ry. Co., 39 Cal. App. 658, 179 P. 538. It is the duty of a pedestrian to look before starting to cross a street. Davis v. Breuner Co., 167 Cal. 683, 140 P. 586. But he is not precluded from recovering by reason of the fact that he was crossing between intersections (Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239

P. 709, 41 A. L. R. 1027; Broedlow v. LeGros, 88 Cal. App. 671, 263 P. 1027), or diagonally; but in either case a greater degree of care must be observed than where an established crosswalk is used (Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493), and the defense of contributory negligence may be invoked in an action by or on behalf of a child, or brought by the parent for damages on account of the child's death, where the latter was of an age sufficient to exercise discretion for the avoidance of injury. A child, however, is not held to the same degree of care as an adult, and is only required to exercise that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion. There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age. The question as to the capacity of a particular child at a particular time to exercise care to avoid a particular danger is one of fact, falling within the province of a jury to determine. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712. The rule has been applied in cases where the ages of the children sought to be charged with contributory negligence varied from 12 to 15 years. Cahill v. E. B. & A. L. Stone Co., supra; Bowdoin v. Southern Pacific Co., 178 Cal. 634, 174 P. 664; Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Schroeder v. Baumgarteker, 202 Cal. 626, 262 P. 740; Greeneich v. Knoll, 73 Cal. App. 1, 238 P. 163.

[6-10] The trial court, however, is not bound in such cases to submit the question to the jury when no other inference than that of negligence on the part of the child can be drawn from the facts (Studer v. Southern Pacific Co., 121 Cal. 400, 53 P. 942, 66 Am. St. Rep. 39); and a finding that the child was guilty of contributory negligence will be upheld where the evidence shows a want of such care to avoid danger as might reasonably be expected from a person of its age and capacity (Opelt v. Al. G. Barnes Co., 41 Cal. App. 776, 183 P. 241; Todd v. Orcutt, 42 Cal. App. 687, 183 P. 963). While in the present case the jury might have concluded from portions of plaintiff's testimony that the deceased failed to look in the direction from which the automobile approached, he also testified that he did not know whether she looked in that direction or not. Notwithstanding any inconsistencies in his testimony his credibility was a question for the jury. Withers v. Massengill, 148 Cal. 769, 84 P. 153; Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131. The presumption is that the child was at all times exercising the requisite amount of care for her own safety (Code Civ. Proc., § 1963, subd. 4), and until overcome by proof to the contrary the fact presumed was evidence in accordance with which the jury was bound to decide. Hatzakorzian v. Rucker-Fuller Desk Co., supra. The finding was against the plea of contributory negligence, and the evidence was such as to sustain rational differences of opinion on that issue. Even where the facts are undisputed, if different inferences might reasonably be drawn therefrom, the question of negligence is one for the jury. Lewis v. Tanner, 49 Cal. App. 271, 193 P. 287. Under the circumstances shown, the issue was properly submitted to the jury and we cannot say that their conclusion was unsupported.

[11-13] Where a parent sues to recover damages for a child's wrongful death, recovery may not be had if the negligence of the parent proximately contributed thereto. Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A. L. R. 401; Waterman v. Visalia Electric R. R. Co., 23 Cal. App. 350, 137 P. 1096; Keena v. United Railroads of San Francisco, 57 Cal. App. 124, 207 P. 35. The testimony shows that the child's whole life was spent in the vicinity of the place where she met her death, and that she was intelligent and familiar with street conditions. The record also discloses evidence that she had been warned by her parents of the dangers from approaching vehicles and the necessity for watchfulness in that respect. It was not negligence per se for plaintiff to permit her to cross the street unattended (Metcalf v. Romano, 83 Cal. App. 508, 257 P. 114; Wong Kit v. Crescent Creamery Co., 87 Cal. App. 563, 262 P. 481); and, in view of the physical and mental condition of the plaintiff, the question whether he was lacking in due care under the circumstances was one for the jury.

[14] After a review of the evidence, we are satisfied that the jury was justified in concluding that the proximate cause of the damage was the negligent operation of the automobile, and that neither the plaintiff nor his daughter was guilty of contributory negligence.

The judgment is affirmed.

102 Cal. App. 299

CITY OF LOS ANGELES v. OLIVER et al.★
(Civ. 6571.)

District Court of Appeal, Second District, Division 2, California. Dec. 3, 1929.

Rehearing Denied Dec. 31, 1929. Hearing Denied by Supreme Court Jan. 30, 1930.

1. Eminent domain 🔑124—Law relating to date of ascertaining value of property taken for street improvement held "retroactive" or "retrospective" (St. 1927, p. 1146, § 8).

St. 1927, p. 1146, § 8, relating to date of ascertaining value of property taken for street improvement, *held* a "retroactive" or "retrospective" law; such terms being used synonymously to denote a law which operates on matters which have occurred or rights or obligations which have existed before time the law went into effect.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Retrospective Law.]

2. Constitutional law 🔑186—Enactment of retrospective law does not violate Constitution unless interfering with some vested right existing before enactment.

Enactment of restrospective laws is not in violation of Constitution, except in so far as elements of retrospective action enters into consideration of constitutionality for purpose of determining whether or not it interferes with some vested right before its enactment or whether it impairs the obligation of a contract.

3. Constitutional law 🔑92—"Vested right," as used in relation to constitutional guaranties, implies interest proper for state to recognize and of which individual cannot be arbitrarily deprived (Const. art. 1, § 14).

A "vested right," as that term is used in relation to constitutional guaranties, implies an interest which it is proper for state to recognize and protect, and of which individual could not be deprived arbitrarily without injustice, so that in exercise of right of eminent domain the right vested in individual owner of property is that his property shall not be taken or damaged for public use without just compensation in accordance with Const. art. 1, § 14.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Vested Right.]

4. Eminent domain 🔑122—"Just compensation" required to be paid for land taken means value of land taken and damage to land not taken by reason of severance (Const. art. 1, § 14).

Phrase "just compensation," as used in Const. art. 1, § 14, denying right to take property without just compensation, means value of land taken and damage if any to land not taken, value of which has been diminished by reason of severance therefrom of original parcel; the adjective "just" only emphasizing what would be true if omitted, namely, that compensation should be equivalent of property.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Just Compensation.]

5. Constitutional law 🔑106—Procedure by which compensation is to be ascertained for property taken is not right guaranteed by Constitution and vested in property owner.

Procedure by which amount of compensation to owner of property taken is to be ascertained and determined is not within or portion of right guaranteed by Constitution, and therefore vested in property owner.

6. Constitutional law 🔑106—Fxing of date to ascertain value is matter or procedure not within constitutional right to receive just compensation for property taken for public purposes.

Fixing of some particular date as of which value shall be ascertained is a matter of procedure and not included within constitutionally guaranteed right to receive just compensation for property taken or damaged for public purposes.

7. Constitutional law 🔑106—Legislature may change procedure or remedies and make changes applicable to pending actions, unless vested rights are destroyed or obligations of contracts impaired.

Legislature may change rules of procedure or remedies, and such changes may be made applicable to pending actions, provided that under the guise of a mere change of procedure or substitution of remedy vested rights are not destroyed or obligations of contracts impaired, and so long as a reasonably efficient remedy remains.

8. Statutes 🔑267(1)—Rights of action will be enforceable under new procedure without regard to time accrual, where law only affects remedy or procedure, unless there is saving clause.

When a law affects only remedy or procedure, all rights of action will be enforceable under new procedure without regard to whether they accrued before or after such change in the law and without regard to whether suit had been instituted or not, unless there is a saving clause as to existing litigations.

9. Constitutional law 🔑106—Right of Legislature to change rules of procedure or remedies applies in proceedings in eminent domain.

Right of Legislature to change rules of procedure or remedies without destroying vested rights or impairing obligations of contract apply in proceedings in eminent domain as well as in those of a different nature; it being established that, in the absence of any provision in organic law prescribing a contrary course, the mode of exercising right of eminent domain is within discretion of Legislature.

10. Constitutional law 🔑106—Power of Legislature to fix time for ascertaining value of property taken for public purposes is continuing one.

Power of Legislature to fix time for ascertaining value of property taken for public purposes is a continuing one, and original exercise of it neither exhausts it nor affects right to change the time first fixed as often as to legislative will may seem expedient.

★Rehearing denied. Hearing denied by Supreme Court.

11. Constitutional law 🔑106—Property owner's right to just compensation does not include right to have compensation ascertained in any particular mode or at any particular time.

Right vested by Constitution in owner of property to receive just compensation for the taking thereof does not include the right to have that compensation ascertained and assessed in any particular mode or as of any particular time.

12. Constitutional law 🔑106—Law changing date for ascertaining value of property taken for public purposes related merely to procedure and is applicable to pending actions (St. 1927, p. 1146, § 8, amending Street Opening Act 1903, § 10).

St. 1927, p. 1146, § 8, amending the Street Opening Act 1903, § 10, changing the date as of which value of property taken for public purposes was to be ascertained, related merely to procedure which it was within power of Legislature to make applicable to pending actions.

13. Appeal and error 🔑1056(2)—Rejecting offer to prove irrelevant or immaterial evidence is not error.

Where evidence if admitted would have been irrelevant or material, there was no error in rejecting an offer of proof.

14. Statutes 🔑74(1)—Law changing date for ascertaining value of property taken did not violate constitutional provision requiring laws of general nature to have uniform operation (St. 1927, p. 1146, § 8, amending Street Opening Act 1903, § 10; Const. art. 1, § 11; Code Civ. Proc. § 1249).

St. 1927, p. 1146, § 8, amending Street Opening Act 1903, § 10, *held* not in violation of Const. art. 1, § 11, requiring all laws of a general nature to have a uniform operation by reason of fact that date for ascertaining value of property taken for public purposes differed from that fixed by Code Civ. Proc. § 1249, on the same subject of compensation, since the amendment operates uniformly on all persons whose property is sought to be acquired under its provisions.

15. Statutes 🔑74(2)—Legislature may classify subjects either of regulation or of procedure and enact laws applicable to all within same class (Const. art. 1, § 11).

Legislature may without violating Const. art. 1, § 11, requiring all laws of a general nature to have a uniform operation, classify subjects either of regulation or of procedure and enact laws applicable to all within the same class, provided that such laws apply equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction.

16. Statutes 🔑94(2)—Laws relating to acquisition of property for public improvements are general laws relating to all persons in class founded on sufficient legal distinction.

Laws relating to acquisition of private property by municipal corporations for public improvements, and prescribing the manner in which right of eminent domain shall be exercised by such muncipalities as well as procedure to be followed in actions to enforce that right, are to be regarded as general laws relating to all persons in same class founded upon a sufficient legal distinction.

17. Constitutional law 🔑251—"Due process of law," as applied to judicial proceeding, imports orderly proceeding with right to enforce and protect rights.

Phrase "due process of law," as applied to judicial proceeding, imports an orderly proceeding adapted to nature of case, in which person is accorded an opportunity to be heard and to defend, enforce, and protect his rights, and has the same meaning as expression "by the law of the land" as used in Magna Charta.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Due Process of Law.]

18. Constitutional law 🔑315—That property owner was dissatisfied with ruling of tribunal in proceeding for taking of property does not justify contention that he was deprived of due process (Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

Where property owner received notice of every step in proceeding for the taking of property for public improvement and was given every opportunity to present his side of the case to an impartial tribunal, the fact that he was dissatisfied with ruling of tribunal in matters of law does not justify contention that he was deprived of due process of law in violation of Const. Cal. art. 1, § 13, and Const. U. S. Amend. 14.

19. Motions 🔑64—Order made in course of action is binding on litigants and court so long as it has not been set aside (Code Civ. Proc. § 1003).

An order defined under Code Civ. Proc. § 1003, as every direction of court or judge, made or entered in writing and not included in judgment which has been made in course of an action, is binding on litigants and court alike so long as it has not been set aside.

20. Courts 🔑99(1)—Ruling that amendment changing date of ascertaining value of property taken for public improvement did not apply to pending actions was not binding on another judge hearing referee's report (St. 1927, p. 1146, § 8, amending Street Opening Act 1903, § 10).

Ruling of judge that St. 1927, p. 1146, § 8, amending Street Opening Act of 1903, § 10, and changing date of ascertaining value of property taken for public improvements, did not apply to pending actions, was not binding upon another judge at subsequent hearing of referee's report and exceptions thereto, since if such judge is convinced that ruling was erroneous, it was not only his right but his duty to reverse such ruling.

21. Municipal corporations 🔑79—Los Angeles City Charter provision relative to street improvement prevails over general improvement law (Street Opening Act of 1903; Los Angeles City Charter, art. 3, § 37; Const. art. 11, § 6).

Authority of city of Los Angeles to open and widen street was not derived from the Street

Opening Act of 1903, but from City Charter, art. 3, § 37 (St. 1925, p. 1045), the provisions of which are supreme and supersede all general laws inconsistent therewith as to such matters as Constitution has authorized to be provided for in freeholders' charters, among which matters are those falling under the designation "municipal affairs" in Const. art. 11, § 6, and in a case of a conflict between a charter provision and general improvement law the provisions of charter will prevail.

22. Municipal corporations 🔑306—Ordinance of intention for street improvement was not invalid for failure to designate fund for payment of portion of expense (Los Angeles City Charter, art. 3, § 37).

Ordinance of intention for street improvement in the city of Los Angeles was not invalid by reason of failure to designate fund from which portion of expenses to be borne by city was to be paid, there being no requirements in City Charter, art. 3, § 37 (St. 1925, pp. 1024, 1045) for such designation.

23. Municipal corporations 🔑288(1)—Order that payment for street improvement be out of city treasury is tantamount to order for payment from general fund.

An order that payment of portion of expense for street improvement to be borne by city be out of the treasury of such city is tantamount to an order that it be paid from the general fund.

24. Municipal corporations 🔑111(4)—Void section of ordinance for street improvement which could be eliminated and still leave workable and enforceable ordinance will be disregarded.

In case section of ordinance of intention for street improvement was void by reason of attempt to appropriate sum less than whole cost of improvement, such section will be disregarded and remainder of enactment given full force, since void portion could be eliminated and still leave a workable and enforceable ordinance.

25. Municipal corporations 🔑288(1)—Provisions of charter authorizing council to appropriate the whole but not a portion of the cost of public improvement was not mandatory (Los Angeles City Charter, art. 3, § 37).

Provision of Los Angeles City Charter, art. 3, § 37 (St. 1925, p. 1045), authorizing council to appropriate the whole but not a portion of cost of public improvement, was permissive and not mandatory.

26. Statutes 🔑225—Court has duty of so construing general law and city charter dealing with same general subject-matter as though they were one act.

It is duty of court to construe both general law and city charter, in so far as they deal with the same general subject-matter, as though they were but one act, each referring to and supplementing the other, harmonizing them so far as possible so as to give force to each without destroying the meaning or intent of the other.

27. Eminent domain 🔑255—Property owner filing answer in condemnation proceedings could not object for first time on appeal to order setting cause for trial (Street Opening Act 1903, § 8, as amended by St. 1927, p. 1145, § 6).

Where property owner filed answer in condemnation proceeding more than seven months before order setting case was made and was served with notice of motion to set without objection, he cannot be heard to object for the first time on appeal that order setting the cause for trial and appointing referees was violative of Street Opening Act of 1903, § 8, as amended by St. 1927, p. 1145, § 6.

28. Eminent domain 🔑262(5)—Any error in condemnation proceeding in setting case for trial was harmless as respected property owner filing answer theretofore (Const. art. 6, § 4½).

Any error in trial of condemnation proceeding in setting case for trial before oral answers were in and all defaults entered *held*, as respected property owner filing answer more than seven months before order setting the case, to be harmless within Const. art. 6, § 4½.

29. Eminent domain 🔑122—Damage to one defendant in condemnation proceeding does not depend on damage to others.

Damage to one defendant in proceeding in eminent domain will in no particular depend upon damage to others, since neither party is interested in any allowance for damages except his own.

30. Stipulations 🔑3—Parties to action in eminent domain may stipulate as to fact of value.

Parties to an action in eminent domain may stipulate as to the fact of value as well as to any other fact, just as they may do in any other type of action; such stipulations being regarded by court as establishing facts stipulated and as taking the place of evidence with regard thereto.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Condemnation proceeding by the City of Los Angeles against J. G. Oliver, Leonard J. Woodruff, and others. From an interlocutory judgment of condemnation, defendant last named appeals. Affirmed.

J. A. Coleman and Ed. Fitzpatrick, both of Los Angeles, for appellant.

Erwin P. Werner, City Atty., and Arthur W. Nordstrom and Leslie K. Floyd, Deputies City Atty., all of Los Angeles, for respondent.

BURNELL, Justice pro tem. The appellant is one of several hundred defendants in an action brought by the city of Los Angeles for the purpose of condemning some 370 separate parcels of land, one of which is owned by him, for the widening of existing streets and the opening of new streets in that city. The proceedings were taken and the action instituted under the provisions of the Street Opening Act of 1903 (St. 1903, p. 376, and acts amendatory thereof). Appellant makes no complaint as to the regularity or validity of any of the proceedings prior to the commencement of the action. His appeal is from the interlocutory judgment of condemnation therein.

Inasmuch as several of the numerous points on which appellant relies for a reversal relate to and involve the time at which certain of the various steps in the action were taken, it may be well at the outset to give a chronological history of the case in so far at least as is material to the questions presented for our determination.

Complaint was filed and summons issued August 6, 1926; appellant's answer was filed December 7, 1926; and the order appointing referees and setting the case for trial as to those defendants who had demanded jury trials was made July 30, 1927. Four answers were filed and several defaults entered subsequent to the last-mentioned date. The trial as to those parcels of land the owners of which had demanded jury trials was set for December 5, 1927. Appellant was not one of these, he having waived trial by court or jury; so that as to parcel 141, owned by him, the hearing was before three referees, appointed as aforesaid, and was held in September, 1927. On July 29, 1927, an amendment to the Street Opening Act of 1903 went into effect, relating to the time as of which the value of land taken or damaged should be ascertained. The referees' report was filed April 12, 1928, and on May 11 the hearing on said report was set for June 4, 1928. Appellant filed his exceptions to the referees' report on May 31. On May 24, 1928, the jury trial, as to the parcels the owners of which had demanded such trial, was had before Judge Keetch; it having been continued to that date from the time originally set. The hearing of appellant's exceptions to the report of the referees was had on July 16 and 17, 1928, before Judge Shaw. July 16 an interlocutory judgment as to the parcels involved in the jury trial was signed by Judge Keetch. On November 28, 1928, Judge Shaw signed and there was entered the interlocutory judgment with respect to those parcels as to which the trial had been before the referees, confirming the referees' report as to the compensation awarded appellant as the owner of parcel 141 and, as to the parcels of others who had filed exceptions, modifying it as to some and confirming it as to others. Thereafter and within due time appellant moved for a new trial. There appears to have been no ruling on this motion, so that under the provisions of section 660, Code of Civil Procedure, it is deemed to have been denied. Thereafter this appeal was perfected.

Appellant urges many grounds for reversal, most of them having to do with what we believe to be the most important question presented on this appeal, namely, the constitutionality of the amendment to the Street Opening Act of 1903 above referred to, as applied to actions pending at the time it went into effect.

At the time the proceedings were instituted which culminated in the condemnation suit, and at the time that action was commenced and summons was served upon appellant, section 10 of the Street Opening Act of 1903 stood as follows: "For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed by the provisions of this act, *provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of trial.*" St. 1925, p. 242, § 4. At its session in 1927, the Legislature enacted a statute amending the title and several sections of the Street Opening Act, which amendatory statute, as we have noted, went into effect July 29, 1927, and after the instant case had been set for trial. The only portions of this 1927 law with which we are here concerned are those amending section 10 above set forth and those relating to the effect of such amendment as to pending proceedings. Section 10 was amended only as to that portion which we have italicized, the portion preceding the word "provided" being left as it was before the amendment. As so amended the latter portion of the section was made to read: "* * * Provided, that in any case where a motion to set the action for trial, as provided in section 8 of this act, is not made within one year after the date of the issuance of the summons therein, the right to compensation and damages shall be deemed to have accrued at the date of the hearing of the motion to set the action for trial." St. 1927, p. 1146, § 8. The last section of the amendatory act of 1927 is as follows: "Any proceeding or action for any improvement, such as is provided for in this act, or in said act to which this act is amendatory, already commenced and pending at the time this act takes effect, under or by virtue of any ordinance of intention theretofore passed, shall, from the stage of any such proceeding or action already commenced and in progress at the time this act takes effect, be continued under the provisions of this act and it shall not be necessary to renew or conduct over again any such proceedings or actions, commenced prior to the taking effect of this act and all steps taken by the legislative body of any city in any such proceedings and any and all acts done and performed therein by any officer or officers of any city, or any and all acts done or steps taken by any other officer or officers in connection therewith, and such proceedings, are hereby validated, ratified, legalized and confirmed." St. 1927, p. 1147, § 10.

There can be no question but that the Legislature intended to make the amendments of 1927 applicable to pending matters. The last-quoted section makes that clear beyond reasonable controversy. Appellant earnestly contends, however, that it had no power to do this, because the Constitutions, state and national, guaranteed him the right to just compensation upon the taking of his property for public purposes, and he had a vested right to have the amount of that compensation ascertained in the manner and as of the time specified by the law as it stood when the action was commenced, namely, as of the date of the trial, and that the ascertainment of the value of his property as of the date of the issuance of summons operated to deprive him of a substantial part of the just compensation to which he was entitled under the constitutional guaranties and thus deprived him of vested rights. In this connection it must be borne in mind that while the trial as to appellant's land was had more than one year after the commencement of the action, the order setting the case for trial was made before the expiration of the year. If therefore the amendment of 1927 to section 10 of the Street Opening Act was constitutional and applicable to pending actions, the date as of which value was to be ascertained and compensation awarded was August 6, 1926, that being the date of issuance of the summons; while if the amendment was unconstitutional as applied to pending actions and the case should have been tried under the statute as it stood when the complaint was filed, the proper date was some 23 months later.

Upon this question of the applicability of the 1927 amendment to the pending action two able and learned judges have disagreed. Judge Keetch, presiding at the jury trial, in which appellant's land was not involved, ruled, and instructed the jury, that the date as of which the value of the land taken and the amount of severance damages was to be ascertained was the date of the trial; Judge Shaw, before whom was heard the referees' report and the exceptions thereto, ruled that the date to be considered for this purpose was the date of issuance of summons in the action. Appellant bases one of the points upon which he relies for a reversal, to which we shall later advert, upon the conflicting rulings of these two able trial judges.

[1, 2] There is no question but that the statute of 1927 is, as far as this case is concerned, a retroactive or retrospective law. These terms are used synonymously (Rairden v. Holden, 15 Ohio St. 207; Gray v. Toledo, 80 Ohio St. 445, 89 N. E. 12) to denote a law which operates on matters which have occurred, or rights or obligations which existed, before the time the law went into effect (Smith v. Mathews, 155 Cal. 752, 761, 103 P. 199; People v. Allied Architects Ass'n, 201 Cal. 428, 436, 257 P. 511). While the Constitutions of some of the states forbid the enactment of retrospective laws (Cooley's Constitutional Limitations [8th Ed.] p. 773), our own contains no such inhibition, nor is there any provision of the United States Constitution that prohibits a state from passing laws of this nature. In Baltimore & Susquehanna R. R. Co. v. Nesbit, 10 How. 395, 401, 13 L. Ed. 469, the United States Supreme Court said: "That there exists a general power in the State governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the States by the Federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically ex post facto, or such as impair the obligation of contracts." In the earlier case of Watson v. Mercer, 8 Pet. 110, 8 L. Ed. 876, the same court had held: "It is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective law, generally; but only ex post facto laws. Now, it has been solemnly settled by this court, that the phrase, ex post facto * * * is not applicable to civil laws, but to penal and criminal laws."

In California it has been held that "it is no objection to the validity of a statute to say that it is retrospective in its operation." Pignaz v. Burnett, 119 Cal. 157, 51 P. 48, 49. See, also, Von Schmidt v. Huntington, 1 Cal. 55; Baird v. Monroe, 150 Cal. 560, 89 P. 352, and Craycroft v. Superior Court, 18 Cal. App. 781, 124 P. 1042. As to such a law the element of its retrospective action enters into the consideration of its constitutionality only for the purpose of determining whether or not it interferes with some right vested before its enactment or whether it impairs the obligation of a contract. As said in Galland v. Lewis, 26 Cal. 46: "In all the cases where laws confessedly retrospective, have been declared void, it has been upon the ground that such laws were in conflict with some vested right, secured either by some constitutional guarantee or protected by the principles of universal justice." Again, in Pignaz v. Burnett, supra, following the statement above quoted from that case the court said: "The question is, Is the amendment an ex post facto law, or does it impair the obligation of contracts? and also, perhaps, whether it deprives any one of vested rights. If it does none of these things, it is no objection to it that it applies to pending cases or past transactions." In the present case the only one of these questions with which we are at all concerned is that relating to vested rights, this being a civil action and the element of contract not being involved.

[3-6] A "vested right," as that term is used in relation to constitutional guaranties, implies an interest "which it is proper for the state to recognize and protect, and of which the individual could not be deprived arbitrarily without injustice." 6 R. C. L. 308; Campbell v. Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483. Thus it may be said that so far as the exercise of the right of eminent domain is concerned the right vested in the individual owner of property is that his property "shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner. * * *" Section 14, art. 1, Const. of California. The phrase "just compensation" means the value of the land taken and the damage, if any, to land not taken, but the value of which has been diminished by reason of the severance therefrom of the parcel taken. More than this it does not imply. Pacific Gas & Electric Co. v. Chubb, 24 Cal. App. 265, 141 P. 36. "The adjective 'just' only emphasizes what would be true if omitted—namely, that the compensation should be equivalent of the property" Monongahela Navigation Company v. United States, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463. Beyond providing that this compensation "shall be ascertained by a jury, unless a jury be waived," as it was by appellant in the instant case, the Constitution contains no provisions as to the procedure by which the amount of the compensation—the value of the land taken—is to be established. Consequently, "the procedure by which this just compensation is to be ascertained is as much the subject of statutory law as is the procedure by which the property is to be taken. There is no way to exercise the right of eminent domain except as prescribed by statute, and there is no way for the property owner to secure just compensation for his property except by statute law." Pacific Gas, etc., Co. v. Chubb, supra. It would thus appear that the *procedure* by which the amount of compensation is to be ascertained and determined is not within, or a portion of, the *right*, guaranteed by the Constitution and therefore vested in the property owner. That the fixing of some particular date as of which values shall be ascertained is a matter of procedure would seem self-evident. As said in City of Pasadena v. Porter, 201 Cal. 381, 257 P. 526, 530, 53 A. L. R. 679: "It is necessary, for the purpose of assessing compensation and damages in eminent domain proceedings, that the right thereto shall be deemed to have accrued at a fixed date." Or, to state it in a slightly different manner, "the value of the property at some period antedating the judgment could alone be awarded to the owner, because the award must be made by the judgment." California Southern R. R. Co. v. Kimball, 61 Cal. 90. The Legislature, in providing a method of procedure for the ascertainment of the compensation guaranteed by the Constitution, has seen fit to designate the date of the issuance of the summons as the date as of which such compensation shall be ascertained in actions instituted under the Street Opening Act of 1903—subject to the provisos contained in section 10 of that act as it stood at the time this action was commenced and as thereafter amended. It might with equal authority have designated for that purpose the date of the filing of the last answer to be filed, or any other date between that of the commencement of the action and the rendition of a judgment therein. It has frequently been held that the fixing of a particular date as a time basis for the estimation of property values in condemnation suits is not a legislative interference with the right to just compensation guaranteed by the Constitution—which is but another way of stating that there is no vested right to have compensation assessed as of any particular date. Thus, in California Southern R. R. Co. v. Kimball, supra, it was contended that the Code provision relating to proceedings in eminent domain in general and fixing the date as of which compensation was to be ascertained as the date of issuance of the summons (section 1249, Code Civ. Proc.) was in conflict with the constitutional guaranty as to just compensation, and that the value should be fixed as of the time of the actual taking. Rejecting this contention the court said: "And the Constitution simply means that the compensation awarded in the manner prescribed by law shall be paid to the owner before his property shall be taken for public use." This decision has been referred to with approval in a number of later cases. Tehama County v. Bryan, 68 Cal. 57, 8 P. 673; San Jose, etc., R. R. Co. v. Mayne, 83 Cal. 566, 23 P. 522; Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585; Sacramento Terminal Co. v. McDougall, 19 Cal. App. 562, 126 P. 503; Marin Municipal Water District v. Marin Water & Power Co., 178 Cal. 308, 173 P. 469, 471. In the case last cited it was urged that the provisions of section 47 of the Public Utilities Act (St. 1911 [Ex. Sess.] p. 42), relating to condemnation, were unconstitutional. Construing the section and answering this contention the court said: "The effect of section 47 is to provide a scheme for the condemnation of property by the public corporations men-

tioned therein, by a proceeding wherein the value is to be fixed by the Railroad Commission, and the right and power of such public corporation to condemn the property is to be determined by the superior court. The enforcement thereof is also given over to the superior court. The appellant contends that if it shall be construed to provide for the taking of the property at the time of the judgment in the superior court, upon payment of the value previously fixed by the commission, it would be unconstitutional. The argument is that the owner is entitled to the value of the property at the time it is taken, and that he cannot be deprived thereof for public use, upon payment as compensation of the value fixed at a previous time, unless it shall appear that there has been no increase in value up to the time it is taken. So far as the provisions of the Constitution of California are concerned, the proposition is without merit. * * * Nor is the enactment, we think, violative of the clauses of the federal Constitution prohibiting a state from depriving a person of his property without due process of law, or denying him the equal protection of the laws. It is not to be doubted that, irrespective of any more specific requirements in state Constitutions, the due process clause of the Fourteenth Amendment requires compensation to be made or secured to the owner of private property taken by authority of the state for public use. C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979. But section 47 of the Public Utilities Act provides in express terms for the ascertainment, and the payment to the owner, of 'just compensation' for property taken. It is contended that the scheme of valuation is not fair to the owners of public utilities, *in that the value is fixed as of the time of the hearing by the Railroad Commission, which must precede the commencement of the formal condemnation suit.* Under the general law relative to eminent domain, the value of property taken is assessed as of the date of the issuance of summons. Code Civ. Proc. § 1249. It is settled by our decisions that this rule, the equivalent of which is found in many other states (15 Cyc. 721), involves no violation of constitutional right. (Citing cases.) On analysis, it will be found that the distinction between the Code provisions and those of the Public Utilities Act is formal rather than substantial. Section 47 creates a special proceeding in eminent domain. The ascertainment of value by the railroad commission and the subsequent action in the superior court, in which the previous finding of value is made conclusive, are both parts of that proceeding. *The hearing by the commission on the question of value is merely a step in the litigation prosecuted to enforce the right of eminent domain.* In effect, therefore, the value is fixed as of the date of the institution of the condemnation proceeding, as it is in cases prosecuted under the Code sections alone." (Italics ours.)

In City of Pasadena v. Porter, supra, a similar point was raised as to the very section of the Street Opening Act of 1903 involved in this case. That section as it then stood read: "For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the order appointing referees or of the order setting the cause for trial, as the case may be. * * *" St. 1909, p. 1038, § 5. Examination of the transcript in the case cited discloses that the complaint was filed and summons issued July 11, 1924, that the order appointing referees was made January 23, 1925, and that the hearing of the referees' report and the exceptions thereto was had July 20, 1925. The chief bone of contention was the allocation of the compensation as between the owner of the fee in certain land taken and the owner's lessee. Both the referees and the court had, at the respective hearings, accepted January 23, 1925, as the date from which damages should be computed. The appellant owner contended "that the damages awarded the tenant should date only from the time of the actual loss of possession by the tenant" and that the amount awarded the tenant was excessive "because it includes an allowance for account of rent for a period between the date of the appointment of the referees and the date of the final decree, or the date when the tenant will lose possession, during all of which period the Gekco Company has had, and will retain, the possession, use, and enjoyment of the entire premises. Such a proceeding, she asserts, amounts to a violation of article 1, § 14, of the state Constitution, which provides that private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." Answering this argument the court in that case said: "There is no merit in the contention. It is necessary, for the purpose of assessing compensation and damages in eminent domain proceedings, that the right thereto shall be deemed to have accrued at a fixed date. Under the general law relative to eminent domain, the value of property taken is assessed as of the date of the issuance of the summons. Code Civ. Proc. § 1249. It is settled by the decisions that this rule, the equivalent of which is found in many states, involves no violation of constitutional right. California Southern R. v. Kimball, 61 Cal. 90; Marin Municipal Water Dist. v. Marin W. & P. Co., 178 Cal. 308, 314, 173 P. 469, and cases cited. On analysis, it will be found that the distinction between the provision of the Code section and that of the Street Opening Act, supra, is formal, rather than substantial, as it was held to be between the Code section and the provisions of the Public Utilities Act considered in the cases just cited."

It seems clear to us that the foregoing authorities amply sustain the proposition that the constitutionally guaranteed right to receive just compensation for property taken or damaged for public purposes neither includes nor implies the right to have such compensation ascertained by any particular procedure or as of any certain date.

[7, 8] It is a well-settled rule of law that the Legislature may change rules of procedure, or remedies, and that such changes may be made applicable to pending actions, provided, of course, that under the guise of a mere change of procedure or substitution of remedies vested rights are not destroyed or the obligation of contracts impaired (Buck v. Canty, 162 Cal. 226, 121 P. 924; Aikins v. Kingsbury, 170 Cal. 674, 151 P. 145; Bassford v. Earl, 172 Cal. 653, 158 P. 124), and so long as a reasonably efficient remedy remains (Mill and Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648; Lantz v. Fishburn, 17 Cal. App. 583, 120 P. 1068). As said by Judge Cooley in his work on Constitutional Limitations, "The bringing of suit vests in a party no right to a particular decision." Cooley, Const. Lim. (8th Ed.) p. 789. When a law only affects the remedy or procedure, "all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law and without regard to whether the suit had been instituted or not, unless there is a saving clause as to existing litigation." People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329.

[9] These principles apply in proceedings in eminent domain as well as in those of a different nature. As said in Secombe v. Milwaukee & St. Paul Ry. Co., 23 Wall. 108, 117, 23 L. Ed. 67: "It is no longer an open question in this country that the *mode* of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the Legislature." (Italics ours.) The same principle is thus enunciated in Springfield, etc., R. R. Co. v. Hall, 67 Ill. 99: "The State has the right to say on what terms it will allow its right of eminent domain to be exercised, so long as anything remains to be done by the corporation in order to complete the condemnation of the land." And as held in St. Joseph, etc., R. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581, it is competent for the Legislature to change the method or procedure to be used in assessing damages for condemnation as to pending actions. "The rule of law upon this subject is, that whatever belongs merely to the remedy, adapted for the acquisition of a right, may be altered according to the will of the state, provided the alteration does not impair the obligation of a contract; and such result is not worked where a substantial remedy is left to the parties according to the ordinary course of justice." Long's Appeal, 87 Pa. 114. The appellant in that case was the owner of land sought to be condemned by a railroad company, under the power of eminent domain delegated to it by the state. The law at the time the proceedings were commenced provided for the ascertainment of compensation by "viewers," no right of appeal from their report being given to either party. Prior to the hearing as to value a new law went into effect which gave either party a right of appeal from the assessment of the viewers. Long took such appeal, and on motion of the railroad company it was "struck off," or as we would say in this state, dismissed, and from the decree of dismissal Long appealed to the Supreme Court. We again quote from the opinion: "Here, then, we have the two rights clearly defined and recognized; the company's right to take the property of the citizen and the citizen's right to compensation. What remains is but a question of remedy. If the parties cannot agree upon the value of the property taken, some means must be provided by which it can be ascertained, and the owner must have some method by which he may enforce payment. The remedy is to be found in the 4th section of the Act of March 27th, 1848. [The procedure for ascertainment of damages, as above set forth, is here described.] * * * This, then, is the remedy prescribed, the means to be used in order to secure to the owner the value of his property. It is, however, but a remedy, *and it neither enlarges nor abridges the rights vested in either party.* Such being the case, we cannot see why the lawmaking power may not only amend the present remedy, but even substitute a new one, provided there be no interference with the company's franchise or the citizen's right." (Italics ours.)

To a similar effect is the decision in Title Insurance & Trust Company v. Lusk et al., 15 Cal. App. 358, 115 P. 53, 54. There the proceedings were for the widening of a street under the same act involved in this case. The condemnation action was commenced in 1907, and the interlocutory judgment awarding compensation for property taken and damaged was entered in January of 1910. Thereafter, in conformity with the procedure provided in the act, an assessment on the property declared to be benefited by the improvement was prepared and filed with the clerk of the city council, to which assessment protests were filed by certain of the owners of the property assessed to pay for the cost of the improvement, including, of course, the damages awarded. November 15, 1910, these protests were sustained by the council, but that body failed and refused to either confirm, modify, or correct the assessment or to order a new assessment, but instead directed the preparation of an ordinance abandoning the proceedings. At the time the condemnation suit was commenced, the act of 1903 permitted the city to abandon the proceedings by ordinance and to dismiss the action without prejudice *at any time prior to the payment of the compensation* awarded to the defendant property owners, but in 1909 section 14, containing this provision, was amended so as to provide that the city council might *at any time prior to the entry of the interlocutory judgment* abandon the proceedings and cause the action to be dismissed. St. 1909, p. 1040, § 8. Section 11 of the amendatory act of 1909 (St. 1909, p. 1042) provided that it should apply to pending proceedings and actions thereunder. Certain of the property owners, defendants in the condemnation action, applied to this court for a writ of mandate to compel the respondents, as members of and composing the city council, to proceed and confirm, correct, or modify the assessment, or order a new assessment; their position being that as the interlocutory judgment had been entered the council had lost jurisdiction to abandon the proceedings and that its plain duty under the law was to act upon the assessment. On the other hand, it was argued that the provisions of the act as it stood at the time the action was commenced governed, and hence that the right to abandon could be exercised at any time before the compensation awarded in the interlocutory judgment was paid, and that the application of the 1909 amendment would operate to impair a vested right. The court held: "This section affects a remedy as distinguished from a right. 'Remedies must always be under the control of the Legislature' * * * and where a reasonable remedy is provided it is immaterial that it alters one previously existing."

[10] A consideration of the authorities just passed in review, and especially those immediately preceding the one last noted, inspires a somewhat different but closely related view of the point now under scrutiny. The Constitution provides for the taking of private property for public use upon the rendition of just compensation. It is not worth while to cite authority for the practically self-evident statement that the moment when, in a long chain of proceedings, the taking is deemed actually to occur is necessarily a matter for legislative determination. Now it is plain that a declaration that the value of the property to be taken is to be ascertained as of a certain time is practically equivalent to a statement that the time named is that upon which the taking is to be deemed to have occurred. Again, if the Legislature is to fix the time of taking, it is evident that the power is a continuing one and that an original exercise of it neither exhausts it nor affects the right to change the time first fixed as often as to the legislative will may seem expedient. Therefore, if the Legislature fixes the time of taking, in effect, by determining the period at which, during the long chain of proceedings, the value of the property to be taken is to be ascertained, that body may change at its will the designation of the moment as of which the value is to be ascertained, without a deprivation of the various constitutional guaranties above mentioned. So much seems to have been settled by the authorities to which we have above referred.

[11, 12] We have discussed at some length the constitutional question which enters into a number of the points raised by appellant for the reason that this is a case of first impression in this state and, as far as we have been able to discover, elsewhere. Our conclusion is that the right vested by the Constitution in the owner of property to receive just compensation upon the taking thereof does not include the right to have that compensation ascertained and assessed in any particular mode or as of any particular time, and that the amendment affecting the date as of which the value of appellant's land was to be ascertained was one relating merely to procedure which it was within the power of the Legislature to make applicable to pending actions.

[13] Our ruling on the point just discussed is, of course, determinative of appellant's contentions that the court below erred in overruling his objection to the hearing of the referees' report for the reason that the value of his property was fixed therein as of the date of the issuance of the summons and in its rulings on certain objections to evidence as to value, which objections were based on appellant's theory as to the unconstitutionality of the 1927 amendment, as well as his claim that the court erred in rejecting his offer to prove the value of the land as of the date of the hearing of the exceptions. As to the last-mentioned point it suffices to say that there can be no error in rejecting an offer to prove where the evidence if admitted would have been irrelevant or immaterial (Logan v. McMullen, 4 Cal. App. 154, 87 P. 285), and since, as we have held, the amendment of 1927 to section 10 was applicable, the value of appellant's property at a time subsequent to that of the issuance of the summons was immaterial.

[14, 15] Appellant further contends that section 10 of the act in question violates section 11, article 1, of the state Constitution, which requires that "all laws of a general nature shall have a uniform operation." His position as to this contention is thus stated in his opening brief on this appeal: "The provisions of the 1927 amendment of 1903 act conflict with section 1249, C. C. P. on the same subject of just compensation, in this, the 1927 amendment provides that the date of value shall be as of issuance of summons, provided, that the motion to set the case for trial is not made within one year after issuance of summons, and in that case then the date of value shall be for all parties as of that date only, that is, the date of hearing the motion to set the action for trial. While under

section 1249, Code Civ. Proc., there may be various dates, that is, there may be a new date upon the trial of each parcel tried separately by the court or by the referees. That with the two statutes as they now stand a person who should be named in a proceeding under 1903 act is restricted to either date of summons or of date of motion to set case for trial. While persons that may be named in proceedings commenced under the general law may have their values fixed as of date of summons or as of date of trial. Therefore, the laws prescribed for fixing date of value for just compensation cannot operate uniformly on all persons in the same category, and upon rights and things in the same relation for that, those named under the general law are entitled to various dates depending upon time when their trials would be heard." There is no merit in this contention. The section as amended operates uniformly upon all persons whose property is sought to be acquired under the provisions of, and for the purposes stated in, the Street Opening Act of 1903, and upon the property of such persons. The Legislature may, without violating the constitutional provision above quoted, classify subjects either of regulation or of procedure and enact laws applicable to all within the same class, provided of course that such laws apply "equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction" and do not confer "peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." City of Pasadena v. Stimson, 91 Cal. 238, 251, 27 P. 604, 607. As said in Matter of Stoltenberg, 165 Cal. 789, 792, 134 P. 971, 972: "It needs no argument, of course, to show that, while constitutional provisions prohibit arbitrary discrimination in favor of or against selected individuals or groups, it is within the legislative power to classify subjects of regulation, and to pass laws applicable to all of a class (In re Zhizhuzza, 147 Cal. 328, 81 P. 955), provided that the classification so made be founded upon some reasonable, intrinsic basis of differentiation." Again, quoting from Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 958, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475: "A law which applies alike to all the subjects upon which it acts, or, in other words, a law which applies equally to all persons or things within a legitimate class to which, alone, it is addressed, does not violate the provision requiring laws of a general nature to have a uniform operation, and is neither local nor special." And as said in Hellman v. Shoulters, 114 Cal. 147, 44 P. 915, 918: "It has been uniformly held that a law is general which applies to all of a class, the classification being a proper one, and that the requirement of uniformity is satisfied if it applies to all of the class alike." To the same effect are the decisions in Ex parte Halsted, 89 Cal. 472, 26 P. 961; Cody v. Murphey, 89 Cal. 524, 26 P. 1081; Abeel v. Clark, 84 Cal. 230, 24 P. 383; Summerland v. Bicknell, 111 Cal. 569, 44 P. 232, and Johnson v. Gunn, 148 Cal. 745, 84 P. 665. "Procedure may not be said to be special because it is peculiar to the character of the action with reference to which it is prescribed." Title Insurance & Trust Co. v. Lusk, supra; People ex rel. Swindell v. City of Los Angeles (Cal. App.) 269 P. 934.

One of the objections urged against the constitutionality of the Public Utilities Act in Marin Municipal Water District v. Marin Water, etc., Co., supra, was based upon an alleged discrimination between the mode of condemning property under the general law and that provided by section 47 of the act for condemning the property of public utilities in certain cases. Answering this objection, the Supreme Court said: "None of these discriminations, as we have seen, goes to any matter of essential justice or fundamental right. The constitutional provision under consideration does not prohibit a state from establishing different rules of procedure for different classes of cases or of litigants, provided the variations relate merely to matters of procedure, and do not operate to deprive any class of substantial equality in the adjudication of its rights or liabilities. 12 C. J. 948; Cin. St. Ry. Co. v. Snell, 193 U. S. 30, 24 S. Ct. 319, 48 L. Ed. 604; Cook v. Ray Mfg. Co., 159 Cal. 694, 115 P. 318. In condemnation proceedings, so long as the state provides a fair and equitable judicial inquiry, in which the parties interested are allowed to be heard and present evidence, and are protected in their right to have just compensation, they are not deprived of the equal protection of the laws because the state, under authority of its own Constitution, has seen fit to provide for other classes of cases a different method or a different tribunal for accomplishing the same result. Railroad Co. v. Tel. Co., 65 S. C. 459, 43 S. E. 970; Kennebec Water D. v. Waterville, 96 Me. 234, 52 A. 774. Whether the property of public utilities forms a class which may fairly be thought to require a different kind of procedure from that adopted for the taking of other property by eminent domain is primarily a question for the state itself." (178 Cal. 316, 173 P. 472.)

[16] Turning from these statements of the general rule to the application thereof to the point urged by appellant, we find that it has been uniformly held that laws relating to the acquisition of private property by municipal corporations for public improvements and prescribing the manner in which the right of eminent domain shall be exercised by such municipalities as well as the procedure to be followed in actions to enforce that right are to be regarded as general laws relating to all persons in a class founded upon a sufficient

legal distinction. Thus in Clute v. Turner, 157 Cal. 73, 106 P. 240, 242, where it was contended that the Street Opening Act of 1889 (St. 1889, p. 70) was unconstitutional because not a general law, it was said: "The class to which the act applies is a well-recognized class, to which general legislation of the character mentioned in the title of the act may be addressed, namely, municipalities, and the subject of that legislation, the laying out and opening of streets and other public places, is one usually committed to such municipalities, either by charter or general laws, as matter of municipal concern, and a law which provides for all municipalities a system for opening and extending streets and kindred matters, such as are embraced in the title to the act, is uniform in its operation." See, also, Davies v. City of Los Angeles, 86 Cal. 37, 24 P. 771; Cohen v. City of Alameda, 124 Cal. 504, 57 P. 377, and Alameda v. Cohen, 133 Cal. 5, 65 P. 127. In City of Los Angeles v. Zeller, 176 Cal. 194, 167 P. 849, 850, where the proceedings involved were under the Act of 1903, the court observed that "proceedings for the opening, widening, and improving of streets in municipalities form a subject for special treatment and procedure," while in Frank v. Maguire, 201 Cal. 414, 257 P. 515, 518, it was held that "the act of 1903 covers a field of legislation to which the general code sections are not made adaptable, and is a law general as to all coming within its provisions," and that it "involves no unlawful discrimination."

[17, 18] A further attack is made by appellant upon the constitutionality of the amendment based upon the claim that both section 13 of article 1 of the state Constitution and the Fourteenth Amendment to the federal Constitution have been violated by the application of the provisions of the 1927 amendment to this pending case. Both of these constitutional inhibitions are against the deprivation of any person of life, liberty, or property "without due process of law." As applied to judicial proceedings, the phrase "due process of law" imports an orderly proceeding adapted to the nature of the case in which a person is accorded an opportunity to be heard and to defend, enforce, and protect his rights. County of Santa Clara v. Southern Pacific Ry. Co. (C. C.) 18 F. 385. It has the same meaning as the expression "by the law of the land," as used in Magna Charta. Den ex Dem. Murray's Lessee v. Hoboken Land, etc., Co., 18 How. 272, 15 L. Ed. 372. It means a process which, "following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." Hagar v. Reclamation District, 111 U. S. 701, 4 S. Ct. 663, 667, 28 L. Ed. 569. It was undoubtedly the purpose of the framers of both constitutional guaranties to secure to every person a judicial trial according to the established rules of law, before he could be deprived of either life, liberty, or property. Cohen v. Wright, 22 Cal. 293, 318. Applying these principles to actions of the nature of the case before us, it was said by Mr. Justice Bradley, in his concurring opinion in Davidson v. New Orleans, 96 U. S. 97, 107, 24 L. Ed. 616, quoted in Hagar v. Reclamation District, supra, that: "in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" In amplification of the statement just quoted it was further held in Davidson v. New Orleans, supra: "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." In the instant case the appellant, having been regularly served with a copy of the complaint and summons, as provided by law, in due time filed his answer; served with notice of motion to have the cause set for trial, he waived trial by jury and had a hearing before referees, in which evidence was adduced by the city on the one hand and by himself on the other; objecting to the findings and report of the referees as to the value of his property, he filed his objections thereto and was accorded a hearing thereon in the superior court, with an opportunity to produce evidence in support of his objections. He received notice of every step in the proceeding, and so far as the record shows was given every opportunity to present his side of the case to an impartial tribunal. The fact that he is dissatisfied with the rulings of that tribunal on matters of law does not justify his contention that he has been deprived of due process of law. As said in Davidson v. New Orleans, supra: "There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the cause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

[19, 20] Having disposed of the various constitutional questions presented by appellant, we now turn to his claim that whether or not Judge Keetch was correct in ruling that the 1927 amendment did not apply and in instructing the jury that compensation was to be ascertained as of the date of the trial (as provided in section 10 of the Street Opening Act of 1903 prior to such amendment and as it stood when the action was commenced), his view of the law as so expressed was binding upon Judge Shaw at the subsequent hearing of the referees' report and the exceptions thereto. Appellant's argument is based upon the theory that, as held in People v. Grace, 77 Cal. App. 752, 247 P. 585, 588, the superior court is but one tribunal no matter into how many departments it may be divided, and "an order made in one department during the progress of a cause can neither be ignored nor overlooked in another department in which the cause falls by transfer." We dispute not the correctness of this premise, but are unable to accept the conclusion which appellant draws therefrom. An order is thus defined: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." Code Civ. Proc. § 1003. Manifestly, if an order has been made in the course of an action it is binding on the litigants and court alike so long as it has not been set aside. In People v. Grace, supra, an order had been made granting a defendant in a criminal case a trial as to his sanity. The case was transferred to another department of the court which proceeded to try the defendant for the crime with which he was charged, entirely overlooking the previous order for a trial as to sanity. We there held that this order was as binding upon the judge sitting in the department to which the case was transferred "as if the latter judge had made it himself." The situation there was entirely different from one in which *the court* changes a ruling previously made by it on a point of law arising in the case before it. True, the court is but one tribunal, and its rulings are to be regarded as the rulings of that tribunal rather than of the particular judge who happens to occupy the bench at the time they were made, the situation in its legal aspect being as though there was but one judge; but if appellant's argument be followed to its logical and ineluctable conclusion, it would lead to the astounding fallacy that a judge having ruled erroneously is without power to reverse himself and thus correct his own error. This is not the law. The doctrine that a previous ruling has become the law of the case has no application except as to the decisions of appellate courts. 2 Cal. Jur. 955; Lawrence v. Ballou, 37 Cal. 518. The correct rule is stated in De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717, 718, as follows: "It is a most common occurrence for a trial court to change its rulings during the progress of a trial, upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that the former ruling was erroneous." If the court below, speaking through Judge Shaw, was convinced that it had ruled erroneously when speaking through Judge Keetch, it was not only its right but its duty to reverse its former ruling.

Appellant's next point is that the complaint fails to state a cause of action in that it discloses that the sum appropriated by the city council towards the expense of the proceeding was in violation of the charter of the city of Los Angeles. Section 2 of the Street Opening Act of 1903 as amended in 1925 (St. 1925, p. 238, § 1) provides that the "city council may, in its discretion, order and declare that the whole or any percentage of, or any sum toward the expense of said improvement be paid out of the treasury of the municipality, in which case the sum or percentage to be paid shall be stated in said ordinance of intention." Section 37, article 3 of the City Charter (St. 1925, pp. 1024, 1045) contains this provision: "The Council shall have power to provide for any or all of the following improvements, to wit: * * * and to make the costs and expenses thereof, including all incidental expenses and any damages to private property occasioned thereby, to be paid from the general fund of the city or from such other fund as the Council may designate; or to make such costs and expenses, including such incidental expenses and damages, a lien upon the abutting property, or upon property in districts according to benefits, which lien shall be a first lien, paramount to all other liens except those for state, county and municipal taxes; and to make and enforce provisions for the enforcement of such lien. * * *" The ordinance of intention to order the improvement which is the object of these proceedings (adoption of which was the initial step therein) is set forth as an exhibit to the complaint and by appropriate pleadings made by a part thereof. Section 5 of said ordinance is as follows: "It is further ordered and declared by said City Council of the City of Los Angeles that the sum of One Hundred Forty-Eight Thousand Seven Hundred Eight and No-100 Dollars ($148,708.00) be paid towards the expense of said improvement in Section I of this ordinance described out of the treasury of said city." It is appellant's theory that the charter provision does not authorize the council to appropriate any sum less than the whole cost of the proceeding, and that some specific fund must be designated from which the expenditure is to be made.

[21-23] In support of his position appellant cites the case of O. T. Johnson Corporation v. City of Los Angeles, 198 Cal. 308, 245 P. 164, 170. The proceeding there involved was under the Street Opening Act of 1903 prior to the 1925 amendment of section 2 thereof, that section then providing that "said city council may, in its discretion, order and declare that the whole or any percentage of the expense of said improvement be paid out of the treasury of the municipality *from such fund as the council may designate, in which case it shall be so stated in said ordinance of intention.*" The city's only authority to pay a portion of the cost of an assessment proceeding taken under the act was derived from this section of the act itself, since the charter as it then existed contained no provision of the nature of section 37 of article 3 above quoted. Under these circumstances and in the light of the law as it then stood, it was held that "as neither the percentage of the cost of the improvement to be borne by the city nor the fund from which such expenditure was to be made were ordered, declared, or designated in the ordinance of intention, the failure to follow the terms of the act in those respects resulted in a lack of jurisdiction to proceed." The act as it now stands and has stood during the pendency of these proceedings does not require a designation in the ordinance of the fund from which the expenditure is to be made; and moreover, the city's authority is now derived not from the act but from its charter, the provisions of which are supreme and supersede all general laws inconsistent therewith as to such matters as the Constitution has authorized to be provided for in freeholders' charters. Morgan v. City of Los Angeles, 182 Cal. 301, 187 P. 1050; Kubach Co. v. McGuire, 199 Cal. 215, 248 P. 676; Graham v. Fresno, 151 Cal. 465, 91 P. 147. Among these matters are those falling under the designation "municipal affairs" (section 6, art. 11, Cal. Const.), and in this category are included proceedings for the opening and widening of streets (Sinton v. Ashbury, 41 Cal. 525; Byrne v. Drain, 127 Cal. 663, 60 P. 433) and for other street improvements, and in case of a conflict between a charter provision and a general improvement law the provisions of the charter will prevail. Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 171 P. 304; Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 P. 296. The charter does not require a designation in the ordinance of intention of the fund from which is to be paid the portion of the expense to be borne by the city, as did the section of the act involved in the O. T. Johnson Case as it then read, and it does provide that it may be paid from the general fund, which is the collective designation of all moneys in the city treasury not set apart for particular purposes and which furnish the means for the support of the municipality and the defraying of the discretionary appropriations of its legislative body. People v. Orange County Supervisors, 27 Barb. (N. Y.) 575; Smith v. Haney, 73 Kan. 506, 85 P. 550. An order that the payment be "out of the treasury of said city" is tantamount to an order that it be paid from the "general fund."

An objection similar to that raised by appellant was held untenable in Frank v. Maguire, supra, from the opinion in which case we again quote: "It is next contended that the act of 1903 as now in force, when read in connection with the charter of the city, requires that the fund from which the city's proportion of the expense is to be paid must be designated in the ordinance of intention. Prior to the amendment of 1925, section 2 of the act, so far as material here, read as follows: 'Said city council may, in its discretion, order and declare that the whole or any percentage of the expense of said improvement be paid out of the treasury of the municipality from such fund as the council may designate, in which case it shall be so stated in said ordinance of intention.' * * * By the amendment of 1925 that portion of the section was made to read as follows: 'Said city council may, in its discretion, order and declare that the whole or any percentage of, or any sum toward the expense of said improvement be paid out of the treasury of the municipality, in which case the sum or percentage to be paid shall be stated in said ordinance of intention.' * * * It will be noted that the clause 'from such fund as the council may designate' was omitted from the section as amended. Section 6 of the ordinance of intention provides: 'It is further ordered and declared by said city council of the city of Los Angeles that the sum of $1,500,000.00 be paid toward the expense of said improvement, in section 1 of this ordinance described, out of the treasury of said city.' Under the statute prior to its amendment the name of the fund from which the contribution was to be paid was required to be stated. O. T. Johnson Corp. v. City of Los Angeles, supra. The undoubted purpose of the amendment was to avoid the requirement that the fund be so designated. When the time comes for the city to order the payment of the contribution, it must be assumed that such payment will be made from a fund from which it will be lawful to make the payment. The language of said section 6 is deemed sufficient for the purposes of the ordinance of intention."

[24] As an additional reason for rejecting appellant's contention it may well be pointed out that if the city was without authority to appropriate any sum less than the whole cost of the improvement the action of the council in attempting so to do was ultra vires and section 5 of the ordinance of intention void. If void, that particular section of the ordinance would be disregarded—treated as if it were not there—and the remainder of the enact-

ment given full force, since the void portion could be eliminated and still leave a workable and enforceable ordinance. Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40; Hunt v. Superior Court, 178 Cal. 470, 173 P. 1097; Maclay v. Love, 25 Cal. 367, 85 Am. Dec. 133; Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L. R. A. 249; Matter of Bonds San Joaquin Irr. Dist., 161 Cal. 345, 119 P. 198. The effect of this would simply be that the whole burden of the cost of the improvement would have to be borne by the assessment district without contribution from the city. So far from being benefited by such a construction of the city's power as appellant contends for, it would operate to increase the amount of the assessment as to his remaining property in the district as well as all other assessments on property therein.

[25, 26] As to the point that the city charter authorizes the council to appropriate the whole but not a portion of the cost of the improvement it is only necessary to point out that the language of section 37 is permissive, not mandatory, and inasmuch as the appropriation is made before the amount of compensation to be paid the owners of property taken or damaged is ascertained in the trial of the condemnation suit, the total amount of which compensation forms the bulk of the expense of the proceeding, it would be manifestly impossible for the council to determine in advance what would be the entire cost and to appropriate that amount. Furthermore, we find no conflict between the permission thus accorded the council by the charter and the provision of section 2 of the act as amended in 1925 to the effect that the council may order "the whole or any percentage of, or *any sum*" towards the expense of the improvement to be paid out of "the treasury of the municipality," and it is our duty to construe both of these laws, the charter and the statute, in so far as they deal with the same general subject-matter, as though they were but one act, each referring to and supplementing the other, harmonizing them so far as possible so as to give force to each without destroying the meaning or intent of the other. Spreckels v. Graham, 194 Cal. 516, 228 P. 1040; Bateman v. Colgan, 111 Cal. 580, 44 P. 238; McMinn v. Bliss, 31 Cal. 122. So construing them, we are of the opinion that the provisions of the charter permit the city to avail itself of those of section 2 of the statute.

[27, 28] Appellant next urges that the order setting the cause for trial and appointing referees was violative of section 8 of the act (as amended by St. 1927, p. 1145, § 6), which provides that when all defendants have answered or their defaults have been entered a motion may be made, on notice to those who have appeared, to set the case for trial, in that said order was made prior to the filing of several answers and the taking of several defaults against defendants failing to answer. Appellant's own answer was filed more than seven months before the order setting the case was made; the state of the record was as open to him as to the city; he was served with notice of motion to set, and the record herein discloses no objection on his part to the setting of the case. He cannot be heard to raise such an objection for the first time on this appeal. 2 Cal. Jur. 234; Griess v. Investment Co., 98 Cal. 241, 33 P. 195. Moreover, if error was committed by setting the case for trial before all answers were in and all defaults entered, appellant has failed to show in what manner, if at all, he was injured thereby. Such error, if error there was, was of the most harmless description and well within the purview of section 4½ of article 6 of the Constitution.

[29, 30] The next two points raised by appellant may be considered together, as they both rest largely upon the same argument. His contention is that the interlocutory judgment signed by Judge Keetch following the jury trial as to certain parcels of land "does not follow the verdict of the jury," in that it was, as to some of those parcels, based upon stipulations as to value instead of evidence submitted to the jury, and that the findings signed by Judge Shaw following the hearing of the referees' report are open to the same objection. Appellant had no interest in any of the parcels to which these stipulations related, and it is difficult to see in what manner he could possibly be affected, since "the damage to one [defendant in an action in eminent domain] will in no particular depend upon the damage to the others. Neither party will be interested in any allowance for damages except his own." Weiler v. Superior Court, 188 Cal. 729, 207 P. 247, 248. His theory, however, is that his land not taken will be subject to assessment to pay the expense of the improvement, which assessment will be based on compensation awarded without any evidence of value having been submitted to the jury in the one instance and to the court in the other. We see no reason why the parties to an action in eminent domain may not, if they choose, stipulate as to the fact of value as well as to any other fact, just as they may do in any other type of action. 23 Cal. Jur. 816. Such stipulations have always been regarded by the courts as establishing the facts stipulated and as taking the place of evidence with regard thereto. See long list of cases cited in footnotes on page 816, article on "Stipulations," in 23 Cal. Jur. A situation somewhat analogous to that of which appellant complains arose in the case of Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 P. 52, in that a portion of the compensation awarded the landowner was fixed by stipulation and not by the deliberations of the jury on evidence presented to them. The jury in that case had found that the amount of fencing required to fence the owner's land abutting the roadway condemned was 29 miles and that the cost thereof was $650 per mile, to which sum the owner was entitled as compensation in addition to the value of the strip of land taken and the severance damages. One of the grounds urged on a motion for new trial was that the jury had erroneously computed the amount of mileage of fencing required. This point the trial court found well taken and that the correct mileage was 31½ miles, for which the defendant owner should have been awarded further compensation at the same rate per mile. It therefore required the county to consent to this increase of compensation as a condition to a denial of the motion for new trial, whereupon the county counsel, representing the plaintiff county, filed a stipulation consenting to this increase in the amount of the defendant's compensation over and above the compensation found by the jury. One of the grounds urged by the appellant owner for a reversal was that the lower court had no power to act on this stipulation "and by so doing to change the amount of compensation fixed by the jury." This contention the court held to be without merit. The same point was urged in County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 P. 27, which case involved the same proceeding as that in the Adamson Case, it being urged that the effect of the trial court's ruling on the motion for new trial and its action on the stipulation "was an exercise by the court of the functions of the jury, by reason of which defendants were deprived of the constitutional right of having a vital element of damage determined by the jury." This contention was held untenable. Hearings in the Supreme Court after judgment in this court were denied in both of these cases.

We have carefully examined the other points made by appellant and find them without merit.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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102 Cal. App. 342

WENDT v. GATES et al. (Civ. 7075.)[*]

District Court of Appeal, First District, Division 2, California. Dec. 4, 1929.

Rehearing Denied Jan. 2, 1930.

1. Appeal and error ⇨1008(1)—Whether findings for defendants are conclusions depends on nature of evidence.

In action in ejectment, whether findings of fact for defendants are conclusions depends on nature of evidence.

2. Appeal and error ⇨757(3)—Appellate court could not hold that findings for defendant in ejectment were conclusions, where plaintiff's brief did not set forth evidence supporting contention.

In action in ejectment where plaintiff's brief on appeal set forth no evidence supporting his contention that findings of fact for defendants were conclusions, appellate court could not hold that findings were conclusions.

3. Appeal and error ⇨1008(1)—Court's finding in ejectment that plaintiff's vendor appeared in foreclosure proceedings could not be held erroneous, where answer therein was filed for defendants.

In ejectment action where it appeared that plaintiff's vendor had been named as party defendant in foreclosure action, judgment of which was pleaded as bar, where answer was filed by defendants and judgment recited that evidence was received on part of parties herein concerned, appellate court was unable to say that trial court erred in making implied finding that plaintiff's vendor appeared and answered in foreclosure proceedings.

4. Judgment ⇨279—Minute order dismissing foreclosure action as to plaintiff's vendor held not part of judgment roll and incompetent in ejectment to impeach foreclosure judgment (Code Civ. Proc. § 670).

Minute order of court, dismissing foreclosure action as to plaintiff's vendor because summons was not served and returned within three years, *held* not competent evidence in ejectment action to impeach judgment in foreclosure action, since under Code Civ. Proc. § 670, such order was no part of judgment roll, and only judgment roll could be considered in attack on judgment.

5. Appeal and error ⇨1071(3)—Judgment for defendants must be affirmed, although plaintiff's attacks on certain findings are sustained, where judgment is supported by other findings.

Although plaintiff's attacks on certain findings are sustained, judgment for defendants must be affirmed, where supported by remaining findings, which are supported by evidence.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Fred Wendt against Pearl E. Gates and husband. Judgment for defendants, and plaintiff appeals. Affirmed.

Frederick Dubovsky and E. E. Keyes, both of Oakland, for appellant.

Vallandigham & Hollingsworth, of Santa Rosa, for respondents.

STURTEVANT, J. The plaintiff commenced an action in ejectment against the defendants. The defendants answered and a trial was had before the court without a jury. The court made findings of fact in favor of the defendants, and from a judgment entered thereon the plaintiff has appealed and has brought up typewritten transcripts.

[1, 2] In findings 1 and 2 the trial court

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[*] Rehearing denied.

found that the defendants were the owners and that the plaintiff had no interest in the property involved. The plaintiff contends that the findings were conclusions. In his brief he does not set forth any of the evidence supporting his contention. Whether the findings mentioned are or are not conclusions depends on the nature of the evidence. In Levins v. Rovegno, 71 Cal. 273, 12 P. 161, the court was considering the same attack in an action of ejectment. At page 278 of 71 Cal., 12 P. 164, the court said: "If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law, in order to reach a final determination, the result is a conclusion of law." From all that is set forth in plaintiff's brief we cannot say that the findings were conclusions.

In the next place the plaintiff contends that finding No. 3, which is on the subject of adverse possession, is contrary to the evidence. In his brief he quotes no evidence and does not even cite the reporter's transcript.

[3] Finding No. 4 was in response to an allegation pleading a judgment in bar. The plaintiff asserts that his vendor was not served with process and made no appearance in the former action and therefore this plaintiff is not barred by the judgment. On the trial of the instant case, the judgment roll in an action foreclosing a mortgage, Stump et al. v. Marvin et al., No. 11944, records of the county clerk of Sonoma county, was introduced. In that action plaintiff's vendor, George W. Riddell, was named as a party defendant. Summons was issued and returned and the record does not show that Riddell was or was not served. An answer was filed by "the defendants." The same expression is used several times in the answer. David E. Williams signed the answer as attorney for "the defendants." The judgment recites that Williams withdrew as attorney for certain defendants, naming them, but not naming Riddell. The judgment further recites that evidence was received "on the part of the parties herein concerned." This court is unable to say that the trial court erred in making an implied finding in this action that Riddell appeared and answered in the foreclosure proceedings.

[4] The judgment in the foreclosure proceedings was entered May 18, 1921. In a supplemental transcript the plaintiff inserts what he claims to be a minute order made January 20, 1928, and which in form is an order dismissing the said action No. 11944 as to the defendant Riddell because summons was not served and returned within three years. The record is not clear as to whether said order was received in evidence in the instant case. Be that as it may, it was not competent evidence in this collateral proceeding to impeach the judgment in action No. 11944. It was no part of the judgment roll in said action. Code Civ. Proc. § 670. Therefore, in the instant case, said order could not be used for the purpose of disproving any recital contained in the judgment in action numbered 11944. It is well settled that the judgment roll only can be considered in such an attack. 15 Cal. Jur. 290, § 276; Hahn v. Kelly, 34 Cal. 391, 404, 94 Am. Dec. 742; Hobbs v. Duff, 43 Cal. 485, 490, 491; City of Los Angeles v. Glassell, 203 Cal. 44, 49, 262 P. 1084.

[5] The plaintiff claims that finding No. 5, which treats of adverse possession, was not responsive to any allegation made in the pleadings. An inspection of the clerk's transcript shows that the contention is well founded. If the plaintiff's attacks on findings 1, 2, 3, and 5 are each and all sustained, nevertheless the judgment must be affirmed because it is supported by the remaining findings, which, as we have shown, are sustained by the evidence.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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102 Cal. App. 794

Fred WENDT, Plaintiff and Appellant, v. Winnie M. STUMP et al., Defendants and Respondents. (Civ. 7076.)★

District Court of Appeal, First District, Division 2, California. Dec. 4, 1929.

Rehearing Denied Jan. 2, 1930.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Frederick Dubovsky and E. E. Keyes, both of Oakland, for appellant.

Vallandigham & Hollingsworth, of Santa Rosa, and L. G. Scott, of Sebastopol, for respondents.

STURTEVANT, J. The plaintiff commenced an action to quiet title. The defendants appeared and answered and filed a cross-complaint. The cross-complaint was answered and a trial was had before the court sitting without a jury. The court made findings in favor of the defendants, and from a judgment entered thereon the plaintiff has appealed and has brought up typewritten transcripts.

The title to the property involved rests on the judgment that was involved in the action Wendt v. Gates et al. (Civ. 7075) 283 P. 312, this day filed. In their cross-complaint the

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★Rehearing denied.

defendants pleaded that judgment in bar. The trial court made findings in favor of the defendants on the issues involving that judgment. The material facts and the law pertinent thereto are the same as in Wendt v. Gates et al. For the reasons there stated the judgment must be the same. Under these circumstances it is unnecessary to discuss any other points made by the plaintiff.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

102 Cal. App. 571

CITY OF LOS ANGELES et al. v. BABCOCK et al. (Civ. 3967.)

District Court of Appeal, Third District, California. Dec. 16, 1929.

1. Estoppel 🔑118, 121—Judgment denying mandatory injunction requiring removal of buildings from electric line right of way because of estoppel held not sustained by findings or evidence.

In city's action for mandatory injunction to require defendants to remove their buildings from city's right of way for electrical transmission lines under recorded right of way deed providing that no buildings or other structure should be erected on right of way, pastural, agricultural, and mineral rights only being reserved, findings that use of city's easement by defendants had been acquiesced in by city, based solely on testimony that defendants had not been notified to remove buildings from right of way, and that city employees patrolled right of way approximately once a week, *held* insufficient to support judgment for defendant on theory that city was estopped, in absence of evidence or finding that city's agents or employees knew that defendants' buildings trespassed on easement, or that defendants relied on any act or word of such persons or changed their position in reliance thereon.

2. Easements 🔑22—Record of power line easement gave subsequent purchasers of lots constructive notice of exterior lines of right of way.

Where conveyance to city of right of way for electric power line, providing that no buildings or other structures should be erected thereon, and reserving only pastural, agricultural, and mineral rights, had been on record for years prior to defendants acquiring their lots or erection of any buildings thereon, defendants were presumed as a matter of law to have had knowledge of exterior lines of right of way belonging to city.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the City of Los Angeles and another against William Babcock and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Jess E. Stephens, W. B. Mathews, Floyd M. Hinshaw, and Kenneth K. Scott, all of Los Angeles, for appellant.

Sherman & Sherman and R. J. Gardner, all of Los Angeles, for respondents.

PLUMMER, J. This action was instituted to obtain a mandatory injunction requiring the defendants to remove certain buildings from a right of way belonging to the city of Los Angeles, upon which it had established, and was maintaining, electrical transmission lines. The defendants had judgment, and the plaintiffs appeal.

The record shows that in 1916, the plaintiff, city of Los Angeles, became the owner of a right of way 120 feet in width, for the erection and maintenance of electric light and power transmission lines; that along the center of said right of way the city had erected, and for a number of years had been maintaining, such lines; that the deeds conveying a right of way to the city of Los Angeles was of record in the office of the county recorder of Los Angeles; that the deed of conveyance of said right of way provided that no buildings or other structure should be erected thereon, pastural, agricultural, and mineral rights only being reserved. Subsequent to the acquiring of the easement and right of way herein mentioned, the premises involved, together with other premises adjoining, were subdivided into city lots, the defendants named becoming owners of certain lots partly covered by the easement and right of way owned by the city of Los Angeles.

The judgment of the trial court was to the effect that the city of Los Angeles was estopped from demanding the removal of the buildings referred to in the plaintiff's complaint.

[1] Upon this appeal a number of grounds for reversal are assigned and presented to this court for consideration, only one of which, however, needs to be mentioned, to wit, that the court erred in holding that the city of Los Angeles was estopped from demanding the removal of the buildings from its right of way over lots 58, 70, and 73 of tract No. 5552, or had ever acquiesced in the erection and maintenance thereof. If this holding is erroneous, then and in that case the judgment should be reversed, irrespective of any of the other assignments. An examination of the findings will determine whether the assignment of error which we have quoted is tenable. Omitting all the preliminary matters contained in findings 1, 2, 3, and 4, relative to the city of Los Angeles being a municipal corporation and operating an electric transmission line, and the description of the right of way acquired in 1916, by the city of Los Angeles, we come to finding No. 5 which sets forth that the deed of conveyance to the city of Los Angeles, for the right of way referred to, was recorded in the office of the

county recorder of Los Angeles on the 26th day of June, 1916. Finding No. 6 is to the effect that, ever since the 6th day of June, 1916, the board of water and power commissioners has maintained, and now maintains and operates over said easement, electric wires for the transmission of electric energy to the city of Los Angeles, said wires carrying, at the time of the trial, approximately 110,000 volts of electricity; that the power line now existing on said easement is along the center line thereof. Finding No. 7 is to the effect that the premises referred to had been subdivided into city lots, and that the easement covers a portion of said lots. Finding No. 8 is in these words: "The court finds that the maintenance, use and occupancy of said buildings and structures upon plaintiff's easement prevent, and are a continuous and constant interference with the free, full and perfect use and enjoyment by plaintiffs of the rights and easements granted them by said deed, but that the use of said easement by the defendants has been acquiesced in by the plaintiffs since the erection of said buildings." Finding No. 9 is to the effect that the plaintiffs, prior to the beginning of the suit, had not demanded the removal of said structures. Finding No. 10 is to the effect that on May 7, 1923, the defendant Lulu Wilson entered into a contract for the purchase of lot 58, and, in the year 1924, erected a garage thereon, and that on July 9, 1925, the defendant Lulu Wilson became the owner of said lot 58; that a residence erected upon said lot 58 projects 7.15 feet upon the easement and right of way of the plaintiff. Finding No. 11 is to the effect that Jess Chenoweth is the owner of lot 70; that the buildings on said lot were erected in the year 1924; that a certain frame building on said lot projects 9.21 feet over and upon the easement and right of way of the plaintiff. Finding No. 12 is to the effect that Charles E. Luring and Alice Luring are the owners of lot 73, and erected a residence and garage thereon in the month of February, 1923; that the buildings erected by the Lurings project from 14 to 24 feet over and upon the easement and right of way belonging to the plaintiff; that a garage erected by said defendants stands wholly upon the easement or right of way. Finding No. 13 is to the effect that the buildings referred to do not constitute a fire hazard. Finding No. 14 is as follows: "The court finds that during the erection of the buildings so erected and constructed by defendants upon said lots 58, 70 and 73 of Tract No. 5552, and continuously thereafter to the date of the filing of plaintiff's complaint, plaintiff's agents and employees regularly patrolled the said right of way approximately once each week." Finding No. 15 is to the effect that the city of Los Angeles, in erecting and maintaining electrical transmission lines, is acting in a proprietary capacity. Finding No. 16 is to the effect that Raymond Luring and Ina M. Luring are the owners of lot 71 of the tract referred to, subject to the easement belonging to the city of Los Angeles. Finding No. 17 is to the effect that Charles E. Luring and Alice Luring are the owners of lot 73, subject to the permanent easement and right of way belonging to the city of Los Angeles. Finding No. 18 is to the effect that Jess Chenoweth is the owner of lot 70, subject to the permanent easement belonging to the city of Los Angeles. From these findings the court drew the following conclusions of law: That plaintiffs are estopped from demanding the removal of the now existing buildings and structures situate upon lots 58, 70, and 73 of said tract.

The latter portion of finding No. 8, to the effect that the use of the easement belonging to the city has been acquiesced in, is based simply upon testimony to the effect that the defendants had not been notified to remove the buildings from the right of way belonging to the city of Los Angeles, and further testimony to the effect that agents and employees, or, rather, to the effect that employees patrolled the right of way approximately once a week to observe the condition of the electric wires and transmission lines erected on the same. There is not a word of testimony in the record to the effect that these agents or employees of the city knew or had any knowledge that the buildings erected by the defendants trespassed upon the easement or right of way belonging to the city, or ever said a word to any of the defendants relative to the buildings involved, or that any of the city employees knew anything whatever of any of the acts of the defendants, or that the defendants relied upon a single act or word of any of the persons patrolling the power and transmission lines belonging to the city.

Upon the findings which we have set forth, the court drew the conclusion that the city was estopped, and entered judgment on the theory that the city was estopped. It requires only a reading of the findings to show that there is not a single element of estoppel shown in this case. While the respective parties to this action have submitted a voluminous list of authorities, and by way of briefs made somewhat extensive arguments, it is unnecessary to follow the same. The findings are absolutely devoid of anything showing, or tending to show, that the defendants relied upon a single act, declaration, or representation of any of the plaintiffs, or any of their agents. The only mention of anything in the case, which does not amount to a scintilla of evidence, is an allegation in the answers of some of the defendants to the effect that the city issued a permit to erect buildings on a portion of the lots involved, no mention or allegation being made as to the portion of the lots upon which the buildings were to be erected. There is no finding to the effect, nor has our attention been called to any allegation in the pleadings or testimony in the transcript showing that the defendants, or any of them, have changed their position by reason of any act, thing, or conduct on the part of the plaintiffs, or any of their agents. There is no mention in the findings, no allegation in the pleadings, and no testimony showing that the defendants, or any of them, ever made any effort to ascertain the exterior lines of the easement or right of way belonging to the city of Los Angeles, nor any finding, allegation, or testimony in the transcript that the defendants, or any of them, were ever misled as to such exterior boundaries. There is no finding, nor is there any allegation in the pleadings, or testimony in the transcript, showing that the defendants could not, by reasonable diligence, have ascertained the extent and exterior boundaries of the right of way belonging to the city. The poles and transmission lines were in place years before any of the defendants became interested in the three lots in question, and were there at the time the defendants, respectively, became the owners of the several lots, as heretofore stated. We need only to cite the general rules as to equitable estoppel set forth in 10 Cal. Juris. beginning on page 624, and 21 C. J. 1119, and the text following the pages of the respective volumes which we have cited, to show that there is nothing in the findings in this case to support the judgment, and that the court was in error as alleged by the plaintiffs. In 10 Cal. Juris. 626, the elements of estoppel are thus stated: "The vital principle of equitable estoppel is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he has acted. * * * In general, four things are essential to the application of the doctrine of equitable estoppel; first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct, to his injury."

[2] As we have said, there is not a word in the findings that the plaintiff, or any of its agents, were apprised of the trespass being committed by the defendants, nor is there a word in the findings to show that the city intended, by its conduct or by the conduct of any of its agents, that the defendants might erect buildings upon the easement or right of way belonging to the city. It may be that the defendants were ignorant of the exterior lines of the right of way belonging to the city, but as the conveyance to the city was on record, and had been on record for years prior to the acquiring of any of the lots or the erecting of any of the buildings by any of the defendants, they are presumed, as a matter of law, to have had such knowledge. As to "knowledge," we find the following on pages 636 and 637 of 10 Cal. Juris.: "It is an essential element of an estoppel by conduct that the party asserting it must be ignorant of the true state of facts and should have relied upon the representations or admission of the adverse party. If he relies upon negligence as the basis of the estoppel, he must show that such negligence was the proximate cause of the deceit. He need, however, not be destitute of all possible means of knowledge of the facts, it being sufficient if he is destitute of convenient and ready means to that end. To warrant reliance, a representation must be such as would induce a reasonable man to act upon it. * * * He must show that he was misled by the conduct of the other party; that in reliance thereon, he was induced to do something which he otherwise would not have done." There is nothing in the findings to this effect. There is not a line in the pleadings, not a word in the transcript, and nothing in the findings to which our attention has been called showing that the defendants, or any of them, relied upon any act, statement, or declaration of the plaintiffs, or of any of their agents. The facts, so far as the testimony shows and the findings show is to the effect that the defendants simply erected the buildings on the premises, and without any reference to the right of way or easement belonging to the city. The defendants had a convenient and ready means of ascertaining the exterior lines of the easement or right of way belonging to the city. In 21 Cal. Juris. 1119, the general rules relative to equitable estoppel are thus stated: "In order to constitute this kind of estoppel there must exist a false representation or concealment of material facts. It must have been made with knowledge, actual or constructive, of the facts. The party to whom it was made must have been without knowledge or the means of knowledge of the real facts. It must have been made with the intention that it should be acted upon, and the party to whom it was made must have relied on, or acted upon it, to his prejudice." There is nothing of the kind in the findings, and nothing in the pleadings or testimony called to our attention, sustaining any of these necessary elements of estoppel. And further, in the same volume on page 1129, we find the following: "As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is, as a general rule, essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have been also without convenient or ready means of acquiring such knowledge." And, further, on page 1130 of the same volume, it is stated: "A public record is an available means of information as to the question of title, and one who does not take advantage of it cannot claim estoppel against one who merely fails to furnish such information." All of these rules relative to estoppel

which we have quoted are supported by an abundance of authorities, and these citations abundantly show that there is no escape from the conclusion that no judgment of estoppel is or can be supported by the findings in this case.

It follows, therefore, without further citation of authorities, that the judgment of the trial court must be, and the same is hereby, reversed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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102 Cal. App. 436

RINKER v. CARL et al. (Civ. 3955.)

District Court of Appeal, Third District, California. Dec. 9, 1929.

1. Appeal and error 🔑1001(1)—Findings supported by testimony are conclusive.

Where there is testimony in record which, if believed by jury, is sufficient to sustain verdict, appellate courts are bound by jury's findings.

2. Automobiles 🔑244(6)—Evidence supported verdict for pedestrian on theory that defendant drove automobile to left of center of boulevard (Motor Vehicle Act, § 122).

In action for injury to plaintiff struck by defendant's automobile while crossing boulevard, evidence *held* sufficient to support verdict for plaintiff on theory that defendant was driving to left of center line of paved portion of boulevard under Motor Vehicle Act, § 122 (St. 1923, p. 557).

3. Automobiles 🔑245(72)—Pedestrian crossing paved highway is not contributorily negligent as matter of law in failing to look to left after reaching center line (Motor Vehicle Act, § 122).

It is not contributory negligence as matter of law for pedestrian crossing paved highway not to look to left after reaching center line, in view of Motor Vehicle Act, § 122 (St. 1923, p. 557), requiring drivers of vehicles to proceed on right side of highway or street.

4. Automobiles 🔑246(31)—In action for injuries to pedestrian struck by automobile, instruction respecting contributory negligence held not erroneous.

In action for injuries to pedestrian struck by automobile while crossing highway, instruction that in crossing highway pedestrian must safeguard himself from traffic reasonably to be expected, that before reaching center of street it was plaintiff's duty to look for traffic coming from his left, that after crossing medial line it was his duty to look for automobiles coming from his right, and that he had right to assume that automobiles would travel on right side of highway, and that automobiles operated on wrong side of highway would give ample warning, *held* not erroneous.

5. Automobiles 🔑217(5)—Pedestrian crossing boulevard held not under obligation to look both ways at all times.

In action for injuries to pedestrian struck by automobile while crossing street, from south to north, plaintiff *held* required to look to left which crossing southerly half and to look to right while crossing northerly half, but he was not under obligations to look both ways at all times.

6. Automobiles 🔑246(56)—Refusal of instruction respecting law as to speed of automobiles held not error in action for pedestrian's injuries, where it was not contended that excessive speed caused injuries.

In action for injuries to pedestrian struck by automobile while crossing boulevard, refusal of instruction respecting law as to speed *held* not error, where no contention was made that injury was caused by reason of excessive speed and injury as found by jury must have resulted from defendant's automobile being driven on wrong side of road.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Richard Rinker against J. C. Carl and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Bertrand J. Wellman, of Los Angeles, for respondent.

PLUMMER, J. Plaintiff had judgment against the defendant J. C. Carl in the sum of $8,000 as compensation for injuries suffered by him when the plaintiff was injured by an automobile driven by said defendant. From this judgment the defendants appeal.

The transcript shows that on or about the 22d of November, 1925, during the nighttime, the plaintiff was driving an automobile in a westerly direction along that certain highway in Los Angeles county known as and called Los Feliz boulevard; that when the plaintiff reached a certain point on said boulevard where it is intersected by Griffith Park drive the plaintiff turned his car across the boulevard in a southerly direction and parked the same at the side of Griffith Park drive. His purpose in doing so was to enable him to examine a signboard on the north side of Los Feliz boulevard, giving directions as to how to reach certain cities. The plaintiff, after parking his car in the Park drive, started to cross Los Feliz boulevard from the southerly side thereof, proceeding in a general northerly direction toward the point where the signboard was stationed. The paved portion of Los Feliz boulevard is shown by the testimony to be from 18 to 20 feet in width. After crossing a portion of the paved part of the boulevard, the plaintiff was run down and injured by an automobile owned and then operated by the defendant J. C. Carl. The plaintiff was severely injured, but, as no argument is made as to the excessiveness of the verdict, the extent of the injuries need not be considered.

[1, 2] It is contended on the part of the appellants that the testimony shows no negligence on the part of the defendant J. C. Carl, but does establish the fact of negligence on the part of the plaintiff. The testimony of witnesses called and examined on behalf of the defendants would indicate that the plaintiff was injured while he was on the southerly, or what would be the right one-half of the paved portion of the highway for an automobile driver when propelling his machine in an easterly direction; the contention of the appellants being that the plaintiff stepped in front of the machine driven by the defendant J. C. Carl at such a close distance to the automobile that it was impossible for the same to be stopped prior to the running down of the plaintiff. Upon this theory the appellants have argued the cause. If this version of the occurrence had been accepted by the jury, then and in that case we would unhesitatingly say that the verdict was sufficiently sustained by the testimony. We may admit that upon the record the preponderance of the testimony appears to be in favor of the appellants, but the rule is well established that, where there is testimony in the record which, if believed by the jury, is sufficient to sustain the verdict, appellate courts are bound by the findings of the jury. The testimony in this case, as it appears from the transcript, is in sharp conflict, and when there is a conflict, all we can legally do is to examine the record and ascertain if there is testimony upon which the verdict may rest if accepted by the jury. The chief contention made by the appellants is that the plaintiff, as he walked across the portion of Los Feliz boulevard, did not look in both directions. In support of this contention a number of cases are cited, which, however, no longer state the law in California. It is claimed on the part of the plaintiff that he was injured while on the northerly half of the paved portion of the highway; that at the time of the injury the defendant J. C. Carl was driving his automobile in an easterly direction; and that the law required his automobile, at the time and under the circumstances, to be driven on the southerly side of the paved portion of the boulevard. Before quoting the testimony upon which the verdict of the jury may be sustained upon this theory, we will quote section 122 of the Motor Vehicle Act (St. 1923, p. 557) which reads: "On all occasions, the driver of a vehicle shall drive the same upon the right half of a public highway and close to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing other vehicles, in which latter case, the vehicle may be driven on the left side of the highway if such left side is clear and unobstructed for at least one hundred yards ahead." The amendment to this section by the Legislature in 1929 (St. 1929, p. 540) does not change this portion thereof, and the section as quoted was in full force and effect at the time of the injury complained of. There is no showing in the transcript that at the time of the injury it was impracticable to travel on the right side of the highway. It is not claimed that the appellants were passing any other vehicles, and there is no testimony in the record relative to the left side being clear and unobstructed, as required by the section. With this statement of the law in view, we may now consider the testimony of the plaintiff which relates directly to the injury, and which, if believed by the jury, is sufficient to sustain the verdict on the theory that the defendant J. C. Carl was driving his automobile to the left of the center line of the paved portion of Los Feliz boulevard at the time of the injury. The testimony of the plaintiff relative to the circumstances of the injury is as follows: "After I turned my machine off onto Griffith Park drive I went back across Los Feliz to look at the road sign. I wanted to go to Santa Monica and wanted to see this sign because I was not familiar with the road there. When I started walking across Los Feliz boulevard there was considerable traffic. I looked in both directions and thought that I had time to get across and started across. I saw cars coming from my left, but the nearest car was a good way down; it must have been pretty near a block. I started to cross Los Feliz and I was just past the center of the road when I was hit. I was four or five feet from the north edge of the pavement. As I passed the center of the road I looked at the other direction towards my right towards Glendale I saw cars coming. Then the next thing I got hit by a car coming from the left. The place where I got struck is down grade. I couldn't say what part of my body was struck. I was not facing this machine when it struck me; it came from the back or my left." As corroborative of this testimony the witness Bessie Beal testified as follows (speaking of the north side of the boulevard): "There was a little ditch there. Mr. Rinker was lying on the edge of the boulevard; on the edge of the north side of the boulevard and about two feet from the little ditch. The ditch is about two feet from the edge of the boulevard as I remember. He was lying within two feet of the ditch. I believe they were just picking him up as I was crossing the street. I could see where he was lying before I crossed the street. I saw him by the headlights of other cars. He was lying there before I got to him and they picked him up." This testimony shows the position of Mr. Rinker's body after being run down by the automobile. There is testimony in the record to the effect that the body rolled some 10 feet down hill after being struck by the automobile, but there is no testimony to the effect that it rolled either in a southerly or northerly direction. Consequently, in connection

with the statement of the plaintiff that he was on the northerly portion of the paved highway at the time he was struck, the testimony of the witness Beal, that his body was within two or three feet of the northerly edge of the paved portion, was evidence for the jury to consider in determining where the automobile and the plaintiff were at the time of the impact, and whether the automobile was or was not on the northerly half of the paved highway, and in a position where it legally had no right to be.

[3] Basing their contention upon the statement of the plaintiff that he did not look to the left after reaching the center of the paved portion of the highway, appellants cite the cases of Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 P. 185; Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174; Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493; Moss v. Boynton, 44 Cal. App. 474, 186 P. 631, and a few others where similar circumstances are involved, and urge upon the court that, as the plaintiff did not look to the left after reaching the medial line of the paved portion of the highway, he was guilty of contributory negligence. These cases, however, do not cite the law applicable to the circumstances here presented. By reason of the testimony which we have quoted and the verdict of the jury, we must hold that the plaintiff was injured while on the northerly half of the paved portion of the highway, by an automobile driven by the defendant J. C. Carl, traveling in an easterly direction, and that the law at that time, under the circumstances, required the automobile to be on the southerly half of the paved highway. Under these circumstances it is now well established that it is not contributory negligence as a matter of law for one crossing a paved highway from the south to the north not to look to the left or to the west after reaching the medial line; that the rules of the road require east-bound traffic to travel on the southerly half and west-bound traffic on the northerly half, and it is the duty of the pedestrian, when he reaches the southerly line walking northerly, to look to the right and safeguard himself against stepping in front of west-bound automobile. In California Jurisprudence, 1928, Permanent Supplement, on page 197, of the addenda, considering the subject of automobiles, we find the rules of law which we have referred to stated as follows: "If the established usage required the driver of vehicles to proceed on the right side of the highway or street, the plaintiff is entitled to recover, on proof that the injured person looked in the direction from which cars, proceeding in conformity with the law or custom, might have been expected to approach. A pedestrian has a right to expect the driver of an automobile to conform to the customary traffic laws. Thus, a judgment for the plaintiff is proper where it appears that in traversing the street he looked to the left and was injured by the defendant's vehicle which was approaching from the right on the left side of the street, or where the evidence shows that after having arrived at the center of the way, he looked to the right and was struck by the vehicle which was being driven on the wrong side of the street. He had the right to assume that no vehicle would approach him from the left beyond the medial line of the intersecting street."

This court, in the case of Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010, 1011, where a similar question was involved, held that the plaintiff had a right to assume that no automobile driver would run him down from the left, or what, under the circumstances of that case, would be driving an automobile on the wrong side of the street. This, of course, does not give the plaintiff the privilege of reckless disregard of his own safety or entitle him to heedlessly place himself in a position of danger. But if the testimony accepted by the jury which we have quoted, is true, neither of these latter conditions are presented. The cases cited by the appellants to which we have heretofore referred are all limited in their application and shown to have no bearing upon the issue before us. In the case of Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649, the circumstances of that case, as applied to the case at bar, show that the authorities cited by the appellants are inapplicable, and it was simply a question for the jury as to the plaintiff's contributory negligence at the time he was injured by the automobile driven by the defendant.

Again, in the case of Nickell v. Rosenfield, 82 Cal. App. 369, 255 P. 760, 762, where it was contended that the injured party should have continually looked to the left, or should have looked in both directions for traffic, or otherwise held guilty of contributory negligence, was not sustained. It was there held, just as we have here stated, that the duty of the pedestrian is to look in the direction from which traffic is to be expected. Failing so to do he would be guilty of contributory negligence; but if he fails to observe an automobile approaching from the wrong direction, the pedestrian is not guilty as a matter of law for failing to observe the same, and if the jury finds in favor of the plaintiff, under such circumstances the verdict will not be disturbed on the ground that the plaintiff did not look in the direction from which traffic was not to be expected.

In the case of Henry v. Lingsweiler, 81 Cal. App. 142, 253 P. 357, this court held as follows: "A pedestrian crossing a street near an intersection has a right to assume that no vehicle will approach him from the left beyond the medial line of the street." In that case the plaintiff was crossing the street in the direction that an automobile approaching from the left would be traveling on the wrong side of the street. To the same effect is the case of Wright v. Foreman, 86 Cal. App. 595, 261 P. 481, and Rignell v. Font, 90 Cal. App.

730, 266 P. 588. Other cases might be cited, but the rules are well established, just as we have stated them, by the authorities cited.

[4-6] It is further urged that the court erred in its instructions to the jury. An examination of the instructions, however, reveals that the court very carefully instructed the jury, stating the law clearly and accurately upon the questions presented to them for consideration. The court in its instructions stated, among other things, the law correctly concerning contributory negligence, and the duty incumbent upon a pedestrian when about to cross a highway, stating, in substance, that in crossing a highway, it is the duty of the pedestrian to safeguard himself from the traffic reasonably to be expected upon the side of the highway, while crossing; that before he reached the center of the street in this case it was the duty of the plaintiff to look for traffic coming from the west or from his left and as he crossed the medial line of the paved portion, it was his duty to look out for automobiles coming from the east or from his right, and that he had a right to assume, until apprised to the contrary, that automobiles traveling eastward would travel on the southerly half of the paved portion of the highway, and that automobiles being operated on the wrong side of the highway would give ample warning of their approach. The court also instructed the jury that a person driving a vehicle on the public highway was required to drive the same at all times in a careful and at a prudent rate of speed, and not greater than is reasonable and proper, having due regard to the traffic, surface, width of the highway, etc. The court further instructed the jury that when one is about to cross the highway, or is crossing a highway, he is bound to use reasonable care, to look and listen as he proceeds across said road, in order that he may be able to avoid colliding with others exercising the common privilege of traveling on the highway. The court also instructed the jury that when the plaintiff entered upon the boulevard in question it was necessary to look to the left to protect himself from automobiles approaching from that direction, and gave to the jury the following instruction which, as we have shown by the authorities, is far more favorable to the defendants than they were entitled to under the law: "You are instructed that neither a pedestrian nor the driver of a vehicle has any right over a boulevard superior to the other, but each has the same right in common with the other, and in its exercise each is bound to use ordinary care for his own safety. Accordingly, one thus traveling across a boulevard, such as the one in question, is in duty bound to be alert and to look both ways, with ordinary care, for the purpose of ascertaining whether or not he might be struck by an approaching vehicle, and if the plaintiff failed to do this, he was guilty of negligence, and if such negligence directly or proximately contributed to the happening of the accident in any degree, however slight, your verdict will be for the defendant, notwithstanding you may believe the defendant was guilty of negligence at the time and place of the accident." This, of course, is not a correct statement of the law. The plaintiff was not under obligations to look both ways at all times. He was under obligations to look to the left while crossing the southerly half of the boulevard and to look to the east when crossing the northerly half thereof. A failure to look both ways while he was crossing the respective halves of the boulevard did not, and would not, constitute negligence per se. At most it would only present the question of contributory negligence to the jury as a matter of fact, by reason of the rule prevailing that automobile drivers, under ordinary circumstances, must propel their cars on the half of the highway prescribed by section 122 of the Motor Vehicle Act as well as the authorities which we have here cited. Complaint is made that the court refused to instruct the jury that under the law the defendant J. C. Carl was entitled to drive his automobile at a speed of 35 miles per hour at the place of the collision. No contention is made that the injury was caused to the plaintiff by reason of the excessive speed of the automobile. The injury, as found by the jury, must have resulted from the automobile being driven on the wrong side of the road and where it should not have been, and where the plaintiff could not have reasonably expected it to be. Under these circumstances the fact that the owner of the automobile, under the law, may have been entitled to drive at a greater rate of speed than it was then moving, had it been on the proper side of the highway, is wholly immaterial. The refusal to give other instructions based upon the cases cited by the appellants, which we have stated, do not state the rules of law now prevailing in this state, need not be considered, as it would unduly extend this opinion and serve no useful purpose. It is sufficient to say that a reading of the instructions given by the court to the jury shows that the appellants suffered no injury therefrom.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

102 Cal. App. 452

BAIRD v. OLSHESKI. (Civ. 6418.)

District Court of Appeal, First District, Division 1, California. Dec. 10, 1929.

1. Trover and conversion 🔑32(4)—Mere allegation that defendant unlawfully took property is insufficient, in action for conversion.

Allegation, in action for conversion, merely that defendant unlawfully took property, was insufficient, in that words "wrongfully" and "unlawfully," when used in connection with issuable facts, are surplusage.

2. Trover and conversion 🔑32(4)—No particular form of words is essential in averring conversion, providing fact of conversion is sufficiently stated.

No particular form of words is essential in averring a conversion, provided fact of conversion is sufficiently stated, and it is unnecessary to set forth in what way or by what means conversion was accomplished or to allege that property was wrongfully or unlawfully converted, since allegation that it was converted, which is a conclusion of fact, implies a wrongful act.

3. Trover and conversion 🔑32(1)—Averment that defendant converted property after proper allegation of plaintiff's ownership thereof sufficiently stated cause of action.

In case plaintiff's ownership of property is sufficiently alleged, and there is an averment that defendant converted the same, a cause of action is sufficiently stated as against special demurrer directed only to allegations that taking was unlawful rather than to a material allegation of complaint.

4. Pleading 🔑18—Complaint for conversion was not demurrable for uncertainty of allegation as to unlawful surrender of stock pledged to secure loan.

Complaint, in action for conversion, alleging surrender of stock pledged to secure payment of loan, was not subject to demurrer for uncertainty by reason of failing to show in what respect surrender of possession and custody of pledge was unlawful, in that surrender thereof was not material to a statement of cause of action, the gravamen of which was alleged failure to return pledge upon demand after payment of loan.

5. Pleading 🔑18—Complaint alleging conversion of pledged stock must state with certainty date of payment and demand for return.

Complaint alleging conversion of stock pledged to secure loan must state with certainty the date of alleged payment and demand for return of stock as constituting material facts.

6. Corporations 🔑123(14)—Parties may stipulate as to notice to be given before sale of stock pledged to secure loan.

Parties had right to stipulate as to notice to be given before sale of stock pledged to secure loan in that such agreement was not fraudulent or against statute on public policy.

7. Corporations 🔑123(15)—Pledgor, in case of unauthorized sale by pledgee, may regard it as conversion and recover damages.

Where sale of stock pledged to secure loan as made by pledgee is not authorized, pledgor may regard it as a conversion and recover damages therefor, the relation between them in such case being in its nature a trust relation.

8. Pleading 🔑18, 19—Allegations that pledgor received no notice of sale of pledged stock were not subject to demurrer either for uncertainty or ambiguity.

Allegations of complaint for conversion by reason of sale of stock pledged to secure loan, to effect that plaintiff received no notice of sale, were not subject to demurrer either for uncertainty or ambiguity.

9. Pleading 🔑11—Whether agreement as to notice before sale of pledged stock was oral or written was matter of evidence and not of pleading.

Whether agreement between pledgor and pledgee relative to notice before sale of pledged stock was oral or written was matter of evidence and not of pleading, and it was unnecessary to allege such fact.

10. Corporations 🔑123(14)—Additional consideration for pledgee's promise to give actual notice of sale of property was unnecessary.

Additional consideration for pledgee's promise to give actual notice of sale of stock pledged to secure loan was unnecessary, in view of allegations that such promise was part of original agreement and supported by same consideration.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by C. S. Baird against Joseph C. Olsheski. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Clarence E. Todd, of San Francisco, for appellant.

Otto G. Kuklinski, of San Francisco (Jack A. Seaman, of San Francisco, of counsel), for respondent.

PER CURIAM. A demurrer by respondent to the second amended complaint filed in the above action was sustained with leave to amend. The plaintiff having failed to amend, a judgment, from which he has appealed, was entered against him.

[1, 2] The suit was for the conversion of certain corporate stock. The complaint set up three causes of action, to each of which a demurrer, both general and special, was interposed. The first cause of action alleged that plaintiff, on November 25, 1925, was the owner and lawfully possessed of stock, and "that on or about said last mentioned date the defendants unlawfully took and carried away said stock and have converted and disposed of the same to their own use to the damage of plaintiff in the sum of $1,000.

* * *" As the special ground of demurrer to this cause of action it was alleged that it could not be ascertained therefrom "in what respects defendant unlawfully took or carried away the said stock or converted and disposed of the same." As stated by respondent, the words wrongfully and unlawfully, when used in connection with issuable facts, are surplusage (21 Cal. Jur. [Pleading] § 16, p. 32), and it is not sufficient in an action for conversion to allege merely that the defendant unlawfully took the property. Triscony v. Orr, 49 Cal. 612. As held in Hutchings v. Castle, 48 Cal. 152, no particular form of words is essential in averring a conversion, provided the fact of the conversion is sufficiently stated, and it is unnecessary to set forth in what way or by what means the conversion was accomplished (Daggett v. Gray, 110 Cal. 169, 42 P. 568; 25 Standard Encyclopedia of Procedure [Trover and Conversion] pp. 38, 39), or to allege that the property was wrongfully or unlawfully converted, since the allegation that it was converted, which is a conclusion of fact (31 Cyc. [Pleading] p. 54; Duggan v. Wright, 157 Mass. 228, 32 N. E. 159; Wells v. Connable, 138 Mass. 513), implies a wrongful act (Reish v. Reynolds, 68 Ind. 561; Cordill v. Minnesota Elevator Co., 89 Minn. 442, 95 N. W. 306; Nance v. Georgia C. & N. Ry. Co., 35 S. C. 307, 14 S. E. 629; McCarthy v. Heiselman, 140 App. Div. 240, 125 N. Y. S. 13; Barnett, etc., Co. v. Jarrett, 133 Ark. 173, 202 S. W. 474; Hooser v. G. M. Carlton, etc., Co. [Tex. Civ. App.] 288 S. W. 1095).

[3] The rule appears to be well settled that, if plaintiff's ownership of the property is properly alleged, and there is an averment that the defendant converted the same, a cause of action is sufficiently stated (26 Ruling Case Law [Trover] § 39, pp. 1129, 1130). Respondent contends that, while a pleading containing the above allegations is sufficient as against a general demurrer, such is not the rule when a special demurrer is filed. Intimations to that effect appear in Daggett v. Gray, supra, and Florence v. Helms, 136 Cal. 613, 69 P. 429, but an examination of these cases shows that the excerpts quoted by counsel were in each case unnecessary to the decision. Moreover, the special demurrer in the present case was not directed to a material allegation of the complaint, but to the allegation that the taking was unlawful, which, as stated, is surplusage.

As a second cause of action, it was averred that appellant pledged the above stock, which was of the value of $1,000, to respondent, to secure the payment to him of $500 with interest; that respondent, without the knowledge or consent of appellant, thereafter surrendered the possession of the stock to one Crapuchettes, who at no time had an interest in the loan or the pledge agreement mentioned, and thereby placed the property beyond his power to redeliver upon the payment of the loan; that the amount of the loan, with interest, was thereafter paid to respondent, and demand made upon him for the return of the stock, which was refused, to the damage of plaintiff in the sum of $1,000. The demurrer to the above was both general and special, the latter grounds being as follows: "That it cannot be ascertained * * * in what respects the alleged delivery or surrender of the possession and custody of the pledge was unlawful or damaged plaintiff; that it does not appear in said alleged cause of action when the plaintiff paid defendant the amount of said loan or interest, or when he demanded the return of said pledge; whether plaintiff claims that he offered to pay or paid defendant before the alleged surrender of the possession and custody of said pledge by defendant to said Leon P. Crapuchettes."

[4] The surrender of the pledge to Crapuchettes was not alleged to have been unlawful, nor was it the foundation of appellant's claim for damages. It was not material to a statement of his cause of action, the gravamen of which was the alleged failure of respondent to return the pledge upon demand after the payment of the loan with interest. The allegation was but a matter of inducement, and might have been omitted without impairing the sufficiency of the pleading. Consequently it was not subject to a demurrer for uncertainty, but to a motion to strike. Kraner v. Halsey, 82 Cal. 209, 22 P. 1137; Henke v. Eureka Endowment Association, 100 Cal. 429, 34 P. 1089.

[5] We find no merit in the further objection that the complaint failed to allege with certainty or at all whether payment was made or offered before or after the surrender of the stock to Crapuchettes, the fact of the surrender not being material, but the alleged payment and demand and the dates when the same were claimed to have been made were material facts, and the time of the occurrence of such facts must be stated with certainty; otherwise a complaint is demurrable. Wise v. Hogan Co., 2 Cal. Unrep. 893, 18 P. 784; Kraner v. Halsey, supra; Williamson v. Joyce, 137 Cal. 151, 69 P. 980; 21 Cal. Jur. (Pleading) § 23, p. 42. For the above reasons the demurrer to the second cause of action was properly sustained.

[6, 7] As a third cause of action it was alleged that the stock of the above value was pledged to defendant to secure a loan of $500 evidenced by a promissory note; that, as part of the contract, and for the same consideration, it was agreed that defendant should take no action to recover the debt before a sale of the pledge, after such actual notice to plaintiff of the time and place of sale as would be reasonably sufficient to enable him to attend. The defendant, contrary to the agreement, brought suit on the note, secured a judgment by default, and thereafter, "with-

out notice to plaintiff as provided by law or otherwise and without the knowledge of plaintiff," caused execution to be levied and the stock sold. It was further alleged that defendant purchased the same at the execution sale; that the amount of the loan and the judgment were thereafter paid by the plaintiff, and a demand made for the return of the stock, which was refused, all to his damage in the above amount. That the parties might stipulate as to the notice to be given before a sale of the pledge, such agreement not being fraudulent and against statute or public policy is well settled. Hunter v. Hamilton, 52 Kan. 195, 34 P. 782; Dunbar v. Commercial Electrical, etc., Co., 32 Okl. 634, 123 P. 417; Travelers' Ins. Co. v. Lazenby, 16 Ala. App. 549, 80 So. 25, 28; Jones, Pledges and Collateral Securities (2d Ed.) § 730. The relation between them in such a case is in its nature a trust relation (Hudgens v. Chamberlain, 161 Cal. 710, 120 P. 422); and, if the sale as made by the pledgee is not authorized, the pledgor may regard it as a conversion and recover damages therefor (Cushing v. Building Association, etc., 165 Cal. 731, 134 P. 324; 21 R. C. L. [Pledge] § 52, p. 691).

[8-10] The special objections to the above pleadings were in substance that it could not be ascertained therefrom in what respect the levy of execution and the sale of the stock was made "without notice to plaintiff as provided by law or otherwise"; whether the alleged agreement was in writing, or what additional consideration the defendant received therefor. The effect of the allegations of the complaint was that the plaintiff received no notice of sale, and these allegations were not subject to a demurrer either for uncertainty or ambiguity. Whether the agreement was oral or written was a matter of evidence and not of pleading, and it was unnecessary to allege the fact (Bradford Investment Co. v. Joost, 117 Cal. 204, 48 P. 1083; 12 Cal. Jur. [Statute of Frauds] § 107, p. 938); nor was an additional consideration for defendant's promise to give actual notice of the sale necessary, it being alleged that this promise was a part of the original agreement and supported by the same consideration.

While it is the rule, upon an appeal from a judgment rendered after refusal to amend a complaint to which a general and special demurrer has been sustained, to construe all ambiguities and uncertainties found in the pleading against the pleader, in the present case it is our conclusion that the first and third causes of action were not subject to demurrer on any of the grounds urged by the defendant, and that the demurrer thereto should have been overruled.

The judgment is accordingly reversed, with directions to the trial court to overrule the demurrer to the first and third causes of action, and permit the defendant to answer the same within ten days after notice.

LE BRUN et ux. v. RICHARDS. (Civ. 5633.)★

District Court of Appeal, Second District, Division 2, California. Dec. 6, 1929.

Rehearing Denied Jan. 4, 1930. Hearing Granted by Supreme Court Feb. 3, 1930.

1. Waters and water courses 🔑118, 119(1)—Owner of dominant estate has natural easement to discharge surface waters over land of servient owner; servient owner is liable for obstructions causing water to back up or remain on upper proprietor's land.

Owner of dominant estate has legal and natural easement in servient estate to discharge all surface waters naturally falling or accumulating on his land on or over land of servient owner in manner in which it would naturally flow from a higher to a lower level, and owner of lower estate is answerable in damages for any injury which may be caused to upper estate by reason of obstructions which he has placed in the way of such natural flow, causing it to back up or remain on land of upper proprietor.

2. Waters and water courses 🔑116—One may protect himself against flood waters notwithstanding barriers erected may cause floods to rise higher or flow with greater force on neighbor's land.

Flood waters are regarded as a common enemy, against which every man has a right to defend himself, regardless of fact that barriers erected for protection of his land may cause floods to rise higher or flow with greater force on his neighbor's land.

3. Waters and water courses 🔑115—"Flood waters" are waters escaping from stream or other body of water and overflowing adjacent territory.

"Flood waters" are those which escape from a stream or other body of water and overflow adjacent territory.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Flood Water.]

4. Waters and water courses 🔑115—"Surface waters" are produced by rainfall, melting snow, or springs.

"Surface waters" are those which are produced by rainfall, melting snow, or springs, and such waters are not divested of their character as surface waters by reason of their flowing from land on which they first made their appearance onto lower land in obedience to law of gravity.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Surface Water.]

5. Waters and water courses 🔑119(2)—Upper proprietor may not divert surface waters by artificial means to lower proprietor's land; his right being limited to disposition of water through natural channels.

Upper proprietor may not by artificial means divert surface waters on his own land to lands of lower proprietor, nor may he accelerate by

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★Hearing granted. 291 P. 825.

means of ditches or increase drainage of his own land to injury of lower owner, but his right is limited to disposition of the water through chosen channels of nature.

6. Waters and water courses ⇨115—Water coming on plaintiffs' property because of street and other improvements held "surface water," and lower owner was liable to plaintiff for obstructing flow thereof.

Where, when defendant constructed irrigation ditch, fence, and embankment near plaintiffs' higher land, such improvements did not affect flow of surface waters detrimental to plaintiffs, but thereafter, owing to improvement of upper land by streets and other structures, surface waters which previously had flowed to either side of plaintiffs' and defendant's lands were thrown on plaintiffs' land, and defendant's ditch was inadequate to carry off torrent of water, and his embankment and fence obstructed its further progress and caused it to overflow plaintiffs' property, *held* that water so coming on plaintiffs' property was "surface water," and defendant was liable in damages for obstructing its flow across his property.

7. Waters and water courses ⇨118—"Natural," used respecting flow of surface waters, has no necessary relation to course taken by flow prior to alteration of terrain by works of man or operation of nature.

The term "natural," as applied to course taken by surface water which lower proprietor must receive on his land, does not mean "original," and has no necessary relation to contour of terrain or to course taken by flow prior to alteration of either by works of man or by operation of forces of nature, but has reference to that course which would be taken by such waters falling or rising on land of upper proprietor or carried thereto from still higher land and flowing or running therefrom on lands of lower proprietor undiverted, and unaccelerated by any interference therewith by upper proprietor.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Natural.]

8. Waters and water courses ⇨118—That lower proprietor might have relief against those causing diversion of surface water held not to relieve him of liability to upper owner for obstructing such flow.

That defendant lower proprietor might have relief against those who caused original diversion of surface water so as to flow on his land, did not relieve him from liability to plaintiff upper proprietor for erecting obstructions to flow of such water and causing it to back up on plaintiff's land.

9. Waters and water courses ⇨125—Measure of damages for obstructing natural flow of surface water, causing it to overflow upper owner's land, is difference in market value of land before and after injury.

Correct measure of damages for obstructing natural flow of surface water and causing it to back up and overflow upper owner's land, is difference, if any, in market value before and immediately after injury, not cost of repairing damages caused thereby.

10. Evidence ⇨474(18)—Rule permitting nonexpert to testify as to value of his property does not permit testimony respecting cost of repairs.

An owner of property may, without being qualified as an expert on values, testify as to his opinion of value of that which he owns, but this rule does not extend to the giving of testimony as to cost of repairs, especially where such testimony is merely a repetition of statements of other persons.

11. Waters and water courses ⇨125—$1,000 for damages caused by obstructing flow of surface waters held not excessive under evidence.

In action for damages to realty caused by lower owner's obstructing natural flow of surface water causing it to back up on upper owner's land, award of $1,000 damages to upper owner *held*, under the evidence, not excessive.

12. Appeal and error ⇨1013—Damages for discomfort and annoyance must be left to trial court's sound discretion after consideration of evidence.

Amount of damages to be allowed for discomfort and annoyance caused by a wrongful act is not susceptible of proof, but must be left to trial court's sound discretion, to be ascertained and adjudged after consideration of all the facts and circumstances established by evidence.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Percy A. Le Brun and wife against R. J. Richards. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hearing granted by Supreme Court; LANGDON and SEAWELL, JJ., dissenting.

E. R. Young and Harlow Hurley, both of Los Angeles, for appellant.

E. A. Lane and Victor T. Watkins, both of Los Angeles, for respondents.

BURNELL, Justice pro tem. There is no dispute as to the facts of this case, which may be summarized as follows:

The plaintiffs, respondents here, are the owners of a parcel of land located at the south end of Vancouver avenue, on the westerly side of the street. Vancouver avenue extends in a southerly direction from Whittier boulevard, the latter running easterly and westerly. Both streets and all of the territory referred to in the evidence and findings are in Los Angeles county, outside of the boundaries of any incorporated city. Defendant-appellant owns a tract of land east of Vancouver avenue and south of the termination of that street; his property abutting that of the plaintiffs to the east and south and lying at a lower level. The general slope of the land south of Whittier boulevard, and also to the north of that thoroughfare, is from north to south. Prior to the making of certain improvements presently to be described, the storm and surface waters falling upon the lands north of Whittier boulevard, to quote the language of the court's findings, "flowed in two natural and well-defined channels, which channels were of the character of depressions or swales and diverged from a common point several thousand feet northerly of Whittier boulevard, and ran, one in a southeasterly, and one in a southwesterly direction, and entered Whittier boulevard at a point several thousand feet easterly and at a point several hundred feet westerly of plaintiffs' property and drained in a southerly direction therefrom without flowing over or upon the property of the plaintiffs or of the defendant." In May, 1922, prior to the laying out of Vancouver avenue, and also prior to the improvements referred to, the defendant constructed an irrigating ditch with earth embankments and a wire fence along the northerly side of his land and within a few feet of the south line of the plaintiffs' property. In 1924 the county of Los Angeles graded and paved Whittier boulevard, and since this improvement its elevation at a point about 1,500 feet westerly of Vancouver avenue is approximately 1¼ feet higher than at Vancouver avenue, while its elevation at a point about 1,800 feet easterly of Vancouver avenue is over a foot higher than at Vancouver avenue. The lowest point, however, on Whittier boulevard between these points, is at Victoria, formerly known as Clela avenue, the street immediately west of Vancouver, and, like the latter, running south a short distance from Whittier. At about the same time that Whittier boulevard was being improved, a large area of land lying north of it, and extending for several thousand feet both easterly and westerly of Vancouver avenue, and which had in former years been used for grazing and later on for agricultural purposes, was subdivided and platted, and a large number of streets laid out thereon and graded and paved; the northerly ends of the north and south running streets being over 30 feet higher than the elevation of Whittier boulevard at its several points of intersection with the southerly termini of said streets. The court found: "That the grading and paving of said streets north of Whittier boulevard, resulted in the filling up and closing of said natural drainage channels north of Whittier boulevard and the storm and surface waters which formerly flowed across Whittier boulevard easterly of plaintiffs' property were diverted into Whittier boulevard at a point several hundred feet westerly of its natural channel and water that formerly crossed Whittier boulevard westerly of plaintiffs' property was diverted into Whittier boulevard at a point several hundred feet easterly of its natural channel and to a point several hundred feet easterly from where it usually flowed and crossed Whittier boulevard; that due to the graded and paved condition of said last mentioned streets, the natural flow of storm and surface water falling on those lands and the lands northerly thereof has been greatly accelerated with the result that during the rainy seasons of the year storm and surface waters flow in a southerly direction over and along said last mentioned streets to Whittier boulevard." The result of the change in the grade of Whittier boulevard, together with the improvement of that thoroughfare and of the land north of it as above-described, has been to cause this accelerated flow of storm and surface water thus brought onto Whittier boulevard to escape therefrom at the low points and thus to flow down Vancouver and Victoria avenues, to some extent onto the land of plaintiffs, and if not diverted, across the land of the defendant.

It is apparent from the evidence (nor is there any contention to the contrary) that the construction of the ditch, embankment, and fence by the defendant did not in any way detrimental to the plaintiffs, affect the flow of the surface or storm waters under the conditions which obtained at the time of their construction or until the completion of the various improvements above referred to. But in 1925, and after conditions had been changed as described in the portion of the findings from which we have quoted, there was a heavy fall of rain, and the water which poured into Whittier boulevard flowed south therefrom in Vancouver avenue "just like a river," as one witness expressed it. Defendant's ditch was utterly inadequate to the task of carrying off this torrent of water, and his embankment and fence presented an obstacle to its further southerly progress, and caused it to back up and to overflow plaintiffs' property, thereby causing considerable damage thereto. There was a recurrence of these conditions in 1926.

The appellant denies liability for the damage caused to respondents' property, and seeks a reversal of the judgment upon the theory that, as a matter of law, he was not required to receive surface waters in greater quantities or in a different manner than would occur under conditions such as existed prior to the improvements referred to and the consequent interference with the flow of such waters and the diversion and concentration thereof onto his property. Stated in different words, his contention is that he had a right to protect his property from the onslaught of waters which, under natural conditions, would not have been precipitated thereon.

[1, 2] It is thoroughly settled in California that the owner of the upper or dominant estate has a legal and natural easement or servitude in the lower or servient estate to discharge all surface waters naturally falling or accumulating on his land, upon or over the land of the servient owner in the manner in which they would naturally flow from a higher to a lower level, and that the owner of the lower estate is answerable in damages for any injury which may be caused to the upper estate by reason of obstructions which he has placed in the way of such natural flow, thus causing it to back up or remain on the land of the upper proprietor. Jaxon v. Clapp, 45 Cal. App. 214, 187 P. 69, 70; Board of Trustees v. Rodley, 38 Cal. App. 563, 177 P. 175, 176; Ogburn v. Conner, 46 Cal. 347, 13 Am. Rep. 213. In Heier v. Krull, 160 Cal. 441, 117 P. 530, 531, which is regarded as a leading case on the subject of surface waters, the rule is stated as follows: "Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. From these rights and burdens, the principle follows that he has a lawful right to complain of others, who, by interfering with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions. This is the settled law of this state." In support of the above statement, the court cites a long array of earlier decisions.

On the other hand, a different rule applies in the case of flood waters. Such waters are regarded as "a common enemy, against which every man has a right to defend himself, regardless of the fact that the barriers he erects for the protection of his land may cause the flood to rise higher, or flow with greater force upon his neighbor." McDaniel v. Cummings, 83 Cal. 515, 23 P. 795, 797, 8 L. R. A. 575. This rule has been enunciated and applied in a number of cases, among which may be mentioned Lamb v. Reclamation District, 73 Cal. 125, 14 P. 625, 2 Am. St. Rep. 775; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 99, 89 Am. St. Rep. 169; Gray v. Reclamation District, 174 Cal. 622, 163 P. 1024; and Horton v. Goodenough, 184 Cal. 455, 194 P. 34, 35. A concise statement of the rules relating to the right to protect one's property from damage by water is found in the case last cited: "First, one has no right to obstruct the flow on to his land of what are technically known as surface waters. Heier v. Krull, 160 Cal. 441, and authorities therein cited at page 444, 117 P. 530, [531]. But by 'surface waters' are not meant any waters which may be on or moving across the surface of the land without being collected into a natural water course. They are confined to waters falling on the land by precipitation or rising thereon in springs. Putting it conversely, they do not include waters flowing out of a natural water course, but which yet were once a part of a stream and have escaped from it, 'flood waters' in other words. * * * Second, one has the right to protect himself against 'flood waters,' that is, waters of the character last described, and for that purpose to obstruct their flow on to his land, and this even though such obstruction causes the water to flow on to the land of another. * * * Third, one may not obstruct or divert the flow of a natural water course. But by a 'water course' is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow."

[3-5] In view of the different rules applicable in the respective cases of flood and surface waters, it is important that the nature of the waters involved in the present case be ascertained. Flood waters are those which escape from a stream or other body of water and overflow the adjacent territory. McDaniel v. Cummings, supra; Gray v. Reclamation District, supra; Horton v. Goodenough, supra. Surface waters are those which are produced by rainfall, melting snow, or springs, and which in the case of the two first-mentioned sources are precipitated, and in the case of the last-mentioned source, rise upon the land. See cases cited supra. Such waters are not divested of their character as surface waters by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity. It is waters of this character that the lower or servient estate is bound to receive from the upper or dominant estate and the flow of which he may not obstruct to the detriment of the upper proprietor, provided their flow is a natural one. The upper proprietor may not divert by artificial means the surface waters upon his own lands to the lands of the lower proprietor, nor may he accelerate by means of ditches or increase the drainage of his own land to the injury of the lower owner. His right "is limited to the disposition of the water through the chosen channels of nature." Board of Trustees v. Rodley, supra.

[6] Tested by these definitions, it is evident that the water which came into Vancouver avenue from Whittier boulevard and hence onto the land of the plaintiffs, and the escape of which over the lands of defendant was prevented by the obstructions maintained by him, was surface water, caused by the rainfall on the land north of Whittier boulevard.

[7] It is significant that all of the decisions which state and apply the rule as to the duty of the lower proprietor to receive the surface waters flowing from the land of the upper proprietor relate to the *natural* flow thereof. Thus Heier v. Krull, supra, states the rule as follows: "Every landowner * * * has a lawful right to complain of others, who, by interfering with *natural* conditions, caused such surface water to be discharged in greater quantity or in a different manner upon his land than would occur under natural condi-

tions,"—while in Jaxon v. Clapp, supra, it is enunciated: "The general rule is that where two adjacent parcels of land belong to different owners, one being lower than the other, and the surface water from the higher tract has been accustomed by a *natural* flow to pass over the lower tract, the owner of the higher land has an easement by virtue of which storm waters from such land may be permitted to flow onto the lower tract, which latter is charged with a corresponding servitude." And in Sanguinetti v. Pock, supra, the court said: "It is settled law in this state that plaintiff, as the owner of the upper land, has an easement over the lower adjacent land of defendant to discharge surface water *as it is accustomed naturally to flow*, and defendant had no right to interrupt such *natural* flow to plaintiff's injury." (Italics ours.) See, also, Board of Trustees v. Rodley, supra, and Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400. The court below found, as stated in the résumé of the facts at the beginning of this opinion, that the natural flow of the surface waters from the land north of Whittier boulevard, prior to the work done by the county on that street and to the subdivision and improvement of that territory was not onto or over the land of either of the parties to this action, but was across Whittier boulevard at points "several thousand feet easterly and * * * several hundred feet westerly of plaintiffs' property." It is contended by appellant that it was not the *natural* flow of the waters which he obstructed, but rather an *unnatural* flow caused by the interposition of forces set in motion by those whose grading, leveling, paving, and other works of improvement operated to divert the former course of the waters and caused them to find a new channel which carried them down Vancouver avenue and onto the land of the plaintiffs, and which, except for the obstructions, would have caused them to flow therefrom over the lands of the defendant. He argues that because of this fact the "common enemy" rule applicable to flood waters should be applied rather than the surface water rule. The fallacy of this argument is based upon a misconception of the meaning of the word "natural" as applied to the course taken by the run-off of surface water. It does not mean "original"; it has no necessary relation to the contour of the terrain or to the course taken by the flow prior to any alteration of either by the works of man or by changes due to the operation of the forces of nature. As the word is used in the discussion of questions relating to the reciprocal rights and duties of upper and lower proprietors with respect to surface waters, it has reference to that course which would be taken by such waters falling (or, in the case of springs, rising) on the land of the upper proprietor, or carried thereto from still higher land, and flowing or running therefrom onto the lands of the lower proprietor undiverted and unaccelerated by any interference therewith by the upper proprietor. As said in Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143, 145, "We may therefore construe the term 'natural channel' as including all channels through which, in the existing condition of the country, the water naturally flows;" and again, "For, by the necessarily great changes that must occur in the conformation of the country in the building of a city, the natural channels for the surface water are changed; and as the changes in the ground are inevitable and legitimate, and therefore natural, the new channels, through which, under natural laws, the surface waters are discharged, must also be regarded as natural."

If, then, surface waters which had formerly been carried off in a direction which took them to the right and to the left of plaintiffs' land without entering thereon were, by reason of the diversion thereof consequent upon the changed conformation of the country brought about by the making of the improvements hereinbefore described, cast upon plaintiffs' property, it was still the duty of the lower proprietor to receive such waters naturally flowing from plaintiffs' land onto his, provided, of course, that their flow was neither accelerated, diverted, or concentrated by any act of the plaintiffs. The rule as above stated is well illustrated in the case of Thomson v. La Fetra, 180 Cal. 771, 183 P. 152, 153, in which it was held that the "common enemy" rule applicable to flood waters cannot be invoked in favor of landowners who, to prevent injury to their lands from seasonal waters flowing from a cañon, erected an obstruction which turned the water onto the land of their neighbors, "since, the water not being in any sense flood water, the changing of its course and casting it upon other lands amounted to a trespass." The court there said: "The rule applicable to waters which are a 'common enemy' cannot be invoked under the facts of this case. That rule has application only to flood waters in the strict sense, that is to say, to waters escaping because of their height from the confinement of a stream and running over the adjacent country. The waters here involved are not of that sort. The water not being in any sense flood water, the defendants, by changing its course and casting it upon the lands of the plaintiff, were guilty of a trespass. The fact that the water may have threatened injury to the defendants affords no justification or excuse to palliate the wrong done. If the injury threatened to the defendants' lands was the result of wrongful artificial changes made by upper proprietors, resulting in an increased, accelerated, or concentrated flow of water upon and across the lands of the defendants, their remedy was to proceed by appropriate action against the wrongdoers to enjoin such changes or to have the nuisance abated, and not by an attempt to shift the burden of the wrong upon an innocent third party who but for their intervening willful act would have suffered no injury at all."

[8] That the defendant might have had relief as against those who caused the original diversion of the water is well established by such cases as Conniff v. San Francisco, 67 Cal. 45, 7 P. 41, Los Angeles Cemetery Association v. Los Angeles, 103 Cal. 461, 37 P. 375, and Larrabee v. Cloverdale, supra. If, instead of pursuing the remedies available to him as against those whose acts were the proximate cause of the danger to his property he chose to protect it at the expense of his neighbor, he must answer for the injury he has thus done to the latter.

[9-11] Appellant's second point is that the judgment in the sum of $1,000 which was awarded plaintiffs in the court below "is excessive, and contrary to the evidence and not supported by admissible testimony." As to the amount of damages suffered by the plaintiffs, the case was apparently tried by both parties upon the theory that the proper measure of damages was the cost of repair, whereas the correct rule is that the measure of damages for injuries to real property is the difference, if any, in its market value before and immediately after the injury. Perkins v. Blauth, 163 Cal. 782, 127 P. 50. No point is made as to the admission of evidence of repair cost as such; the sole contention being that the testimony of Mr. Le Brun, one of the plaintiffs, should not have been considered by the court in arriving at the amount of the damage, because cross-examination revealed the fact that he was not an expert contractor and that his figures were based largely upon estimates furnished him by others. His testimony was that the cost of repairing the house would be $800; that he had replanted shrubbery washed out or destroyed by the water, at a cost of $25, and replaced gravel washed from the driveway at a cost of $20; that the work done by himself in replacing the lawn washed away amounted to $64—making a total sum of $909. As to the $800 item, we are of opinion that appellant's point is well taken. An owner of property may, without being qualified as an expert on values, testify as to his opinion of the value of that which he owns. Hood v. Bekins Van & Storage Co., 178 Cal. 150, 172 P. 594; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286. This rule, however, does not extend to the giving of testimony as to the cost of repairs, especially where such testimony is merely a repetition of the statements of other persons to the witness. But, if the testimony of Le Brun as to the cost of repairs to the house be eliminated from consideration, there is still left his undisputed testimony as to the other items, totaling $109, and there is also the testimony of witness Mongey, a carpenter, contractor, and builder of many years' experience, who testified that he had made an examination of the building for the purpose of making an estimate of the cost of repair and that it would be $750. The total amount testified to by Le Brun, exclusive of repairs to the house, added to the figure given by Mongey as the cost of such repairs makes a grand total of $859, or $141 less than the amount awarded. Appellant further urges that, even if the cost of repair as testified to by Mongey and Le Brun be deemed established, there is still a lack of evidence to support the finding of $1,000 damages. But, besides the items of damage above mentioned, there was evidence that during 1925 the plaintiffs were compelled to move out of their house on several different occasions, and to remain away from it for periods aggregating about a month in all, and that the same thing occurred again in 1926. According to the undisputed testimony of Le Brun, the rental value of the house was $35 or $40 per month. This deprivation of use would add at least $70 to the financial damage proven. Taking into consideration the actual discomfort and annoyance suffered by the plaintiffs, it would seem that the $71 allowed by the trial court in addition to the actual money loss proven was, to say the least, far from excessive.

[12] As to this element of damages the amount of compensation in dollars and cents is of course not susceptible of proof, it must be left to the sound discretion of the trial court, to be ascertained and adjudged after consideration of all the facts and circumstances established by the evidence in the case. As was said in Dauberman v. Grant, 198 Cal. 586, 246 P. 319, 321, 48 A. L. R. 1244: "It was not necessary to the recovery of damages caused by the nuisance of smoke and soot to prove actual damage to plaintiff's property. She was entitled to recover for the personal discomfort and annoyance to which she had been subjected, and it was a question for the trial court to determine the amount of the compensation which she should receive." To the same point are the decisions in Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247, and Tuebner v. California Street Ry. Co., 66 Cal. 186, 4 P. 1162.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

102 Cal. App. 365

NEWS PUB. CO. v. GUARDIAN THRIFT CO. OF SUSANVILLE. (Civ. 3830.)

District Court of Appeal, Third District, California. Dec. 5, 1929.

1. Principal and agent 🔑123(7)—Evidence in action on accounts stated held insufficient to show ostensible authority in third party to bind defendant (Civ. Code, § 2317).

In action on accounts stated for price of printed forms, evidence showing defendant did nothing prior to giving of order and receipt of supplies to cause plaintiff to believe that third party had authority to bind it *held* insufficient to show ostensible authority in third party to bind defendant as defined by Civ. Code, § 2317.

2. Corporations 🔑448(2)—Corporation's using supplies under belief they were furnished by promoter in accordance with agreement held not ratification of promoter's unauthorized act in purchasing supplies for account of corporation.

Where corporation used supplies under belief that they were being furnished by promoter in accordance with his agreement and had no knowledge of unauthorized act in purchasing supplies for account of corporation, use of supplies *held* not to constitute ratification of promoter's unauthorized act.

3. Corporations 🔑448(1)—Promoter's acts prior to existence of corporation are not binding upon it, unless made so by act of incorporation or adopted by corporation.

Acts of promoters of corporation performed prior to existence of corporation are not binding upon it, unless made so by act under which incorporation took place or adopted by corporation after it comes into existence.

4. Accounts stated 🔑19(3)—Evidence in action on account stated held sufficient to support finding that there was not an account stated between parties.

In action on account stated, evidence *held* sufficient to support finding that there was not an account stated between parties.

5. Accounts stated 🔑3—Account stated requires that there be acknowledgment of previous indebtedness.

An account stated requires that there be an acknowledgment of a previous indebtedness, since such indebtedness constitutes consideration upon which new contract is based.

Appeal from Superior Court, Lassen County; J. O. Moncur, Judge.

Action by the News Publishing Company against the Guardian Thrift Company of Susanville. Judgment for defendant, and plaintiff appeals. Affirmed.

R. M. Hardy, of Susanville, for appellant.

J. E. Pardee, of Susanville, and G. C. Julian, of Sacramento, for respondent.

FINCH, P. J. The plaintiff brought this action to recover the amount alleged to be due on several stated accounts. Judgment was entered in favor of the defendant, and the plaintiff has appealed.

There is little conflict in the evidence. Where it is conflicting, only the evidence which supports the findings and judgment will be stated. It appears that W. H. Tobin was engaged in promoting the organization of industrial loan corporations known as Guardian Thrift Companies. During the months of September and October, 1926, he was promoting the organization of such a corporation under the name of the Guardian Thrift Company of Susanville. About the middle of October, his stepson, G. B. Daniel, gave the plaintiff an order for printed forms for the defendant. The name "Guardian Thrift Company of Susanville" was not printed in any of the forms except the stock certificate book. The name printed in the other forms was "Guardian Thrift Company of ———." It does not appear by what authority Daniel placed the order for these forms, but he was not authorized to act for the defendant. November 6, 1926, Tobin made a written offer, directed to the "Organization Committee, Guardian Thrift Company, Susanville, California," in which he stated:

"As you are about to engage in the industrial loan business in Susanville, I take occasion to address you as follows:

"I own and control certain plans, designs, forms, working sheets and other data, especially adapted to the conduct and operation of the business in which you propose to engage. These plans, etc., are generally known as the Guardian Plan, and I make the following proposition:

"I will give you the full and exclusive use, for Lassen County, California, during your charter existence of all these said plans, designs, forms, etc., and all other data under my control, necessary for the proper conduct of your business. I will supply you, without expense to you, all forms, designs, plans, etc., in sufficient quantity to operate your company for the first twelve months. Thereafter said supplies will be furnished to you at net cost to me.

"I will furnish competent instructors to teach your employes how to properly handle and conduct your business in all its details; such instructors to be furnished at my expense and to remain without cost to your company until your employes are thoroughly competent to carry on the work.

"I will give you the supervision and advice, when requested and as hereinafter provided, without expense to you, as follows: I will furnish you with audits every three months from the date you begin business, for the period of one year, and thereafter, at your request, at the cost to me for said service. * * *

"In full remuneration for the above mentioned services and concessions, you shall constitute me as the fiscal agent for the sale of all the capital stock of your company and pay me twenty per cent of the selling price of the stock, payable as and when said stock is sold."

The offer was accepted by the "Organization Committee of the Guardian Thrift Company of Susanville" on the same day it was made. The defendant was incorporated November 10, 1926. Daniel went to Susanville some time in November to instruct J. B. Christie, the defendant's secretary and manager. The defendant received a permit to sell stock on November 30, and on December 2 it "opened the doors for business." Only a part of the printed forms were delivered; the remainder thereof being kept by the plaintiff for future delivery at Daniel's direction. The forms which were delivered "were received at the office of the (defendant) company either by Mr. Daniel or Mr. Tobin at some time, and probably * * * about the 6th or 7th of November," and "after the company was organized and went into operation those forms were used by the company." Daniel "never was an employee of the company. * * * He was the party that was furnished by Mr. Tobin under his contract to instruct Mr. Christie." He remained in the defendant's office almost constantly for three or four months. He instructed Christie "in the handling of the business of the office," and "in a general way" he and Christie "conducted the business of the office," including "the receipt and handling and answering of mail." Daniel "said he was supposed to be an auditor for his company." Among the things furnished by the plaintiff under Daniel's said order was a "binder for form 10." The defendant paid for it on the ground that it was not one of the things which Tobin had agreed to furnish. The plaintiff mailed bills to the defendant at Susanville, for parts of the forms printed, on November 17, 19, 23, and 29, and thereafter mailed statements of account twice a month during January and February, 1927. Thereafter the plaintiff received a letter, dated March 5, 1927, signed "Guardian Thrift Company, by C. B. Daniel," and stating: "In reply to your letter of the first instant. We regret the delay in cleaning up our account with you but you can be assured that same will be taken care of before the last of the present month."

The officers in charge of the defendant's business had no knowledge of the foregoing bills or statements or of the fact that Daniel had assumed to make the purchases for the defendant until early in April, 1927, after Tobin and Daniel had left, when a statement of account was received by the defendant. The defendant immediately informed the plaintiff that it was not liable for the payment of the account, but that "under our contract with Mr. Tobin, who promotes and organizes such companies as ours, he is to pay for all advertising, all printing and furnish all forms for the first year."

[1] There is not the slightest evidence to show that Daniel had actual authority to order the supplies in question for the defendant. Appellant contends that he had ostensible authority to so order them. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes, or allows a third person to believe the agent to possess." Civ. Code, § 2317; 1 Cal. Jur. 739. The defendant did nothing, prior to the giving of the order and its receipt of the supplies, to cause the plaintiff to believe that Daniel had authority to bind it. The claim of ostensible authority therefore is without support in the evidence.

[2] Defendant's use of the supplies, under the belief that they were being furnished by Tobin in accordance with his agreement, did not constitute a ratification of Daniel's unauthorized act; the defendant having no knowledge of such act. 1 Cal. Jur. 777.

[3] Appellant seems to contend that the defendant is bound by the acts of Tobin, the promoter of the organization. Neither the defendant nor the persons who subscribed for its capital stock authorized Tobin to order or purchase supplies for it, but he agreed to furnish supplies of the kind in question at his own expense. "Acts of promoters performed prior to the existence of the corporation are not binding upon the corporation, unless made so by the act under which the incorporation took place or adopted by the corporation after it comes into existence." Biggart v. Lewis, 183 Cal. 660, 667, 192 P. 437.

[4, 5] There is ample evidence to support the finding that there was not an account stated between the parties. There is a disputable presumption that the defendant received the statements of account mailed to it by the plaintiff, but the court was not bound to find in accordance with the presumption against positive evidence to the contrary. Neither was there a previous indebtedness. "An account stated requires that there be an acknowledgment of a previous indebtedness, since such indebtedness constitutes the consideration upon which the new contract is based." 1 Cal. Jur. 190.

The judgment is affirmed.

We concur: JAMISON, J. pro tem.; R. L. THOMPSON, J.

102 Cal. App. 178

JOHNSON v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

(Civ. 26.)

District Court of Appeal, Fourth District, California. Nov. 26, 1929.

1. Adoption ⚷6—Contract for adoption of child was not dependent on consideration by surrender of some right by aunt negotiating contract.

Contract negotiated by aunt relative to adoption of her nephew was primarily for benefit of child, who was the real party in interest, and was not dependent on consideration by the surrender of some right by aunt in agreeing to adoption.

2. Specific performance ⚷114(4)—Allegations as to performance of services under contract for adoption stated cause of action for recovery of portion of estate.

Allegations of complaint seeking recovery of portion of estate by reason of contract for adoption *held,* in so far as relating to performance of services, to state a cause of action, especially in view of possibility of amendment.

3. Equity ⚷44—Suit in equity was not exclusive remedy for recovery of portion of estate by reason of alleged agreement for adoption.

Suit in equity was not exclusive remedy for recovery of portion of estate by reason of alleged agreement of adoption by deceased, in that the claim is not adverse to estate but in privity therewith, and claim depends on ability to establish equitable status as adopted child.

4. Courts ⚷200¼—Probate court has power to pass on equitable issues involved in determining questions that may arise within its jurisdiction (Code Civ. Proc. §§ 1664, 1665).

Probate court has power to pass upon equitable issues involved in determining questions that may arise within its jurisdiction, in accordance with provisions of Code Civ. Proc. §§ 1664, 1665, giving it the power and duty to determine heirship, all interests, and all claims of interest in estate, if they are not adverse thereto.

5. Executors and administrators ⚷314(3)—Hearing on petition for distribution could not be delayed until determination of suit involving claim to estate, under alleged agreement for adoption.

Hearing in probate court on petition for distribution of estate could not be delayed until determination of suit in equity involving claim to portion of estate by reason of alleged agreement for adoption, regardless of filing of affidavit in probate court setting forth fact that such suit had been filed.

6. Executors and administrators ⚷314(3)—Probate court had duty of determining what persons were entitled to residue as to which deceased died intestate and to make distribution accordingly (Code Civ. Proc. § 1665).

Under Code Civ. Proc. § 1665, relating to distribution of residue of estate in hands of executor or administrator, probate court, where there was a residue in hands of executor as to which deceased died intestate, had duty of determining from evidence submitted at hearing for distribution what persons were entitled thereto, and to make distribution accordingly.

7. Mandamus ⚷31—Heir was entitled to writ of mandamus to require probate court to proceed to hear and pass upon petition for distribution.

Heir could maintain proceeding for writ of mandamus to require the superior court sitting in probate to proceed to hear and pass on petition for distribution of estate, in that refusal of trial court to hear matters involved in petition for distribution was a refusal to perform duty imposed upon it by law.

8. Mandamus ⚷26, 28—Mandamus cannot be used to interfere with proper exercise of discretion, but may be used to compel court to act within line of duty.

Writ of mandamus may not be used in any way to interfere with proper exercise of discretion in acting upon any matter before court, but may be used to compel a court to act in a matter within line of its duty.

9. Executors and administrators ⚷510(2)—Failure of probate court to act on petition for distribution did not authorize appeal (Code Civ. Proc. § 963).

Failure of superior court sitting in probate to act upon petition for distribution of estate did not authorize an appeal, under Code Civ. Proc. § 963, in that an order refusing to postpone a decree of final distribution is not appealable, nor is an order postponing the consideration of a petition for such a decree.

Original application for a writ of mandamus by Christian Johnson for himself and for and on behalf of the other heirs of Edward Johnson, deceased, against the Superior Court in and for San Diego County, and Hon. L. D. Jennings, Judge of Department 3 thereof. Writ granted.

W. J. Mossholder and Harrison G. Sloane, both of San Diego, for petitioner.

Hamilton, Lindley & Higgins, of San Diego, for respondents.

BARNARD, J. Original petition for writ of mandamus. This is a petition asking that a writ of mandamus be issued to compel the superior court of San Diego county and Hon. L. D. Jennings, judge thereof, to proceed to hear and pass upon a petition for distribution in an estate.

It appears from the petition and the answer and return thereto: That Edward Johnson died in September, 1927, leaving a will disposing of about one-half of his estate to various legatees, while, as to the other half of said estate, he died intestate, and that all proceedings in the regular course of probate were had and taken in said court, including the filing of a final account and petition for distribution, and the estate was fully ready to be closed, except as herein set forth. That in May, 1929, after the petition for distribution was filed, but before the same was heard, one Charles Erickson filed a complaint in the superior court of said county, which he denominates a complaint for specific performance and other equitable relief, and in which he alleges that he was born in Chicago, Ill., on May 26, 1873; that his father died in 1876, and his mother died in 1877, leaving him an orphan; that for some time prior to the death of his mother, and for a short time afterward, plaintiff was cared for by an aunt; that soon after the death of his mother, plaintiff, then an infant of about 4 years of age, was given by his aunt into the custody and control of the said Edward Johnson and his wife, who then and there agreed with the said aunt, in consideration of the surrender of plaintiff to their control and custody, and the release of all claims upon her part, that they would receive plaintiff into their home and legally adopt him as their own child, educate and maintain him, and give him the same rights and privileges as a natural child, including the right of inheritance; that pursuant to said agreement, plaintiff lived with the Johnsons as their son, and for many years was known, and is still known to many people, as Charles Johnson; that, until he grew to young manhood, plaintiff rendered unto the said Johnsons all the duties and devotion due parents from their children, and was in all respects treated as their natural son; that he was led to believe, and did believe, he was their legally adopted son; that, because of this belief, after he reached the age of maturity, he rendered to them the duties and obligations of a son to his parents; that he has fully performed the contract made on his behalf by his said aunt, but that no legal steps have ever been taken to adopt him according to law; that, after paying all bequests under the will of said Edward Johnson, and all costs and expense of administration, there remains a residue in cash and certain real property; that said Edward Johnson left neither issue, wife, father, or mother surviving him, but left a brother and sister and certain descendants of deceased brothers and sisters. Plaintiff prays that the agreement between the said Edward Johnson and the aunt of plaintiff be specifically enforced, and that he be adjudged to be the owner of all the property of Edward Johnson, deceased, remaining in the control of the executor and not disposed of by will; that the defendants be adjudged to hold the title thereof in trust for the plaintiff, and be required to convey to the plaintiff their several interests in said estate; that, in the event of their failure to do so, the clerk of the court be authorized to execute proper conveyances thereof; and that the executor be ordered to deliver to plaintiff all funds in his hands belonging to the estate; and that he be restrained from paying or delivering any of the funds or property of said estate to any of the defendants, pursuant to any decree of distribution which has been made, or which may be made. The executor is made a defendant, with allegations that, if not restrained, he will distribute and pay over to the other defendants the residue of said estate.

Before the decree of distribution in the estate of Edward Johnson came on for hearing, one of the attorneys for the said Charles Erickson filed, in the matter of said estate, an affidavit setting forth the fact that said suit by Charles Erickson had been filed; that the object of the action is to obtain a decree for specific performance of a contract of Edward Johnson, deceased, to adopt the plaintiff and to award that portion of the estate of deceased, amounting to approximately $40,000, to plaintiff; and that, until the determination of said action, no decree of distribution can be made in this estate. It further appears that, when said petition for distribution came on for hearing before the respondent court and judge, evidence was offered to show the persons who, by law, are entitled to the distribution of said estate; that said court and said judge declined and refused to pass upon such evidence, or to make any order settling such question or decreeing distribution; that said respondents refused and still refuse to proceed to ascertain the heirs of said deceased, or distribute the residue of the property to the heirs, or those entitled thereto.

The real issue involved in this matter is whether or not the pendency of such an action in equity, which is in fact one to declare the status of plaintiff to be that of an adopted child, empowers the superior court sitting as a court of probate to postpone distribution of an estate until said action has been decided. As bearing upon this main issue, four questions are raised and argued, which we will take up in order.

The first question is whether the complaint in the suit filed by said Charles Erickson shows any right of action at all. The petitioner argues that the complaint is fatally defective, in that it shows upon its face that it is barred by laches; that some 52 years had elapsed since the alleged making of the contract; that some 17 years elapsed before the plaintiff reached maturity, after which adoption was no longer possible, and more than 30 years have elapsed since plaintiff became of age; and that the action was begun after all other interested parties were dead. The respondents answer this contention by citing Furman v. Craine, 18 Cal. App. 41, 121 P. 1007. In this case the court held there was no laches in bringing the suit, since no cause of action accrued until the death of the foster parent, and the suit was brought within 2 years from that date. We are not satisfied that that decision is controlling in this case, since that case was one where the agreement was not only to adopt but to make the plaintiff an heir at law, so that she should inherit the property. In discussing this very point, the court calls attention to the fact that, under the *agreement* in that case, the plaintiff would have been entitled to recover the property from any devisee of the foster parent. In such a case as the one at bar, where there was no agreement that plaintiff should inherit or be given any property, and where plaintiff himself concedes that up to the moment of his death the said Edward Johnson had the full and absolute right to dispose of all of his property by will, there might well be a different holding in regard to laches. It might well be held that the contract was broken, not upon the failure to give him property at the time of Johnson's death, but upon the final failure to adopt the plaintiff, which occurred when he became of age. As to laches, see Stevenson v. Boyd, 153 Cal. 630, 96 P. 284, 19 L. R. A. (N. S.) 525; Harris v. Hillegass, 66 Cal. 79, 4 P. 987; Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516. Respondents argue: "It is not the claim of an heir which we are seeking to enforce. It is the claim by one who might have been an heir had his contract been complied with, but who is entitled to complain and entitled to recover if he can prove his case because the decedent failed to take the steps which would have made him an heir and entitled to all the residue of the estate." If this be true, no agreement to make him an heir, other than an agreement to adopt him, being claimed, did not the breach occur, if at all, at the last opportunity to adopt the plaintiff? We mention this because we do not regard respondents' authority as conclusive in this matter, but, under the view we take of other portions of the case, we do not consider it necessary to decide the point.

[1] It is further urged that plaintiff's complaint shows no consideration, in that the aunt of plaintiff, with whom the contract is alleged to have been made, was not the guardian of the child, had no legal right to his support, society or services, and surrendered nothing whatever in agreeing to the adoption. We think, however, that, if such a contract was made, it was made primarily for the benefit of the child, who was the real party in interest, and that the aunt occupied a position which authorized her to act on behalf of the child, under the circumstances. Steinberger v. Young, 175 Cal. 81, 165 P. 432.

[2] It is also urged that there is a failure of consideration in that the performance of services on the part of the plaintiff are not sufficiently alleged. While the allegations in this regard are quite general and a part of them are conclusions, so far as collateral attack is concerned, and for the purpose of this action, we may assume that a cause of action is set up by the complaint, especially in view of the possibility of amendment. McClung v. Watt, 190 Cal. 155, 211 P. 17; Mills v. Brown, (Cal. Sup.) 269 P. 636.

[3] The next question is whether the superior court sitting in probate has jurisdiction to pass upon such a claim as is raised by the plaintiff Erickson, or whether his exclusive remedy is a suit in equity. In this connection, the respondents urge that the suit filed by Erickson is one, not to enforce the claim of an adopted child, nor even to enforce the right of adoption, but is one for the specific performance of a contract to adopt, and for relief by way of damages for the breach of said contract; the amount of damages being the amount left in the estate and in respect to which the deceased died intestate. It is urged that, until this action in equity is decided, it cannot be told whether or not there will be a residue in the estate subject to distribution. Respondents rely especially on the case of Furman v. Craine, supra, which they insist is similar to the case at bar. We do not so understand the case cited. In that case, the parents entered into a written contract with a widowed aunt of the child, in which the aunt agreed, in consideration of the relinquishment of all claims and rights by the parents, to adopt the child as her own, give her all the rights of a child in and to her estate, and make the child her heir at law, so that she would inherit the aunt's property upon the latter's death. The court particularly pointed out that the agreement was sufficient to have enabled the child to follow the property and recover it from a devisee, in the event the aunt had thereafter willed it to another.

Respondents cite many cases in California and in other states. As typical of these we may mention a few. Owens v. McNally, 113 Cal. 444, 45 P. 710, 713, 33 L. R. A. 369, the first case along this line in California, was a case where it was sought to enforce specific performance of a contract to give all the property of an uncle to his niece. While the court held that the circumstances in that case did not permit the relief demanded, it was held that an agreement to dispose of property in a particular way was valid, if definite and certain. The court said: "Specific performance, as we have said, is not to be decreed under strict rule and formula. Every consideration which may properly be urged upon the court is to be weighed and passed upon, and it will be decreed only when no other adequate relief is available to plaintiff." In Steinberger v. Young, supra, the agreement relied upon was one not only to adopt and treat the plaintiff as a daughter, but also that the plaintiff should be an heir of the foster mother, and upon her death should receive all of her property. In Monsen v. Monsen, 174 Cal. 97, 162 P. 90, the court upheld the right to enforce a contract to make a particular disposition of property upon the death of the promisor, when the agreement is sufficiently definite and certain, but held that the particular circumstances in that case did not warrant relief.

[4] Respondents call attention to the fact that in all these cases, and many others, the procedure followed was that of a suit in equity, rather than taking steps for relief in any pending probate proceedings. It would seem, however, that there is a definite distinction between cases involving a contract under which a claimant has a definite right, existing before the death of the other party, to be given certain property, of which right he cannot be deprived, even by the will of the other party, and cases where the agreement is only one to adopt, and the other party is left free to dispose of his property as he chooses, either before death or by will. The latter is the case here; the claimant conceding that Edward Johnson retained until his death the full right to dispose of all of his property by will. It must be conceded that in those cases, where a stranger is claiming property adverse to the estate, and where, if the plaintiff prevails, the property will be taken away from the estate and will no longer be a part thereof, that the probate court has no jurisdiction, but that a separate action in equity must be filed for that purpose. Estate of King, 199 Cal. 113, 248 P. 519. A closer question is presented in those cases where the alleged contract was both to adopt and to give certain property to the claimant. In such a case there is sometimes an element in the claim adverse to the estate, which may, under some circumstances, make a court of equity a proper, if not an exclusive, forum. This fact, and the fact that sometimes the right to proceed with the probate proceedings is not insisted upon, may explain why the equity procedure was followed in the cases relied upon by respondents. But in the case at bar we have an alleged agreement to adopt alone, unmixed with any agreement to give property. The plaintiff, upon his own showing, had no rights in the property until the death of Edward Johnson. Since Johnson neither disposed of this portion of his estate, nor agreed to dispose of it, during his lifetime, the property is unquestionably a part of his estate. The plaintiff Erickson is claiming, not adverse to the estate, but in privity with it. Whether he relies on a right of inheritance through contract or an a right arising through a breach of the same contract, his claim depends upon his ability to establish his equitable status as an adopted son. Under such circumstances, we think a suit in equity is not necessary, and certainly is not an exclusive remedy. A probate court has the power to pass upon equitable issues involved in determining questions that may arise within its jurisdiction. More v. More, 133 Cal. 489, 65 P. 1044, 66 P. 76; In re Burton, 93 Cal. 459, 29 P. 36. A probate court has the power and the duty to determine heirship, all interests, and all claims of interest in an estate, if these are not adverse to the estate. Code Civ. Proc. §§ 1664, 1665; In re Burton, supra. We are of the opinion that the probate court has jurisdiction to pass upon any rights or interests in this estate claimed by plaintiff Erickson, and, by so holding, the plaintiff is not deprived of his right to a full hearing, since he has ample opportunity to present his claim, and have his rights passed upon, in the hearing on the petition for distribution in the estate mentioned.

[5] The third question is whether or not the hearing on the petition for distribution may be delayed until the determination of the suit in equity, filed by the plaintiff Erickson. The respondents contend that, in California the final distribution of an estate may always be postponed where there is litigation pending which might affect the final distribution of the estate. In support thereof is cited Estate of Ricaud, 57 Cal. 421; Estate of Colton, 164 Cal. 1, 127 P. 643; Estate of King, 199 Cal. 113, 248 P. 519; Estate of Ross, 180 Cal. 643, 182 P. 755, 757; Plass v. Plass, 121 Cal. 131, 53 P. 448; Estate of Burdick, 112 Cal. 387, 44 P. 734. In Estate of Ricaud, an action in ejectment had been commenced against a decedent in his lifetime, and it was not known whether or not the estate owned the property. In Estate of Colton, the greater part of the assets of the estate consisted of a claim against a corporation, which was being litigated. In Estate of King reference was made to assets which might be taken away from an estate by a partner. In Plass v. Plass rights were involved which were derived from another source entirely. In Estate of Burdick there was involved money which it was claimed never belonged to the deceased. The case of Estate of Ross does not sustain the contention of respondents in this regard, but quite the contrary. The court there said: "The law contemplates that this proceeding thus properly instituted shall be carried on to decree of distribution as speedily as is reasonably practicable with due regard to the interests of all concerned, and any interested party appearing is entitled to have it so carried on."

The court held that distribution could not be delayed even to await the determination of a proceeding under section 1664, Code of Civil Procedure. The following is quoted with approval: "Where the circumstances are such that the questions involved may as readily be determined on a pending proceeding for distribution, there is no good reason for even *postponing* the hearing and determination of the distribution proceeding merely because a proceeding under section 1664 has been initiated."

The court held that the utmost effect that could be given to the contentions of the claimant was to treat them as a claim that she was an heir. That is the effect of the claim of plaintiff Erickson, that he is an equitable son and heir, and, since the question involved may as readily be settled at the hearing of the petition for distribution, no good reason appears for delaying that hearing.

None of the authorities mentioned support respondents' claim that a hearing on the petition for distribution may be postponed, under the circumstances of this case. Respondents seek to avoid the effect of this by the contention that this is, in reality, not an action to enforce a contract to adopt and thereby make him an heir, but that it is an action for damages for the breach of such a contract, but the gist of the action is his claim that he is, in equity, the son of the deceased. Even if his action be considered one for damages, no reason appears why he should be given a right in excess of that existing in an ordinary action for damages. He claims a benefit which practically amounts to the effect of a writ of attachment. He not only asks that a restraining order be entered at the conclusion of his suit as prayed for, but he appears by affidavit in the probate proceedings, in which he says he is not interested, and asks that all action there be suspended and the property preserved intact, to be made available to him in the event of his recovery at some future date, in his other action. Some interesting questions might arise, as, for instance, whether he has not such other remedy as will defeat his right to the issuance of a restraining order, and whether a superior court may temporarily restrain the same court sitting in probate from exercising its jurisdiction. Plaintiff apparently recognizes these difficulties, and does not even ask that the probate court be restrained from proceeding either temporarily or at the conclusion of the hearing in his suit in equity, but only asks that at the conclusion of the action an order be issued to restrain the administrator from paying over any money. In the meanwhile, no restraining order against any one having been issued, and without in any manner subjecting himself to any of the burdens that might be incumbent upon him in the usual issuance of a restraining order, and without any apparent authority in law for so doing, he attempts to hold up those proceedings in the probate court to which petitioner is otherwise entitled, by merely filing an affidavit setting forth the fact that he has filed in another forum an action the object and purpose of which "is to obtain a decree of specific performance of a contract * * * to adopt the plaintiff, * * * and to award *that portion of the estate* of Edward Johnson, deceased, * * * to the said Charles Erickson." The filing of this affidavit was not in accordance with any provision of law, cast no duty on the executor, nor on the court, to take any action thereon, and should not have been allowed to delay the hearing of the petition for distribution, when the estate was otherwise in condition to be closed. Estate of King, 199 Cal. 113, 248 P. 519. This is especially true when the claim set up by the affidavit is one in privity with the estate which fully recognizes the assets of the estate as belonging to the deceased up to the moment of his death, with the power of disposition, testamentary or otherwise, unimpaired, and when the claim must stand or fall by his right to be considered a son of the deceased although this right be equitable, rather than legal. He is not claiming hostile to the estate, or as a stranger to the estate, but his entire claim is dependent upon the fact that there is property rightfully in the estate, as to which the deceased died intestate, and which is subject to distribution to some one.

If the estate had already been distributed, a suit in equity might have been permissible on the theory that the distributees held in trust for the plaintiff. The estate not having been distributed, the plaintiff had a speedier remedy in the probate proceedings. If he has sufficient evidence to bear out his claim, no reason has been shown why this cannot be done at the hearing of the petition for distribution. Under such circumstances, a suit in equity, if proper at all, which we doubt, was certainly not an exclusive procedure. There was nothing before the trial court to prevent or delay this hearing upon the petition for distribution, and the refusal of the court to act at all upon said petition, one way or the other, interfered with a substantial right belonging to petitioner.

[6] Section 1665, Code of Civil Procedure, provides that on final distribution "the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto." It cannot be successfully disputed that there is a residue of an estate in the hands of this executor, as to which the deceased died intestate, and, this being so, we think it was the duty of the court to determine, from the evidence submitted at the hearing, what persons were entitled thereto, and to make distribution accordingly. In Estate of Strong, 119 Cal. 663, 51 P. 1078, 1079, the court said:

"The whole subject-matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of our statute very clearly contemplates that property of decedents left undisposed of at death * * * shall, for the purposes of ascertaining and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedents may be conclusively established. And such administration may be initiated and had at the instance of any person entitled under the law to administer upon the estate. * * *

"Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. * * *

"Moreover, and aside from the mere rights of appellant in the premises, the court, having assumed jurisdiction of the estate in a proper case, was without power to thus summarily dispense with the further administration of the estate, and refuse to further proceed therein."

We think the court had no more power to postpone a proceeding of this kind on the showing here made than it would have had to dispense with any further proceedings in the matter.

"If all debts and charges against the estate, including the expenses of administration, have been fully paid, and there is in the hands of the executor or administrator an ascertained balance of assets subject to distribution, the estate is ready for distribution, and distribution cannot be delayed. The Court 'must' proceed to make distribution. (§§ 1665, 1543, Code Civ. Proc.) The command of the law is, under such circumstances, peremptory. (Estate of Pritchett, 51 Cal. 568.)" Estate if Ricaud, 57 Cal. 421.

Even with reference to adverse claims, which the probate court has no jurisdiction to pass upon, the hearing of petition for distribution cannot be delayed to await the determination of prospective litigation. Estate of Ross, supra; Estate of King, supra. The reasons for the rule would be much stronger where the claim is not adverse to the estate.

[7-9] The one remaining question is whether the present proceeding for a writ of mandamus may be maintained by petitioner, or whether his only remedy is by appeal from the order of the court continuing the hearing of the petition for distribution. Section 963 of the Code of Civil Procedure permits an appeal from "a judgment or order * * * refusing, allowing or directing the distribution or partition of an estate, or any part thereof." The respondents argue that the court here did not decline to take jurisdiction, but merely exercised a discretion to postpone any action, until another suit was determined. The writ prayed for may not be used in any way to interfere with a proper exercise of discretion in acting upon any matter before the court, but it may be used to compel a court to act in a matter within the line of its duty. The court did not act here, either to refuse, or to allow, or to direct, any distribution, but merely failed to act upon the matter at all, and the writ prayed for was the only remedy left to petitioner. An order refusing to postpone a decree of final distribution is not appealable. In re Burdick, 112 Cal. at page 396, 44 P. 734. Neither is an order postponing the consideration of a petition for such a decree. We are of the opinion that the trial court, in refusing to hear the matters involved in the petition for distribution, as alleged, declined to perform a duty imposed upon it by law. Hensley v. Superior Court, 111 Cal. 541, 44 P. 232; French v. Superior Court, 3 Cal. App. 304, 85 P. 133.

It is therefore ordered that a peremptory writ of mandamus be issued to the respondents, requiring said court and said judge thereof to proceed as soon as the business of the court will permit to set for hearing the petition for distribution in the estate of Edward Johnson, deceased, and, after considering the evidence presented at such hearing, to render such judgment or order as may be proper under the evidence there produced.

I concur: MARKS, J.

SLOANE, P. J., being disqualified, takes no part in the decision of this case.

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102 Cal. App. 396

SONSTELIE v. BUSH. (Civ. 7025.)

District Court of Appeal, First District, Division 2, California. Dec. 7, 1929.

1. Appeal and error 🔑1043(7)—Where plaintiff had taken defendant's deposition, denial of motion for continuance held not prejudicial, where she could not be present at trial, but could only have repeated testimony in deposition (Code Civ. Proc. § 594).

Where plaintiff, before date of trial, had taken deposition of defendant, and on trial read such deposition, denial of defendant's motion for continuance made under Code Civ. Proc. § 594, relating to bringing issues to trial and proceeding with case, in absence of adverse party, *held* not to result in miscarriage of justice, where, if defendant had been present at trial, she could not have been of any assistance to her counsel in furnishing names of any witnesses, and could not have done more than to repeat testimony she had already given in her deposition.

2. Automobiles 🔑245(43)—Speed at which motorist was driving when striking pedestrian held for jury.

In action by pedestrian for injuries sustained when struck by automobile, speed at which defendant was driving at time of striking plaintiff *held* for jury.

3. Automobiles 🔑246(50)—In action for injuries to pedestrian by automobile, instruction regarding duty to drive on right-hand side of highway held proper under evidence.

In action for injuries sustained by pedestrian when struck by automobile, instruction regarding duty to drive on right-hand side of highway *held* proper, where evidence showed that at one point there was parked automobile, which rendered it impossible for defendant to drive on extreme right, but that at other points there was no such difficulty.

4. Damages ⚷210(2)—Instruction on damages for injuries terminating with statement damages could not be in excess of amount prayed for held proper, though plaintiff had asked for damages covering specific items and also for general damages.

In action by pedestrian for injuries sustained when struck by automobile, instruction regarding elements of damage which plaintiff could possibly claim, terminating with statement that damages could not be "in excess of amount prayed for in his complaint, to-wit, sum of $30,480," *held* not error, though plaintiff had asked for damages covering certain specific items and also for general damages.

5. Automobiles ⚷245(72)—Contributory negligence of pedestrian struck by automobile while crossing street held for jury.

Where plaintiff's witness testified that plaintiff approached edge of sidewalk, and, looking into street, stepped down and stepped back two or three times, and that later, turning his head to right and then to left, plaintiff attempted to cross street, and was struck by automobile, question of plaintiff's contributory negligence *held* for jury.

6. Evidence ⚷501(1)—Opinion as to speed of defendant's automobile held admissible, where witness stated facts on which opinion was based.

In action by pedestrian for injuries sustained when struck by automobile, witness *held* properly permitted to give his opinion as to speed of defendant's automobile, where he testified as to facts on which he based his opinion.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Jorgen Sonstelie against Lucille Bush for damages for personal injuries sustained in automobile collision. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover a judgment for injuries suffered in an automobile collision. The defendant answered, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed.

[1] The trial was held on October 4 and 5, 1928. Having obtained an order shortening time, counsel for defendant served and filed, on October 3, 1928, a notice of motion for a continuance. The motion was heard the morning of the trial. It was denied, and the defendant claims that the trial court erred in denying her motion. She cites and relies on the doctrine stated in such cases as Jaffe v. Lilienthal, 101 Cal. 175, 35 P. 636; Morehouse v. Morehouse, 136 Cal. 332, 68 P. 976; Betts Spring Co. v. Jardine M. Co., 23 Cal. App. 705, 139 P. 657; Swayne & Hoyt v. Wells-Russell & Co., 169 Cal. 204, 146 P. 686; Pacific Gas, etc., Co. v. Taylor, 52 Cal. App. 307, 198 P. 651; Estate of Stevens, 57 Cal. App. 160, 206 P. 668. She also lays stress on the fact that her motion was made under section 594, and not section 595, of the Code of Civil Procedure. We have carefully examined all of her authorities. As each case ordinarily is different in its facts, it is not surprising that no one of the authorities is directly in point. It is not even claimed that, because the defendant, a party, was absent, it was ipso facto necessary that the continuance be granted. Mission Film Corp. v. Chadwick Pictures Corp. (Cal. Sup.) 278 P. 855. Other facts must necessarily be taken into consideration. Before the date of the trial the plaintiff had taken the deposition of the defendant. On the trial the plaintiff read that deposition. In her deposition the defendant testified to facts showing that as she remembered the circumstances she was not guilty of negligence, and that the plaintiff was guilty of contributory negligence; that she was greatly excited by reason of the accident; that it was her first accident; that she did not inquire the names of the bystanders; that she took the plaintiff to the hospital; and that one of the bystanders accompanied her, but she did not know his name. From the facts contained in the record, it appears affirmatively that, if the defendant had been present at the trial, she could not have been of any assistance to her counsel in furnishing the names of any witnesses, and, furthermore, that she could not have done more than to repeat the testimony that she had already given in her deposition. After an examination of the entire cause, including the evidence, this court is unable to say that the ruling complained of has resulted in a miscarriage of justice.

[2] The defendant asserts there is no evidence of negligence on the part of the defendant. There is some conflict in the testimony as to the exact spot where the accident occurred; however, it was in, or within a very few feet of, the intersection of Thirtieth street and Grove street in the city of Oakland. There was evidence to the effect that immediately prior to the collision the defendant was driving 40 miles an hour. It was certainly a question for the jury to determine how fast she was driving at the exact time of the impact.

As just stated, it was a close question as to whether the collision occurred within the intersection of Thirtieth and Grove streets or a

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

little before. The trial court gave an instruction covering section 125, subd. (c), of the Motor Vehicle Act (St. 1923, p. 557). It may not be said that the instruction was inapplicable to the evidence.

[3] The trial court gave an instruction regarding the duty to drive on the right-hand side of the highway. The defendant assigns it as error. From the evidence introduced it is clear that at one point there was a parked automobile which rendered it impossible for the defendant to drive on the extreme right. At other points there was no such difficulty. No facts are quoted showing that the instruction complained of was not pertinent to the case as made by the plaintiff.

[4] The trial court gave an instruction regarding the elements of damage which the plaintiff could possibly claim, and the instruction terminated with the statement that the damages could not be "in excess of the amount prayed for in his complaint, to-wit, the sum of $30,480." In his complaint the plaintiff had asked for damages covering certain specific items and also for general damages. The defendant complains because the trial court did not instruct the jury that each claim for specific damage must be limited to the amount alleged, and that the general damage must be limited to the amount alleged as general damage. She did not ask for such an instruction, but she cites and relies on two cases from Missouri and one from Texas. Houston Electric Co. v. Green, 48 Tex. Civ. App. 242, 106 S. W. 463; Shinn v. United Rys. Co., 146 Mo. App. 718, 125 S. W. 782; Dunham v. Miller, 154 Mo. App. 314, 133 S. W. 675. Conceding that those cases support the argument of counsel, it is clear that they are not followed at home nor abroad at the present time. Missouri, O. & G. Ry. Co. v. Collins, 47 Okl. 761, 150 P. 142, 147, 148.

[5] It is asserted the plaintiff was guilty of contributory negligence as a matter of law. If we examine the record, that claim may not be sustained. The plaintiff called as a witness H. A. Breasing. Among other things, that witness testified that he stood watching the plaintiff, that the plaintiff approached the edge of the sidewalk, and, looking into the street, stepped down and stepped back two or three times, and that later, turning his head to the right and then to the left, the plaintiff attempted to cross the street. If the jury believed his testimony, they were entitled to act thereon, and the question of contributory negligence was not merely a question of law.

[6] When the witness Breasing was on the stand, he was asked how fast the defendant was driving her automobile. He replied he did not know, but he had an opinon. Other questions were asked regarding what that opinion was based on. He answered each of those questions, and then was asked what the speed was. The court did not err in allowing him to answer the latter question.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

102 Cal. App. 510

MAUCK v. NORTHWESTERN NAT. INS. CO. OF MILWAUKEE, WIS. (Civ. 3969.)

District Court of Appeal, Third District, California. Dec. 11, 1929.

1. Appeal and error ⇨197(7)—Contention for first time on appeal by insured that answer did not raise defense under vacancy clause in fire policy held too late, where case was tried on contrary theory.

In action upon fire insurance policy, where case was tried on theory that vacancy clause of policy was an issue in case, contention on appeal by insured for first time that insurer's answer was insufficient to raise issue on defense under vacancy clause *held* too late.

2. Insurance ⇨146(1)—Construction of insurance policy is governed by rules which usually control other contracts.

Insurance policy is contract between insured and insurer, and its construction is governed by rules which usually control other contracts.

3. Insurance ⇨323(1)—Under vacancy clause in fire policy, proof of unoccupancy for year and at time of fire precludes recovery, in absence of waiver or consent to vacancy.

Where fire insurance policy specifically provides that building is insured while occupied only for dwelling house purposes, and that insurer shall not be liable for loss while it is vacant or unoccupied without permission indorsed on policy, proof that for year before and at time of fire no one lived in house is fatal to recovery, in absence of insurer's waiver or consent to vacancy.

4. Insurance ⇨323(3)—Term "vacant" or "unoccupied" used in fire policy with reference to dwelling house implies it must be used and occupied by individuals as their residence; "dwelling house."

Term "vacant" or "unoccupied," used in fire insurance policy with reference to dwelling house, implies that it must be used and occupied by individuals in good faith as their residence in order to validate policy, and proof of vacancy or unoccupancy is sufficient to defeat recovery, since dwelling house is chiefly designed for abode of mankind (citing Words and Phrases, Third Series, "Dwelling House").

5. Insurance ⇨323(3)—Temporary use of room for storing workmen's tools does not constitute "occupancy" within vacancy clause in fire policy.

Mere temporary use of room for storing workmen's tools used in process of moving house does not constitute "occupancy" within fire insurance policy providing that insurer shall not be liable for loss occurring while building is vacant or unoccupied for specified period.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Occupancy; Occupation; Occupy (of Land).]

6. Insurance 🔑323(3)—Altering, repairing, or moving building does not constitute "occupancy" within fire policy when no one actually resides in house.

When no one actually resides in house, altering, repairing, or process of moving building does not constitute occupancy within fire insurance policy.

7. Insurance 🔑646(5)—Insurer having established vacancy rendering inoperative fire policy, insured had burden to show he was released from obligation imposed by vacancy clause.

Where dwelling house was vacant rendering inoperative fire policy, insured *held* to have burden to show he was released from obligation imposed by vacancy clause permitting house to remain vacant and unoccupied for unlimited time if located within incorporated city or town, or that it remained vacant by insurer's written permission or for any other legally excusable cause.

8. Insurance 🔑323(1)—Dwelling in city located within duly authorized fire protection district held not within incorporated city under vacancy clause in fire insurance policy (St. 1923, p. 431).

Dwelling located in city included within duly organized fire protection district, under provision of St. 1923, p. 431 (1 Deering's Gen. Laws 1923, Act 2583), *held* not located within duly incorporated city or town rendering inapplicable vacancy clause in fire insurance policy, providing that, if building is located within incorporated limits in city or town, dwelling may remain vacant or unoccupied without any limitation as to time.

Appeal from Superior Court, Los Angeles County; H. D. Burroughs, Judge.

Action by W. M. Mauck against the Northwestern National Insurance Company of Milwaukee, Wis. Judgment for defendant, and plaintiff appeals. Affirmed.

Winslow P. Hyatt, of Los Angeles, for appellant.

W. W. Hindman, of Los Angeles, for respondent.

R. L. THOMPSON, J. The appellant's assignors and grantors owned a house and lot in the unincorporated city of Graham, in Los Angeles county. The dwelling house was insured by the owners for $2,500 against loss by fire. The policy contained the following condition: "Unless otherwise provided by agreement endorsed hereon * * * this company shall not be liable for loss or damage occurring * * * while mechanics or artisans are employed in building or altering or repairing the described premises for more than fifteen days at any one time * * * or while a building herein described whether intended for occupation by owner or tenant is vacant or unoccupied beyond the period of ten consecutive days."

The policy also contained an exception to the foregoing release from liability for loss by fire which occurred while the building was unoccupied. This clause provided that: "If the building described hereunder is located within the *incorporated* limits of a city or town, permission is hereby granted for the same to remain vacant or unoccupied without limit of time."

On July 10, 1924, the building was destroyed by fire. It had been unoccupied for a year prior to the fire. The owners lived elsewhere, and it was not rented to others. Men were engaged in moving the house to another lot. The building was not being altered or repaired. The doors and windows of the house were barricaded, except that the workmen kept their house-moving implements in one of the empty rooms during the time they were unemployed. The house had been raised and placed upon stringers and rollers preparatory to moving it. In the absence of the workmen, at night, during this process of moving, the house burned. Due proof of loss by fire was made, and payment was refused. This suit was thereupon instituted. The court found that the house was burned while it was vacant; that it had been unoccupied for a year prior thereto; that no permission for vacancy had been granted or indorsed on the policy; that it was not in the process of repairing at the time it was burned and that the property was not located in an incorporated city or town. Judgment was rendered for the defendant, and this appeal was perfected.

The appellant seeks a reversal upon the grounds that (1) the pleadings admit the fulfillment of the contract of insurance in every respect by the insured, (2) the vacancy clause of the policy was inapplicable because the city where the building was located, in effect, was incorporated, and, (3) the building was in the process of being repaired and was occupied by the workmen who were engaged in moving it at the time of the fire.

[1] The complaint alleges that the insured "duly performed all agreements and conditions of said policy required to be performed by them." The answer merely denied that the insured "duly performed all of the agreements or conditions of said policy." In an affirmative defense, however, the answer quoted the foregoing vacancy clause of the policy, and alleged that the dwelling house had been unoccupied for a year prior to and was vacant at the time of the fire. The affirmative allegations of the answer sufficiently raised the issue concerning the occupancy of the building. This was the chief issue at the trial. Evidence upon this subject was adduced without objection on the part of the appellant. The question of the insufficiency of the denials of the answer was not raised at the trial. The

case was tried on the theory that the vacancy clause of the policy was an issue. It is too late to raise this question for the first time on appeal.

[2-4] An insurance policy is a contract between the insured and insurer, and its construction is governed by the rules which usually control other contracts. 14 Cal. Jur. 416, § 5. Where an insurance policy specifically provides, as it does in the present case, that the building is insured "while occupied only for dwelling house purposes," and that the company "shall not be liable for loss" while it is "vacant or unoccupied beyond the period of ten consecutive days," without permission therefor indorsed on the policy, proof of the fact that for a year before and at the time of the fire no one lived in the house is fatal to recovery, in the absence of waiver or permission therefor on the part of the insurer. 4 Joyce on Insurance, 3783, § 2225. Where the term "vacant" or "unoccupied" is used in an insurance policy with reference to a dwelling house, it implies that it must be used and occupied by individuals in good faith as their residence in order to validate the policy. "A dwelling-house is chiefly designed for the abode of mankind." Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 167, 39 Am. Rep. 644; 3 Words and Phrases, Third Series, page 101. Proof of the fact that the dwelling was either vacant or unoccupied is sufficient. 4 Joyce on Insurance, 3784, § 2225. The vacancy provision of a policy is obviously intended as a precaution against carelessness and an increased risk which accompanies an unoccupied house which may thereby become the resort of tramps and lawless individuals. As the court says in the case of Moore v. Phœnix Ins. Co., 64 N. H. 140, 6 A. 27, 32, 10 Am. St. Rep. 384, under protection of the usual vacancy clause, the insurer is entitled to insist upon "a practical occupancy consistent with the purposes or uses for which they were insured. * * *" An occupancy that measurably lessens the vigilance and care that would be incident to its use for such purpose is not an occupancy within the meaning of the term.

[5] Under the evidence in the present case the dwelling house was clearly "vacant and unoccupied." The mere temporary use of a room for storing workmen's tools used in the process of moving the house does not constitute occupancy in the sense contemplated by the policy. In the case of Halpin v. Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482, 484, it is said: "A dwelling-house, to be in a state of occupation must be the customary abode of human beings. * * * The house must be the place of usual return and habitual stoppage. Herrman v. Insurance Co., 85 N. Y. 162 [39 Am. Rep. 644]; Cummins v. Insurance Co., 67 N. Y. 260 [23 Am. Rep. 111]." In 1 May on Ins. 504, § 249c, the author, quoting from Litch v. N. B., etc., Ins. Co., 136 Mass. 491, says: "A house that remains three months vacant and is then let to a tenant who up to the (time of) loss has done nothing but put into it implements for cleaning is unoccupied within the meaning of the policy."

[6] When no one actually resides in a house, altering, repairing, or the process of moving the building does not constitute occupancy. Limburg v. German Fire Ins. Co., 90 Iowa, 709, 57 N. W. 626, 23 L. R. A. 99, 48 Am. St. Rep. 468; 4 Joyce on Insurance, 380, § 2330.

[7] Nor was this vacancy provision of the policy inoperative for the reason that the house was located "within the incorporated limits of a city or town." The vacancy of the house having been established, the burden rested on the plaintiff to show that his grantors and assignors were relieved from the obligation imposed by the vacancy clause of the policy, by virtue of the fact that the house was located within an incorporated city or town; that it remained vacant by written permission of the insurer or for any other legally excusable cause. There was no evidence that the city of Graham, where the house was located, was an incorporated city or town at the time of the fire. The appellant does not assert that it was ever incorporated. All that he contends is that it was included within a duly organized "fire protection district" under the provisions of the Statutes of California of 1923, page 431 (1 Deering's Laws of 1923, Act 2583), and that this organization fulfilled all the requirements within the spirit and intent of the policy which exempts the application from the vacancy clause when the house was situated in an incorporated city or town.

[8] We cannot agree with this construction of the contract. It may not be said that a policy which requires a dwelling house to be located in an incorporated city or town in order to exempt it from the vacancy clause is fulfilled by its location in an organized fire protection district. It may reasonably be presumed that an incorporated city will be provided with police protection, an organized fire department, and other means of minimizing the danger of fire from lawlessness and vandalism, which protection may not be afforded in an unincorporated town, even though it be included in a duly organized fire protection district.

The judgment and findings are adequately supported by the evidence, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

RYAN v. SHANNAHAN et al. (Civ. 5658.)★

District Court of Appeal, Second District, Division 2, California. Nov. 29, 1929.

Rehearing Denied Dec. 28, 1929. Hearing Granted by Supreme Court Jan. 27, 1930.

1. Principal and surety 🔑59—Surety cannot be held beyond express terms of his contract.

Liability of surety is measured and bounded by terms of his contract, beyond express terms of which he cannot be held.

2. Railroads 🔑111—Rental and transportation of shovel used for railroad construction work held not within surety bond for payment of all persons "performing labor or furnishing material" in construction work.

Where owner furnished contractor gasoline shovel, to be used by contractor in railroad construction work, for which contractor agreed to pay certain rent, rental and expense of transportation of shovel back to place where rented *held* not within terms of surety bond, for payment of all persons performing labor or furnishing material used in construction work.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Charles B. Ryan against Charles Edward Shannahan, doing business under the firm name and style of C. E. Shannahan & Co., and the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and the last-named defendant appeals. Reversed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Andreani & Haines and John L. Bisher, Jr., all of Los Angeles, for respondent.

BURNELL, Justice pro tem. Defendant Shannahan, who is not a party to this appeal, entered into a written contract with the Blue Diamond Company to do the grading for a branch railroad line to be constructed in Nevada for said corporation, whereby he obligated himself to furnish "all necessary material, superintendence, labor, tools, plant, equipment, and transportation" in connection with the work to be done. The "general conditions," which were attached to and made a portion of this contract, required the contractor to deliver to the corporation a surety company bond "as security for the faithful performance by the contractor, * * * as well as for the payment in full of all claims of all persons performing labor upon, or furnishing materials to be used in, said work." Pursuant to this requirement Shannahan procured defendant appellant Fidelity & Deposit Company to execute, together with himself, as principal, a bond in the sum of $15,000 "to be paid to the said Blue Diamond Company," conditioned upon performance of the contract by Shannahan and his payment in full of "claims of all persons performing labor upon or furnishing material to be used in such construction work."

A couple of days prior to the execution of the contract with the corporation, Shannahan had entered into another written agreement with the plaintiff respondent, whereby the latter rented to him a gasoline shovel, which he used in the performance of his work under the grading contract. The rental agreement provided for monthly payments for the use of the shovel and required Shannahan to return it to respondent at Los Angeles, paying all transportation charges. This action was brought against Shannahan and the appellant, surety company, to recover a balance claimed to be due on the rental, together with transportation charges for the return of the shovel to respondent, which the latter was compelled to pay because of Shannahan's failure to do so. Judgment went in favor of plaintiff in the court below as against both defendants, from which judgment the surety company alone appeals; the sole question presented being whether or not the surety company is liable on the bond.

[1, 2] The liability of a surety is measured and bounded by the terms of his contract, beyond the express terms of which he cannot be held (Civ. Code, § 2836; Braun v. Crew, 183 Cal. 728, 192 P. 531; San Luis Obispo County v. Farnum, 108 Cal. 562, 41 P. 445; and cases cited in 23 Cal. Jur. at page 1024), and on the very terms of which he is entitled to stand (County of Glenn v. Jones, 146 Cal. 518, 80 P. 695, and cases above). We are of the opinion that the rental of machinery does not come within the terms of the condition for the payment of "all persons (1) performing labor upon, or (2) furnishing material to be used in, such construction work." It can neither be said that, by renting the shovel to the contractor, respondent himself performed labor upon the construction job, nor that, in so doing, he furnished any material to be used therein. In support of the judgment appealed from respondent relies upon several cases in which persons furnishing supplies, machinery, etc., for the use of a contractor in connection with the performance of his contract have been held entitled to recover as against the contractor's bondsmen on the bond given for faithful performance. An analysis of these cases will demonstrate that each falls within one or the other of two classes: Either the bond was conditioned on the payment of the claims of those furnishing supplies or machinery or materials used in connection with the work, as distinguished from materials, etc., to be used *in* the work, meaning actually entering into and becoming a part of the structure or improvement itself, or else the bond was given pursuant to the requirement of some statute, such as section 1183 of the Code of Civil Procedure, which provides for a lien in favor of those "furnishing appliances * * * contributing to the construction, alteration, addition to or repair, etc.," of the structure

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★Hearing granted. 285 P. 1045.

or other improvement by the contractor. In the latter case the provisions of the statute are deemed incorporated in the bond "as effectually as if such obligation were in words inserted in it." State v. Nutter, 44 W. Va. 385, 30 S. E. 67, 68, quoted in Milliron v. Dittman, 180 Cal. 443, 181 P. 779. To the same effect are the decisions in Los Angeles Stone Co. v. National Surety Co., 178 Cal. 247, 173 P. 79, Hansen v. Martin, 63 Cal. 282, Heynemann v. Eder, 17 Cal. 433, Board of Supervisors v. Bird, 31 Cal. 66, and Hub Hardware Co. v. Ætna Accident & Liability Co., 178 Cal. 264, 173 P. 81.

As falling within the first of the classes above referred to may be noted the case of French v. Farmer, 178 Cal. 218, 172 P. 1102, in which the bond was conditioned upon the payment by the contractor of all "persons who shall supply such contractor with provisions or goods of any kind." In that case it was held that the plaintiff was entitled to recover against the surety company for hay and barley sold to the contractor and consumed by the stock used on a road construction job, but that the terms of the bond did not warrant recovery for rental of teams employed in and about the work. The second class of cases is typified by Sherman v. American Surety Co., 178 Cal. 286, 173 P. 161, in which the contract was for the construction of wells for the city of Long Beach, and the bond was given pursuant to the provisions of a statute requiring the contractor on any public work to file a bond which "must provide that, if the contractor * * * fails to pay for any materials or *supplies furnished* for the performance of the work" the surety will do so. St. 1897, p. 201. There the plaintiff recovered for the rental to the contractor of tools used in drilling the wells and for the cost of transporting them to the place where used on the theory that they were supplies furnished *for the performance of the work* as distinguished from materials used in and going to form a part of the structure itself.

An example of those cases which may be said to belong to both of the above-mentioned classes is Bricker v. Rollins & Jarecki, 178 Cal. 347, 173 P. 592, 594, in which the road construction work was done and the bond given under the act of 1897, supra, and where the bond itself was conditioned on the contractor's payment for supplies furnished. The court there held that the rental of animals or machinery, while it might not, in the strict sense, be embraced in the definition of the word "materials," was fairly to be included within the meaning of the "more comprehensive word 'supplies.'" This word the court thus defined: "The ordinary meaning of this term in its general and accepted use is such as to include goods, wares, and merchandise of almost every kind and nature, whether used in the household or on the farm, or in any sort of productive or constructive work requiring the labor or service of men or animals or machinery."

Bearing in mind the rule that the statutory provisions are to be read into a bond given pursuant to a statute, light is thrown upon the problem under discussion by the cases involving section 1183 of the Code of Civil Procedure relating to the liens of mechanics and others and liability on bonds given pursuant to that section.

As this section stood prior to its amendment in 1911 (St. 1911, p. 1313), it accorded a lien to persons "performing labor upon or furnishing materials to be used in" the construction, etc., of buildings and other classes of structures enumerated in the section. It did not, as it has done since such amendment, extend the benefits of such liens to those "bestowing * * * other necessary services, * * * or furnishing appliances, teams and power contributing to the construction. * * *" In Wood, Curtis & Co. v. El Dorado Lumber Co., 153 Cal. 230, 94 P. 877, 878, 16 L. R. A. (N. S.) 585, 126 Am. St. Rep. 80, 15 Ann. Cas. 382, decided with reference to section 1183 as it read prior to the amendment of 1911, the question was squarely presented as to whether or not one who had rented horses and harness to a contractor for use in connection with a railroad construction job came within the category of a person "performing labor upon, or furnishing materials to be used in" the construction work. Determining this question and referring to the claimant the court said:

"He occupied no contractual position whatsoever touching the work. He had merely turned over to the contractor, under a contract of hiring, certain personal property which the contractor himself used upon the work. The fact that the personal property which was so turned over consisted of horses and their harness should not be allowed to cloud the issue. The horses, as horses, were no more entitled to liens than were the harnesses themselves. Each and both together were but convenient appliances for the doing of specific work. In the ultimate analysis there is no difference in principle whether draying is done by horses and wagons, or by automobile trucks; whether grading is done by horses and scrapers, or by traction engines and steam paddies. One and all are in their essence but tools and machinery. This being so, if the ruling for which respondent contends is the correct one, it must result that, if A leases to B a derrick or hoist for use upon the buildings which B is constructing, A will have a lien upon each of those buildings for the value of the use of the derrick; or, in still simpler form, if a carpenter lets to a fellow carpenter his chest of tools for 50 cents a day, the former will have a lien upon every building upon which the latter works and uses the rented tools. The illustration, reduced to its simplicity, shows the untenableness, if not the absurdity, of the contention. Giving to the law its broadest and most beneficent construction, it can never be said that one who merely rents appliances to another who labors upon a structure has himself bestowed labor upon that structure within the meaning of our law."

Again, in Gordon Hardware Co. v. San Francisco & San Rafael Railroad Co., 86 Cal. 620, 25 P. 125, it was held that picks and shovels furnished for a railroad construction job were not the subject of a mechanic's lien. To the above judicial definitions of the expression "performing labor upon or furnishing materials to be used in," which is the language of, and a limitation on the liability with regard to, the bond here in suit, may be added that in City of Los Angeles v. Kautz, 39 Cal. App. 702, 179 P. 716, where it was held that "section 1184 of the Code of Civil Procedure, providing for a 'withhold notice' by any of the persons mentioned in the preceding sections, is limited in its terms to those who have 'performed labor or furnished materials,' and does not include a person who rented to a contractor a steam shovel to be used in the performance of public work, who, if the work had been on private property, would have had a lien under section 1183 of the same Code." It was there said:

"The principal question here turns upon the construction to be given to sections 1183 and 1184 of the Code of Civil Procedure. Appellant's contention is that section 1184 is not limited to persons who furnish labor or materials for the work, but that, on the contrary, it includes one who furnished the contractor a steam shovel to be used in the performance of the work. If the contract had been for work to be done upon private property, and if appellant were endeavoring to enforce a lien upon that property for the amount due him for the use of the steam shovel, we do not doubt that his claim would come within the provisions of section 1183, as amended in 1913. It is there provided, among other things, that all persons furnishing appliances, teams, and power contributing to the construction or repair of a wagon road shall have a lien upon the property for the value of the use of such appliances, teams or power. Section 1184 of the Code of Civil Procedure provides that 'any of the persons mentioned in the preceding sections, except the contractor, may at any time give to the owner a notice that they have performed labor or furnished materials, or both, to the contractor,' stating certain specified facts concerning the claim. 'Upon such notice being given it shall be lawful for the owner to withhold, and in case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim and any lien that may be filed therefor including the reasonable cost of any litigation thereunder.' These provisions of section 1184 were originally enacted prior to the time when section 1183 was so amended as to include a lien for the value of the use of such appliances, teams, or power. Notwithstanding that other amendments have been made to section 1184, the Legislature did not see fit to extend the terms thereof describing the instances in which by giving said notice an equitable lien may be imposed upon the money due or to become due to the contractor. In 1909 a section numbered 1183a was added to the Code of Civil Procedure, wherein it was provided that such persons so supplying power might give written notice of the same character and effect as that which persons so furnishing materials are entitled to give, as provided in section 1184 of that Code. Section 1183a was repealed in the year 1911. It is clear that the right here claimed by appellant cannot be sustained, unless it exists under the terms of section 1184, to which we have referred. Those provisions, however, are in terms limited to those who have 'performed labor or furnished materials' used in the work of construction and have not been extended so as to include a claim and notice of the kind here relied upon by appellant."

It is to be noted that this case was decided after the amendment of section 1183 of the Code of Civil Procedure. The instant case does not, of course, arise under the mechanic's lien law or any other statute of this state, since the work was to be performed in another state; but the decisions we have referred to are of value as defining the very language of the bond here involved. As so defined we are of the opinion that it does not render the surety liable for the rental of the gasoline shovel used in the railroad construction job or for the expense of transporting it back to Los Angeles.

Judgment reversed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

102 Cal. App. 620

ECHOLS v. ECHOLS et al. (Civ. 3920.)

District Court of Appeal, Third District, California. Dec. 18, 1929.

1. Husband and wife ⚷264—Evidence showed that husband, by conveying to wife his interest in community property, lost all interest therein, and property became separate property of wife (Civ. Code, § 164).

In action to quiet title brought by husband against wife, and involving property originally acquired with community funds and taken in names of both, evidence *held* to show that husband, by deed to wife conveying all his interest in such property, lost all interest therein, and that title was thereby vested in wife as separate property, especially under Civ. Code, § 164, as against husband's contention that property retained character as community property even after his conveyance.

2. Appeal and error ⚷1010(1)—Findings supported by evidence are conclusive.

Where a case presents only question of fact and there is abundant evidence in record to support findings of trial court, such findings are conclusive on appeal.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action to quiet title by William Echols against Mary B. Echols and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Irving S. Baltimore and Luke J. McNamee, both of Los Angeles, for appellant.

Joseph Scott and A. G. Ritter, both of Los Angeles, for respondents.

PRESTON, Justice pro tem. The plaintiff, William Echols, brought this action against his wife and daughter to quiet title to two lots situated in the city of Glendale. Judgment was entered in favor of his wife and daughter, and he has appealed.

[1, 2] The property in controversy was acquired by the said William Echols and Mary B. Echols, his wife, on March 2, 1906, with community funds, and the deed was taken in the names of "Mary B. Echols and William Echols, her husband." The title stood in both names until April 9, 1910, on which date the said William Echols made, executed, and delivered to his wife, Mary B. Echols, a grant deed conveying all of his interest in said property to her. Said deed was in the usual form, and contained no reservations whatever, and recited a consideration of "love and affection, which the said party of the first part (William Echols) has and bears unto the said party of the second part (Mary B. Echols); as also for the better maintenance, support, protection and livelihood of said party of the second part. * * *"

Since the execution of this deed, the property has at all times stood of record in the name of the said Mary B. Echols, and she has had exclusive control and management of the same, and paid all taxes levied or assessed against the same; except, that on the 15th day of July, 1923, Mary B. Echols conveyed a portion thereof to her daughter, Della Echols, one of the defendants and respondents herein. Della Echols has remained the owner and in possession of the property conveyed to her ever since she received the conveyance from her mother.

This action was commenced by William Echols on April 21, 1925, which *was over fifteen years after he had conveyed the property to his wife.*

The theory and contention of the appellant seems to be that, although he conveyed the property to his wife on April 9, 1910, nevertheless said property retained its character as community property. This contention is entirely without merit.

Section 164 of the Civil Code provides, in part: "Whenever any property is conveyed to a married woman by an instrument in writing, the *presumption is that the title is thereby vested in her as her separate property.*"

Added to this presumption, which is itself evidence, is the positive testimony of Mary B. Echols, that her husband made her a gift of this property. The testimony of appellant himself shows that, at the time he made, executed, and delivered said deed to his wife, he knew exactly what he was doing and intended at said time to vest the title to said property in his wife, and desired to make a gift of it to her, but contends that, after the deed was executed, Mrs. Echols promised him that the property would be as much his as hers, and that Mrs. Echols should hold the property in trust for him, etc.

Mrs. Echols and Mr. Echols were the only two witnesses who testified relative to the execution and delivery of the deed, and upon the testimony adduced, the trial court found in favor of Mary B. Echols upon all of the issues and found that the property was her sole and separate property, and that, when said deed of April 9, 1910, was made to her by the said William Echols, he intended to make her a gift of the property, and it thereby became her separate property. There is no reason shown in the record why this finding of the trial court should be disturbed. The case, in its last analysis, presents only a question of fact, and there is abundant evidence in the record to support the findings of the trial court; in fact, from the record presented, it is difficult to conceive how any other conclusion could have been reached by the trial court. In such a case, the trial court's findings are conclusive on appeal, and we are powerless to interfere.

In view of the evidence and the findings, the other questions argued by the appellant become wholly immaterial and need no particular discussion.

We strongly suspect, from an examination of the entire record, that this action was instituted, and this appeal taken, for the sole purpose of harassing the defendant Mary B. Echols.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

102 Cal. App. 655

SOUTHERN CALIFORNIA AQUAZONE CO. et al. v. LOS ANGELES SODA WORKS.★ (Civ. 6028.)

District Court of Appeal, Second District, Division 2, California. Dec. 19, 1929.

Rehearing Denied Jan. 17, 1930.

Constitutional law 🔑24—Action pending and ready for final judgment after trial cannot be completed by judge pro tempore after November, 1926 (Const. art. 6, § 1a, as added in 1926, and §§ 6–8, as amended in 1926).

Under Const. art. 6, § 1a, as added in 1926, and sections 6–8, as amended in 1926, action pending and ready for entry of final judgment after trial cannot be completed by judge pro tempore.

Appeal from Superior Court, Los Angeles County; Robert E. Abbott, Judge pro tem.

Action by the Southern California Aquazone Company and another against the Los Angeles Soda Works. Judgment for plaintiffs, and defendant appeals. Reversed.

Louis P. Boardman, of Los Angeles, and Phillip C. Boardman, of San Francisco, for appellant.

C. M. Fickert and Keeler, Fickert & French, all of Los Angeles, for respondents.

CRAIG, Acting P. J. When the issues of fact in this case were ready for trial upon amended pleadings, the department of the superior court in which it was pending was engaged in hearing another proceeding. Upon stipulation the presiding judge referred it to a member of the bar, who qualified as a judge pro tempore, evidence was taken before him, and on December 22, 1926, he signed the findings of fact, conclusions of law, and judgment, to which appellant reserved exceptions upon the ground that the judge pro tempore had been divested of authority to perform the functions of a judge of the superior court.

Our Supreme Court has already decided that an action pending and ready for entry of final judgment after trial might not be completed by a judge pro tempore subsequently to amendment of article 6 of the Constitution on November 2, 1926. Cal. Const., art. 6, §§ 1a, 6, 7, 8 (see Stats. 1925, c. 48, p. 1369); Martello v. Superior Court, 202 Cal. 400, 261 P. 476.

The judgment is reversed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

102 Cal. App. 566

PACIFIC INDEMNITY CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6799.) †

District Court of Appeal, Second District, Division 1, California. Dec. 16, 1929.

Rehearing Denied Jan. 6, 1930. Hearing Denied by Supreme Court Feb. 13, 1930.

1. Bail 🔑59—Bond to appear and answer misdemeanor charge "in whatever court it may be prosecuted" held not void as imposing greater obligation than statute (Pen. Code, § 1273).

Bail bond specifying that defendant, appealing from conviction of misdemeanor in municipal court, "will appear and answer the charge above mentioned in whatever court it may be prosecuted," *held* not void as imposing greater obligation than that required by Pen. Code, § 1273, to "appear in the court to which the cause may be remanded."

2. Bail 🔑75—Municipal court may forfeit bail bond on defendant's failure to appear personally at misdemeanor trial (Pen. Code, §§ 1043, 1434).

Under Pen. Code, § 1434, municipal court may forfeit bail bond on defendant's failure to appear personally at trial of misdemeanor prosecution therein; section 1043, authorizing trial for misdemeanor in defendant's absence, relating to superior courts only.

3. Bail 🔑75—Obligation of bond to appear in whatever court misdemeanor charge was prosecuted held not discharged by appearance by attorney in municipal court.

Obligation of bond to appear and answer misdemeanor charge "in whatever court it may be prosecuted" *held* not discharged by defendant's appearance by attorney at call of case in municipal court after its remand thereto by superior court for new trial; defendant never having surrendered himself to court's custody.

4. Bail 🔑77(2)—Summary judgment on forfeiture of bail bond given by one convicted of misdemeanor held not void because referring to docket entries, instead of minute entries, of municipal court; "minutes" (Pen. Code, §§ 1305, 1428, 1461a).

Summary judgment, entered by superior court on filing of bail bond, given by one convicted of misdemeanor in municipal court, and certified copies of municipal court's "minutes" showing forfeiture thereof and "docket" containing some facts recited in judgment, but not stated in minutes, *held* not void because referring to entries in docket, instead of minute entries, as required by Pen. Code, § 1305; docket itself constituting minutes under section 1428, of which headnote, "Minutes, How Kept," is

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. †Rehearing denied. Hearing denied by Supreme Court.

part, in view of section 1461a, requiring same procedure in municipal courts in misdemeanor cases as in justices' courts.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Minutes.]

Application by the Pacific Indemnity Company for a writ of certiorari to review a summary judgment of the Superior Court in and for Los Angeles County, Hartley Shaw, Judge, forfeiting a bail bond. Judgment affirmed.

Holbrook, Taylor & Tarr, of Los Angeles, for petitioner.

Lloyd S. Nix, City Prosecutor, and F. W. Fellows and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondents.

CONREY, P. J. On writ of review. In this proceeding the court is called upon to determine the validity of a summary judgment entered, upon forfeiture of a bail bond.

In the municipal court, one Armando was convicted of a misdemeanor, and was sentenced to serve a term of imprisonment. Thereupon the defendant appealed from the judgment, and was admitted to bail, and an undertaking of bail executed by petitioner was duly approved and filed. The bond, after the usual preliminary recitals, provides that the surety undertakes that the defendant "will appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall, at all times render himself amenable to the orders and processes of any court in which the same may be prosecuted; and that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that, in case the judgment be reversed and that the cause be remanded for a new trial, that he will appear in the court to which the cause may be remanded, and submit himself to the orders and processes thereof."

Upon the bail so given the defendant was released from custody. Thereafter the superior court reversed the judgment and remanded the cause for a new trial. The order of the superior court having been duly filed in the municipal court on December 13, 1928, the cause was called for resetting. At that time one W. Davis appeared for the defendant, and the case was continued to the next day. On December 14th, Davis again appearing for defendant, the case was set down to be tried on January 9, 1929. "Defendant ordered to appear. Thirty day period waived." When the case was called for trial on January 9th, the defendant failed to appeal. Thereupon the court declared the bail forfeited. Thereafter such proceedings were had that summary judgment was entered against said surety, Pacific Indemnity Company, in the superior court. In the present proceeding by writ of review, the surety contends that the superior court, in entering such judgment, was without jurisdiction, and that the judgment should be declared null and void.

[1] Petitioner's first point is that the bond is void because the conditions of liability, as stated therein, go beyond the requirements of the statutory form of an appeal bond as contained in section 1273 of the Penal Code. That section does not set out a prescribed form, but it provides the essentials of the agreement to be contained in the bond. "1273. *Nature of Bail.* * * * If the offense is bailable, the defendant may be admitted to bail * * * after conviction, and upon an appeal: * * * If judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case the judgment be reversed, and that the cause be remanded for a new trial, that he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof."

The bond now in question contained the agreement required by section 1273. But by words preceding that agreement it specified, in other terms, an undertaking that the defendant "will appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall, at all times render himself amenable to the orders and processes of any court in which the same may be prosecuted." The contention of petitioner is that the inclusion of these words made the bond a void instrument because they constitute a departure from the bond required by the statute, as set forth in Penal Code, § 1273.

The headnote, as well as the text, of section 1273, indicates that there was no intention to prescribe the particular form of the undertaking. In the case of an appeal, if the appeal is dismissed, or if the judgment is affirmed or modified by the appellate court, there will be no further "prosecution," since the enforcement of the judgment relates only to the results of a completed prosecution. If the judgment be reversed and the cause remanded for a new trial, there is no uncertainty about the identity of the court to which the cause must be remanded. From these considerations, it is a reasonable conclusion that the obligation of the surety as expressed in the words "will appear and answer the charge above mentioned in whatever court it may be prosecuted," etc., was in no respect made to differ from the obligation incurred by the words of agreement that the defendant "will appear in the court to which the cause may be remanded." We conclude that the bond was a valid instrument.

[2] Next, petitioner contends that the valid terms of the bond were complied with when Armando appeared by attorney on the call of the case as hereinabove stated, on December 13th and December 14th, and that "the bond

thereupon became functus officio, and no forfeiture thereof or judgment thereon could be validly rendered." This point rests upon the further claim that in a misdemeanor case the defendant need not personally appear, and that his appearance by attorney, when the case is on trial, or preliminary thereto, is a sufficient compliance with the obligation of the bond. The Constitution declares that in criminal prosecutions the defendant has the right "to appear and defend, in person and with counsel." Const. of Cal., art. 1, § 13. It is provided by section 1043 of the Penal Code that in a prosecution for misdemeanor the trial may be had in the absence of the defendant; whereas in section 1434, Penal Code, it is provided that "the defendant must be personally present before the trial can proceed." This apparent contradiction is not actual. People v. Aymar (Cal. App.) 276 P. 595, is a recent decision by Division 2 of this district. (Rehearing denied by Supreme Court.) It was there held, for reasons fully explained, that section 1043 relates to superior courts only, and that section 1434 applies to municipal courts and to the inferior courts. By consequence it was further held that, upon failure of the defendant to appear at the trial of a misdemeanor prosecution against him in the municipal court, the court was authorized to declare a forfeiture of the bond given for his appearance.

[3] We are further of the opinion that the obligation of the bond was not discharged by reason of defendant's appearance by attorney at the call of the case on December 13th, or by his appearance by attorney on December 14th. The defendant has never surrendered *himself* to the custody of the court. If he had left the state, as he may have done, there was no remaining power of the law to hold him, except through the surety on his bond. This control, we think, the law retains, until the defendant has personally submitted himself by an appearance in court.

[4] The next point requiring attention is that the judgment is void because the recitals of fact contained therein refer to entries in the docket of the municipal court, and not to the minute entries, as required by section 1305 of the Penal Code. Under the facts shown by the record, the superior court was authorized to render a summary judgment upon the filing, by the district attorney, of the bond and a "certified copy of forfeiture" as contained in the municipal court's order of forfeiture. The bond was filed, and with it a certified copy of the "minutes" showing the order of forfeiture. There was filed also a certified copy of the "Docket," containing some of the facts recited in the judgment and not stated in the so-called "minutes." We are of the opinion, however, that the docket itself constitutes minutes of the municipal court. Section 1428 of the Penal Code reads as follows: "*Minutes, How Kept.* * * * A docket must be kept by the justice of the peace or police justice, or by the clerk of the courts held by them, if there is one, in which must be entered each action and the proceedings of the court therein." The headnote, "Minutes, How Kept," as the Code was enacted, is a part of the section. Bettencourt v. Sheehy, 157 Cal. 698, 701, 109 P. 89; People v. Richards, 86 Cal. App. 86, 90, 260 P. 582. By the provisions of section 1461a, Penal Code, the procedure to be followed by the municipal courts in misdemeanor cases is required to be the same as provided in certain sections relating to justices' courts. Section 1428 is one of those sections. We have not discovered any provisions of statute which would change or be in conflict with those above noted, nor have we found any good reason why the docket should not be regarded as containing "minutes" of the court. The recitals in the judgment in the case now under review include the jurisdictional facts contained in the "docket" and in the "minutes," and show that they were brought to the attention of the court. This was sufficient to establish the court's jurisdiction to enter the judgment.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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102 Cal. App. 797

PACIFIC INDEMNITY COMPANY, Petitioner, v. MUNICIPAL COURT, CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, Respondent. (Civ. 6841.)

District Court of Appeal, Second District, Division 1, California. Dec. 16, 1929.

Holbrook, Taylor & Tarr, of Los Angeles, for petitioner.

Lloyd S. Nix, City Prosecutor, and F. W. Fellows and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondent.

CONREY, P. J. On writ of review of a summary judgment entered upon forfeiture of a bail bond. The grounds upon which petitioner claims that the judgment should be annulled are included in the questions which have been discussed in our Civil No. 6799, Pacific Indemnity Co. v. Superior Court et al., 283 P. 345, in which the decision has been this day filed. We think that the respondent court acted within, and not in excess of, its jurisdiction.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

MILLER v. PRICE et al. (Civ. 3964.)★

District Court of Appeal, Third District, California. Dec. 13, 1929.

Rehearing Granted Jan. 10, 1930.

1. Pleading 🔑345(1) — Complaint alleging wrongful levy on property resulting in final inability to procure loan to pay incumbrance stated cause of action on motion for judgment on pleadings (Code Civ. Proc. § 448).

Complaint alleging ownership of property incumbered by mortgage and wrongful levy thereon at time owner was negotiating for a loan to satisfy incumbrance, so that he was unable to secure the money to satisfy the obligation, resulting in loss by reason of sale of premises under trust deed, *held* to state a cause of action on motion for judgment on the pleadings under Code Civ. Proc. § 448, which, though perhaps defectively stated, could in many particulars be cured by amendment.

2. Pleading 🔑345(1)—Instructions as to levy and sheriff's return were not "defense founded upon a written instrument" to action for damages for wrongful levy, justifying judgment on pleadings (Code Civ. Proc. § 448, and § 542, subd. 2).

Written instruments consisting of instructions given to sheriff in order to levy on property and return of sheriff, reciting levy in conformity to Code Civ. Proc. § 542, subd. 2, did not constitute a "defense founded upon a written instrument," within meaning of section 448, to action for damages by reason of wrongful levy so as to furnish basis for judgment on pleading.

3. Pleading 🔑345(1)—Written instrument constitutes no basis for judgment on pleading unless binding on opposite party or signed or executed by him (Code Civ. Proc. § 448).

Code Civ. Proc. § 448, to effect that genuineness and due execution of written instrument constituting defense to action are deemed admitted, relates only to genuineness and due execution of instrument, and, unless they are instruments which are binding upon opposite party or writings or instruments which he has signed or executed, they furnish no ground for judgment on pleadings.

4. Pleading 🔑349—Failure to deny execution of writing furnishes no basis for judgment on pleadings unless it constitutes defense.

Where writing does not constitute a defense, fact that its execution is not denied furnishes no basis for judgment on pleadings.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Loren L. Miller against W. C. Price and another. Judgment for defendants, and plaintiff appeals. Reversed.

L. C. Woods, of Los Angeles, for appellant.
William Ellis Lady, of Los Angeles, for respondents.

PLUMMER, J. This is an appeal by the plaintiff from a judgment in favor of the defendants entered upon the pleadings.

The complaint in the action alleges that on and prior to the 11th day of February, 1926, the plaintiff was the owner of certain real property situate in the county of Los Angeles, described as follows, to wit: The south 25 feet of lot 5, and the north 25 feet of lot 6, in block 42 of Owensmouth, as per Map Book 19, p. 36, of maps in the office of the county recorder of said county; and lots 7, 8, 16, 18, and 20 of block 62 of Owensmouth, as per Map Book 19, p. 36 of maps, in the office of the county recorder of said county. That said property was, at the date mentioned and at the date of the beginning of this action, of the value of $11,500, incumbered to the amount of $2,638, secured by a deed of trust payable on the 17th day of March, 1926; that on the 11th day of February, 1926, the said defendants caused to be issued out of the superior court of the county of Los Angeles an execution in an action entitled "W. C. Price vs. John P. Hight et al.," and that acting under and by virtue of said writ of execution, and under instructions of the defendant as to what property to levy upon, the sheriff of the county of Los Angeles did, on the 13th day of February, 1926, wrongfully and without right so to do, levy upon the property heretofore described; that at the time of the levy upon said property the plaintiff was negotiating for a loan of sufficient amount to satisfy the aforesaid incumbrance, and was at such time offering as security for the money to be loaned a deed of trust on the foregoing described property, and that the plaintiff had no other means by which to obtain a sufficient amount to satisfy said incumbrance; that by reason of said wrongful levy, as aforesaid, the plaintiff was unable to secure the money with which to satisfy the said obligation, and that on the 30th day of July, 1926, the trustees in said trust deed named sold said real property to satisfy the obligation referred to; that by reason of the foregoing wrongful acts on the part of the defendants, the plaintiff suffered damage in the sum of $8,862; wherefore, the plaintiff prayed judgment against the defendants. To this complaint the defendants interposed a general demurrer and also a special demurrer that the complaint was uncertain in some particulars not necessary to be mentioned. The demurrer being overruled, the defendants answered, and in their answer denied the ownership of the plaintiff in and to the real property mentioned; denied that the real property was of the value of more than $2,638; denied that the levy of the execution was wrongful; and then, for a further answer, alleged that on the 16th day of June, 1925, in a certain action pending in the superior court of Los Angeles county, the defendant in this action, W. C.

★Rehearing granted, see 284 P. 1035.

Price, obtained a judgment against John P. Hight, Jr., Harriet M. Hight, his wife, and L. B. Miller, in the sum of $4,587.73, together with the further sum of $7 costs and disbursements, and that said judgment was regularly entered in the judgment records of the county of Los Angeles; that thereafter an execution was issued upon said judgment and the plaintiff gave to the sheriff the following instructions: "You are hereby instructed to levy and attach, by virtue of the accompanying writ, in the above entitled suit, the following described property, and place a keeper in charge at plaintiff's expense, viz.: All the right, title and interest of the defendant, L. B. Miller, in and to the following described property:" (The property described being the same as that hereinbefore set forth.) Signed: "William Ellis Lady, Attorney for plaintiff." In pursuance of these instructions the sheriff proceeded to make levy upon all the right, title, and interest of L. B. Miller in and to the real property hereinbefore described, making return thereof as provided by law, and delivering a copy of the writ, together with a notice and description of the property levied upon, to the county recorder of Los Angeles county. Upon these pleadings the defendants moved the court for entry of judgment in favor of the defendants, and upon the hearing of said motion, judgment was so entered. The plaintiff's motion for a new trial being denied, this appeal was taken.

[1, 2] In 21 California Jurisprudence, 240, we find the rules laid down as to how motions or judgments upon the pleadings should be determined. It is there said: "Where a motion is made for judgment on the pleadings the court should dispose of it, even though it has sustained, without leave to amend, a demurrer filed contemporaneously therewith. Such motion should be determined upon the same principles as a general demurrer. Accordingly, on a motion by plaintiff, objections to the answer which are required to be taken by special demurrer or motion to strike out will be disregarded, while on a motion by defendant the court may not consider any matter outside the complaint or any defense thereto in the answer, or any grounds of special demurrer to the complaint; in neither case are questions as to the admissibility or sufficiency of evidence involved." In view of these rules it must be held that the complaint under consideration states a cause of action which, though perhaps defectively stated, may, in any particulars which we might point out, be cured by amendment. The judgment on the pleadings in this action was entered upon, and is sought to be sustained by the respondent by reason of the provisions of section 448 of the Code of Civil Procedure, which reads: "When the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten (10) days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant. (If the defendant relies upon a written instrument, in whole or in part, that fact shall be pleaded.)" That such contention is untenable appears from the reading of the written instruments set out in the defendants' answer. The only written instruments set out are the instructions which were written, given by the defendant to the sheriff, as to what property to levy upon, and the return of the sheriff reciting that he has levied upon all the right, title, and interest of L. B. Miller in and to the real property mentioned, the levy being made, and the return thereof conforming to subdivision 2 of section 542 of the Code of Civil Procedure. There can be no disputing the fact that a levy of execution upon real property, or of any one's right, title, and interest therein, casts a cloud upon the title, and that to remove such cloud, the owner of the property would be put to the time and expense of more or less extended litigation. There can be no question, likewise, that the levying of an execution upon property of an owner thereof, under the guise that a third person has an interest therein, is wrongful. If such third person has no interest, then and in that case the levy is wrongful. The only question in such cases is the amount of damages to which the plaintiff is entitled by reason of the wrongful levy, and whether only compensatory or exemplary damages should be awarded.

[3, 4] Again, the basis of the motion in this case and the action of the trial court in ordering judgment for the defendants are based upon a misapplication of the provisions of section 448 of the Code of Civil Procedure. That section relates only to the genuineness and due execution of the instruments, and unless they are instruments which are binding upon the opposite party, or writings or instruments which he has signed or executed, then, and in that case, they furnish no grounds for a judgment upon the pleadings as against said opposite party. Such papers are simply in the case for what they are legally worth, with their genuineness and execution admitted. In other words, there is no contradiction that the plaintiff, through his attorney, in the case of Miller v. Hight, gave the instructions set out in the exhibit, nor that the sheriff levied the execution upon the property alleged to be owned by the plaintiff. The two writings set out in the transcript are simply Exhibits A and B, attached to the defendants' answer, and are not writings binding upon the plaintiff in any particular; he was no party to either of them, and if the instructions were wrongfully given, as alleged by the plaintiff, and the levy wrongfully made, as alleged by the plaintiff, then and in

that case Exhibits A and B attached to the defendants' answer constitute no defense whatever. What we have said clearly appears from the case of Heath v. Lent, 1 Cal. 411, where a similar question was presented. It is there said: "The statute provides, that when a complaint or answer is founded on an instrument in writing, which is alleged to have been signed by the party, the signature shall be considered as admitted, unless denied by such party on oath. The party to be charged was the representative of the estate of the person whose signature appears on the bond. He had not signed the instrument, and could not deny upon oath its execution by the deceased. *It is clear that the statute does not extend to any other parties than those who are alleged to have signed the instrument.* Such parties are supposed to know the genuineness of their own signatures, but it would be unreasonable to suppose that the representatives of a deceased party possess the same knowledge." In the case of Marx v. Raley & Co., 6 Cal. App. 479, 92 P. 519, 520, an identical situation was presented with the circumstances in the case at bar. In that case a letter was set out in the pleadings, and it was claimed that section 448 of the Code of Civil Procedure was controlling. The court there said: "The principal contention of appellant is that the letter set out in the answer was a written instrument upon which its defense was based, and its execution was not denied under oath. Hence, under section 448, Code Civ. Proc., no proof was admissible controverting its due execution. * * * In our opinion, however, the letter embodied in the answer is not an instrument upon which the defense is founded in contemplation of the Code. Heath v. Lent, 1 Cal. 411, declares: 'It is clear that the statute does not extend to any other parties than those who are alleged to have signed the instrument.'" In that case it was said, just as we may say here, "that the plaintiff was bound to know the genuineness of the signature of the defendant." However, if the plaintiff did know the genuineness of the signature of the attorney and the instructions given to the sheriff as to the real property upon which he was to make the levy, it would not constitute any defense whatever as to the charge of the levy being wrongful. Again, the exhibits set forth in defendants' answer as "Exhibits A and B" do not constitute any defense founded upon written instruments as contemplated by the section of the Code of Civil Procedure to which we have referred. They are merely statements of what the defendants have done, through their attorney, and what the sheriff has done in pursuance of instructions given to him by the defendants' attorney. If, upon the trial of this cause, it should be proven that the levy of the execution was wrongful, the instructions given by the defendants, and the action of the sheriff following the instructions so given, would constitute no defense. Their being set out as exhibits attached to the defendants' answer in no wise affected the issues to be tried. At best, they constitute matters of evidence which it would be proper for the plaintiff to introduce to show that the sheriff acted under the instructions of the defendants' attorney, and then supplement the same, if such testimony exists, by testimony showing that the instructions were wrongfully given. In other words, the plaintiff would have to prove just exactly what the defendants allege to constitute a defense, to wit, that the instructions were given, and that the sheriff acted upon the instructions. The cases are numerous to the effect that where a writing does not constitute a defense, the fact that its execution is not denied furnishes no basis for a judgment on the pleadings. Thus, in Citizens' Bank & Trust Co. v. Pocatello, etc., Co., 41 Idaho, 403, 240 P. 186, it was held: "Where a contract is pleaded in an answer and a copy is attached thereto, failure to deny the genuineness and due execution thereof by affidavit does not admit the same, under C. S. § 6705, when the answer and contract, construed together, do not constitute a defense founded upon a written instrument."

In Krug v. Warden, 57 Cal. App. 563, 207 P. 696, 697, where an intervener in an action to quiet title pleaded a tax deed, and no affidavit denying its due execution and genuineness was filed, sought to invoke the provisions of section 448, Code of Civil Procedure, the court said: "This contention results from a mistaken idea regarding the effect of the provisions of section 448, Code of Civil Procedure. That section provides only that, where a defense is founded upon a written instrument which is copied into the answer, 'the genuineness and due execution of such instrument are deemed admitted,' unless there is an answer under oath denying the same. That an instrument is genuine and has been duly executed can mean only that the party who appears to have made it has attached his signature thereto knowingly, and caused it to be delivered. * * * Plaintiff could not deny that the deeds had been signed by the purported parties or delivered. It was admissible, however, for him to prove that the conveyance to Warden was void," etc.

In the case of Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371, where a tax deed was attached to the answer and its execution and genuineness were undenied, it was held that the court did not err in denying the defendant's motion for judgment on the pleadings, as the defenses which the plaintiff might have to the tax deed were unaffected.

Again, in Interstate Realty Co. v. Clark, 77 Cal. App. 558, 247 P. 244, where it was sought to invoke the provisions of section 448 of the Code of Civil Procedure, based upon a tax deed, the court said: "If under our rules of procedure the respondent could attack the validity of the tax deed upon any of the grounds noted, and if any one of these grounds is sufficient to invalidate the deed, then the judgment must be sustained Section 448, Code of Civil Procedure, provides that, when a written instrument is pleaded in the answer, the plaintiff is deemed to admit its genuineness and due execution, unless he controverts it by affidavit. This, however, does not estop the plaintiff from disputing the invalidity of the deed upon any other ground than 'its genuineness and due execution.'" Applied to the present case, all that could be claimed for the two exhibits, annexed to the defendants' answer, is that the defendants' attorney signed the written instruments and the sheriff executed the levy in pursuance thereof. Other cases might be cited, but these sufficiently establish the law that section 448, Code of Civil Procedure, has no application to papers or written instruments executed only at the behest of one of the litigants and to which the other litigant is not a party, of which she has no knowledge, and especially where they describe actions alleged to be wrongful, as in this case.

We do not need to review the cases cited by the respondent to sustain the judgment in this action, but will content ourselves with saying that an examination of them shows that the opposite litigant was a party to the instruments, or the cases exhibited instances where a party set up a writing showing that he had either no cause of action or no defense. We may mention two of the cases relied upon by the respondent which illustrate what we have just said. In the case of Mangold, etc., v. Utterback, 54 Okl. 655, 160 P. 713, L. R. A. 1917B, 364, the instrument was a negotiable promissory note bearing the indorsement of the party sought to be charged. In Ankeny v. Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 474, the written instrument relied upon by the defendant in his answer showed that he had no title to the premises claimed. The other cases cited by respondent are in line with these two, which requires only the statement of what was involved to show their inapplicability to the issues here presented.

The judgment is reversed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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102 Cal. App. 719

FITZGERALD v. WALSER, Sheriff.
(Civ. 7112.)

District Court of Appeal, First District, Division 2, California. Dec. 23, 1929.

1. Bankruptcy 🔑284—Demand for return of goods is unnecessary, where such goods were consumed before commencement of action.

Bankruptcy trustee's action for conversion against sheriff need not be preceded by demand for return of goods, where such goods were consumed before commencement of action, and demand would have been futile.

2. Bankruptcy 🔑303(3)—In trustee's action for conversion by sheriff of bankrupt's goods, contention of sheriff that he was in possession of equivalent quantity of goods of like character, which he could have turned over, had demand been made, was not sustained by evidence that he sold goods on hand at time of attachment.

In bankruptcy trustee's action against sheriff for goods of bankrupt converted and sold, sheriff's contention that he was in possession of equivalent quantity of goods of like character, which he could have turned over to trustee, had demand been made, was not supported by evidence that goods on hand at time of his attachment had been sold by him; trustee's demand not being subject to satisfaction by return of goods subsequently acquired.

3. Bankruptcy 🔑303(3)—In bankruptcy trustee's action for conversion, defense that sheriff took possession of bankrupt's goods with consent of bankrupt and attaching creditor held unsupported.

In bankruptcy trustee's action for conversion of goods of bankrupt by sheriff under writ of attachment, defendant's contention that he took possession of property with consent of bankrupt and attaching creditor *held* not supported by evidence.

4. Bankruptcy 🔑290—Trustee's action for conversion was not defeated by trustee's sale of bankrupt's assets, where converted property was not on premises at time of sale.

Action of trustee in bankruptcy against sheriff for conversion of bankrupt's goods under writ of attachment is not defeated by trustee's sale of fixtures remaining in bankrupt's premises, where none of the property disposed of by sheriff was situated or located on premises at time of such sale.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Boyce R. Fitzgerald, trustee in bankruptcy of the estate of Sam Brice, bankrupt, against J. C. Walser, Sheriff of Kern County. Judgment for plaintiff, and defendant appeals. Affirmed.

Rowen Irwin and Rollin Laird, both of Bakersfield, and E. A. Klein, of Los Angeles, for appellant.

Siemon & Garber, of Bakersfield, for respondent.

BURROUGHS, Justice pro tem. This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $469.17. The plaintiff is the trustee of the bankrupt estate of one Sam Brice. The defendant is the sheriff of the county of Kern.

On September 8, 1926, in an action wherein the Bakersfield Market, Inc., was the plaintiff, and one Sam Brice was the defendant, said sheriff attached the French Café in Bakersfield, belonging to said Brice. At the instance of the plaintiff in said action, one Andrews was placed in charge of said café as a keeper, and continued to operate the restaurant business under the direction of the attaching creditor. The sheriff failed to take any inventory of the property attached as aforesaid, and, so far as the record discloses, took no further interest in the property. It appears from the evidence of a deputy sheriff that the Bakersfield Market, Inc., entered into an agreement with the sheriff to indemnify him for any loss which he might incur by reason of his allowing the receiver to continue the business of the French Café.

On September 18, 1926, said Brice was adjudicated a voluntary bankrupt by the District Court of the United States for the Southern District of California, Northern Division. On October 2, 1926, the plaintiff in the case at bar was appointed and duly qualified as the trustee of the estate of said bankrupt, and on the same day took possession of the French Café and made an inventory of the property. He was informed by Andrews, the keeper, that all of the stock on hand at the time of the attachment by the sheriff had been purchased from the sheriff by the Bakersfield Market, Inc., and had all been consumed in conducting the business, and the stock then on hand was new. The trustee made a full inventory of the fixtures, dishes, and other articles belonging to the estate of the bankrupt, and located in said café, and these were afterwards sold by the trustee to the Bakersfield Market, Inc., for the sum of $3,000. The trustee also received from the sheriff $425.10, the amount he claimed was received by him from the sale of the stock on hand at the time of the attachment, which sum included the cash on hand at the date of the attachment. The trustee alleged in his complaint in this action that when the sheriff attached the property there was cash on hand amounting to the sum of $684, and there was also attached a stock of groceries, vegetables, and supplies of a similar character, of a reasonable value of $2,000.

The court found, and there is ample evidence to support the finding, that when the attachment was levied there was cash on hand amounting to the sum of $168.20, a stock of groceries, etc., of a nonperishable character, of the value of $527.07, and a stock of perishable supplies, of the value of $200, their total value amounting to the sum of $895.27. It is further found that the sheriff paid to the plaintiff the sum of $425.10, leaving a balance due plaintiff of $470.17. The judgment entered amounts to $1 less than was found to be due the plaintiff.

[1] Appellant contends that, the action being one for the conversion of personal property, it was the duty of respondent to have demanded of the sheriff a return of the goods before commencing this action. The goods having been consumed before the commencement of the action, a demand for them would have been futile, and therefore unnecessary. Mier v. Southern California Ice Company, 56 Cal. App. 512, 206 P. 83.

[2] It is also claimed that the sheriff was in possession of an equivalent quantity of goods of like character, which he could have turned over to the trustee, had a demand been made. We are of the opinion that this claim is answered by the fact that, under the evidence of his own deputy, the goods on hand at the time of the attachment had been sold by him. The proceeds thereof were included in the $425.10 paid to the trustee.

[3] It is also claimed that the business of the French Café was conducted with the consent of Brice, the owner, and the Bakersfield Market, Inc., the attaching creditor. We do not find in the record any consent or acquiescence by Brice, the owner. On the contrary, the sheriff took possession of the property by virtue of the writ of attachment and it does not appear that Brice was ever consulted or had anything further to do with the café after the attachment.

[4] It is further claimed that in the sale of the fixtures made by the trustee there was included all of the property which is the subject-matter of this litigation. This contention is based upon the recitals contained in the order of confirmation, where it is said that the sale included all the right, title, and interest in and to all the personal property situated and located in said restaurant, whether described in the inventory or not. At the time the sale was made, and at the time it was confirmed and the bill of sale executed, all of the property sued for in this action had been disposed of by the sheriff, and none of it "was situated or located in said restaurant."

This disposes of all the objections presented by the appellant. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

102 Cal. App. 422

ROBERTS v. PACIFIC GAS & ELECTRIC CO. et al. (Civ. 3839.)

District Court of Appeal, Third District, California. Dec. 9, 1929.

1. Electricity 🔑16(5)—Neglect of city to inspect power lines for two and a half months would create presumption of constructive notice of defect (St. 1923, p. 672, § 2).

Neglect of city to inspect its electric lines for period of two and a half months after wires had been knocked down by falling of tree would create presumption of constructive notice of defect and constitute negligence, within St. 1923, p. 672, § 2, if city was under duty to make inspection of lines.

2. Negligence 🔑121(1)—Conspicuous defect existing for considerable time will create presumption of constructive notice.

When a duty exists to inspect and maintain property in a safe condition, presence of a conspicuous defect or dangerous condition of the appliances, which has existed for considerable length of time, will create a presumption of constructive notice thereof.

3. Electricity 🔑15(2)—One unlawfully cutting limbs of fallen tree, under which live wire was concealed, was trespasser as to city, where tree grew upon city property (Pen. Code, § 602).

One who attempted to sever limbs of tree for purpose of appropriating wood to his own use, when tree which grew on park property which belonged to city had fallen partly obstructing roadway, was trespasser as to the city, cutting and removing the wood constituting misdemeanor under Pen. Code, § 602; hence recovery could not be had against city for such person's death resulting from shock from live wire hidden under branches, notwithstanding failure of city owning the power line to make inspection.

4. Negligence 🔑32(1), 33(1)—Owner of property owes trespasser or licensee no duty except to abstain from willful injury.

It is well settled that, as against trespasser or mere licensee, the owner of property owes no duty to keep the premises in safe condition, but merely to abstain from willful or wanton injury.

5. Electricity 🔑15(2)—City having no actual knowledge through its agents of condition of city's wires pulled down by falling of tree on city property held not liable for death of trespasser electrocuted while severing branches.

Where none of agents of city maintaining electric power line had actual knowledge of fact that tree growing on city park property had fallen across property line, pulling down wires, and there was no evidence of willfulness or wantonness of city, city was not liable for death of one attempting to cut off branches and remove the wood for his own use, who was electrocuted by live high-power wires concealed in the branches, though city had failed to make inspection and tree had lain on roadway for about two and a half months; deceased being trespasser as to city.

6. Electricity 🔑15(2)—Power company controlling electric line jointly with city was not relieved by fact that one electrocuted by hidden wires in fallen tree was trespasser as to city.

That deceased who was electrocuted by live high-power wires concealed in branches of tree was trespasser as to city owning property on which tree grew, because of deceased's attempt to cut and remove wood, *held* not to relieve from liability power company which with city maintained joint control over electric line; and power company was under duty to deceased to exercise due caution for his safety.

7. Electricity 🔑17—Power company reserving control of city's electric line, for transmitting energy for independent customer, was bound to exercise due caution to inspect line.

Where power company reserved use and control over electric lines constructed for city, for purpose of transmitting electrical energy for sale to independent customer of power company, company was liable for death through electrocution resulting from its failure to exercise due caution to inspect its line or maintain reasonably safe system and appliances for transmitting electricity.

8. Electricity 🔑19(10)—Question of due care in inspecting electrical equipment is ordinarily for jury.

Ordinarily, the question of whether due care has been exercised to inspect electrical equipment and discover defects in appliances is a matter to be determined by the jury, in action for injuries resulting from negligence in that respect.

9. Electricity 🔑17—Power company reserving control over city's electric line for furnishing energy to golf club using park could not avoid liability for death resulting from failure to inspect line, where golf club was self-sustaining.

Where power company constructing electric line to become property of city maintained ownership of transformers, switches, and meters in connection with line, and reserved control thereof for purpose of transmitting electrical energy to golf club, and golf club, though maintained on park property, had private membership paying membership fees, and maintained course and clubhouse, and contracted and paid for electricity which it consumed, it was no defense to the power company in suit for death of one electrocuted, due to failure to inspect line, that company was exempt from liability because reserving no independent control over line.

10. Electricity 🔑19(12)—Contributory negligence of one cutting wood from fallen tree under which were concealed live wires held for jury.

In action against power company for death of one electrocuted by wires concealed by foliage of fallen tree lying on road, contributory negligence of deceased in going among branches of tree to cut wood *held* question for jury, since deceased might have assumed that wires lying under the tree were broken or carried no load of electricity.

11. Electricity 🔑19(13)—Trial 🔑243—Instruction, in action for death from electrocution, that power company using city's line for transmitting energy to others was also under duty to make repairs, held not conflicting or misleading.

In action against city and power company for death of one electrocuted by hidden live wires under tree fallen in roadway, instruction that city became owner of power line with duty of maintaining and repairing it, and that power company, if using line to conduct electricity to customers other than city, was also under duty to maintain and repair it, *held* not conflicting or misleading, where power company reserved part control of line.

12. Electricity 🔑14(1)—Electric light company using road must exercise due care to avoid injury to travelers.

Electric light company permitted to use road generally used for public travel must exercise due care in construction, inspection, and maintenance of wires and poles so that travelers on road will not be injured, and, where danger reasonably apprehended is great, care and vigilance must be commensurate.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Action by Leroy Roberts, as administrator of the estate of Reuben C. Roberts, deceased, against the Pacific Gas & Electric Company and the City of Chico. Judgment for plaintiff, and defendants appeal. Reversed in part, and affirmed in part.

J. C. Wood, of San Francisco, J. D. Peters, of Chico, Thomas J. Straub, of San Francisco, and George F. Jones, of Oroville, for appellants.

J. Oscar Goldstein, of Chico, for respondent.

R. L. THOMPSON, J. Separate appeals were taken by the respective defendants from a judgment for damages which was entered against them jointly upon the rendering of a verdict for $12,500 for the death of plaintiff's intestate, who was killed by coming in contact with a high-power electric wire which was pulled down by the falling of a tree.

The defendant city of Chico owned an extensive tract of land which was used as a public park and was called Bidwell Park. In this park a golf course and two swimming pools were maintained. March 11, 1925, the city executed a written agreement with the defendant Pacific Gas & Electric Company, by the terms of which the electric company agreed to and did construct in and upon said park an electric line of wires and poles covering a distance of five or six miles, to be used for lighting purposes. The contract provided in part: "* * * The Company agrees forthwith * * * to prosecute to completion the work of constructing for the applicant (City of Chico) * * * a pole and wire electric line of the character and along the route as specified and delineated upon the sketch attached hereto and made a part hereof. Said line, upon the completion of the construction thereof, *shall become the sole property of the applicant*, but all transformers, switches, and meters furnished by the company for use in connection with said line shall at all times be and remain the sole property of the company. * * *" This system of electric poles and wires extended on and across the city park property for a distance of about five miles to a point on the Big Chico creek called Five Mile dam, except that for a distance of about 2,300 feet it crossed the property line and extended along the border of an adjoining public roadway. This electric line extended beyond Five Mile dam a distance of about half a mile to the clubhouse which was maintained by a golf club in Bidwell Park. The electric company installed and maintained transformers at the clubhouse, and supplied it with light. This golf club was financed by means of membership and patronage fees. The defendant electric company supplied all the electric light and power used in Bidwell Park. The wires carried 2,300 volts of electricity. The electric company collected for this service regularly from the golf club as a separate customer. The city of Chico had no device or means of controlling the electricity which passed over the wires throughout the park. This transmitting of electric energy over the system was regulated and controlled solely by the defendant Pacific Gas & Electric Company.

The record contains no evidence showing that either the city of Chico or the Pacific Gas & Electric Company patrolled, inspected, or repaired the electric line after its completion and prior to the occurrence of the accident. Ten feet from the edge of the park property a large sycamore tree eighteen inches in diameter was growing. Ten or fifteen feet distant from this tree the electric wires extended along the border of the public roadway. About the middle of September, 1927, this tree fell, dragging the wires down to about three feet from the ground, where the tree lay across the wires for a period of two and a half months, partially obstructing the roadway. The wires were concealed in the branches and foliage of the tree, but were not broken, and continued to carry the load of 2,300 volts of electricity. On December 3d the plaintiff's intestate, in company with one Dunnigan, took an automobile and trailer and drove along this road in search of firewood. A short distance from the place where this fallen tree lay protruding into the roadway one of the tires of the machine received a puncture. While Dunnigan was repairing the puncture, Mr. Roberts took an ax, and was proceeding to cut the branches of this tree for firewood, when he came in contact with the live electric wires and received injuries from which he subsequently died. Regarding the purpose of cutting the limbs of this tree, Mr. Dunnigan testified: "Q. Do you know why he went to the tree? A. Well to trim the tree. Q. What do you mean by 'trimming the tree'? A. Well, to trim up the top of it for wood. Q. For wood? A. Yes. Q. That was his purpose in going there? A. Yes."

Upon proceedings duly had, the plaintiff was appointed and qualified as administrator of the estate of said deceased, and subsequently recovered a judgment against both the city of Chico and the Pacific Gas & Electric Company, as joint tort-feasors. From this judgment separate appeals were perfected.

[1] The appellant city of Chico contends that it is relieved of responsibility for negligence in this case by the provisions of the Statutes of California of 1923, page 675, section 2, for the reason that it was not shown that the city or its agents had knowledge of the dangerous condition of the electric wires. It does, however, appear without contradiction that a large sycamore tree which was growing upon the park premises fell some time in September, 1927, across the property line, pulling down the wires in its fall, and that they lay in this conspicuous condition, partially obstructing the roadway, for about two and a half months.

It is true that the line of electric poles and wires extended along the margin of the public roadway for a distance of 2,300 feet at the place where the accident occurred. It may, nevertheless, have been the duty of the city to reasonably inspect the line along this roadway. It seems unnecessary to determine this problem, however, owing to the disposition of the case which we are constrained to make with relation to the liability of the city of Chico. If this obligation to inspect the line at this place still rested upon the city, its neglect to do so for a period of two and a half months created the presumption of constructive notice of defects which had existed that entire length of time, and constituted negligence on its part.

[2] When a duty exists to inspect and maintain property in a safe condition, the presence of a conspicuous defect or dangerous condition of the appliances which has existed for a considerable length of time will create a presumption of constructive notice thereof. Dawson v. Tulare Union High School Dist. (Cal. App.) 276 P. 424; Wurzburger v. Nellis, 165 Cal. 48, 130 P. 1052; Rafferty v. Marysville, 280 P. 118; 43 C. J. 1043 to 1057.

[3] The evidence is undisputed that, at the time the deceased received the electric shock from which he died, he was unlawfully engaged in cutting for his own use the limbs of the fallen tree in the branches of which the live high-power wire was concealed. This tree grew upon the Bidwell Park property and belonged to the city of Chico. Although, in falling, the top branches of the tree extended beyond the property line and rested upon the public roadway, it nevertheless constituted a trespass against the city on the part of the deceased to unlawfully attempt to sever the limbs of the tree for the purpose of appropriating the wood to his own use. It therefore follows that the deceased was injured while engaged in the performance of an act of trespass against the defendant city of Chico. Cutting and removing the timber constituted a misdemeanor. Section 602, Pen. Code. An actual unauthorized entry upon the land of the defendant city for the purpose of unlawfully taking and removing the wood was not necessary to constitute trespass on the part of the deceased. An unlawful and tortious infringement of the rights of the city by cutting and taking its timber was sufficient to create the relationship of a trespasser. In Leisure v. Monongahela Valley Traction Co., 85 W. Va. 346, 101 S. E. 737, it is said "every person guilty of any tortious infringement upon the rights of another" is a trespasser.

[4, 5] The very act which constituted the trespass was the cause of his injuries. The city was therefore not liable for damages, unless it had actual knowledge of the fallen wires, and willfully or wantonly inflicted or caused the injuries. The rule exempting the owner of property from liability for injuries sustained by a trespasser is concisely stated in Giannini v. Campodonico, 176 Cal. 548, 550, 169 P. 80, 81, as follows:

> "It is well settled that as against a trespasser or mere licensee the owner of property owes no duty to keep the premises in safe condition. The only duty is to abstain from willful or wanton injury." 19 Cal. Jur. 616, § 52; 45 C. J. 742, § 132; 9 R. C. L. 1207, § 17; 20 R. C. L. 57, § 53; Lindholm v. N. W. Pac. Ry. Co., 79 Cal. App. 34, 248 P. 1033.

A person who without license or permission climbs a pole upon which electric wires are attached becomes a trespasser, and may not recover from the owner thereof for injuries sustained by coming in contact with live wires. Augusta Ry. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203; 2 Joyce on Elec. Law, 987, § 610. Willfulness and wantonness may not exist without actual knowledge of the danger. Since the evidence in the present case shows affirmatively that none of the agents of the city of Chico had any knowledge of the fallen and dangerous condition of the wires, and there was a total absence of evidence tending to indicate willfulness or wantonnesss on the part of the city, it is relieved of all responsibility for the injuries which resulted in the death of plaintiff's intestate. It therefore becomes necessary to reverse the judgment in so far as it affects the defendant city of Chico.

[6] The fact that the deceased was a trespasser with respect to the defendant city of Chico by virtue of his wrongful violation of its property rights, in no sense exempts the

defendant Pacific Gas & Electric Company from liability for negligence. The electric company had no property rights in the fallen tree which were interfered with. In spite of the exemption from liability on the part of the owner of the tree, the electric company still owed the deceased the duty of exercising due caution for his safety.

In 2 Joyce on Elec. Law, 986, it is said: "The fact that one is a trespasser as between himself and a landowner is held not to relieve an electric company from the duty to exercise care towards the former and the jury may infer negligence from the omission of a guard wire."

In the case of Guinn v. Delaware & A. Tel. Co., 72 N. J. Law, 276, 62 A. 412, 413, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668, a guy wire had been stretched by the defendant electric company over an open field across which people were accustomed to travel at will to and from a ball ground in an adjoining field. The guy wire broke and fell across a live electric wire. Thus charged with electricity, the guy wire dangled down into the grass where a boy who was crossing the field without license came in contact with it and was killed. The defendant electric company contended it owed the deceased no duty to preserve his safety, for the reason that he was a trespasser. This theory was denied by the court, which held that, although the landowner might set up this defense in a proper action, the defendant electric company could not avail itself of this exemption from liability. The court said:

> "If [the deceased were] a trespasser, his wrong would be to the landowner alone, not a public wrong, nor a wrong to the defendant. The case differs from one where a trespasser or licensee seeks to recover of the landowner. A landowner may, in fact, reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount. * * * The exemption of the landowner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land; but no reason exists for extending this exemption to the case where the rights of the defendant have not been interfered with."

The appellant Pacific Gas & Electric Company disclaims liability for the death of Roberts, and seeks a reversal of the judgment on the grounds that (1) The electric line, including the poles and wires, was the property of the city of Chico; (2) the deceased was guilty of contributory negligence; and (3) the court erred in charging the jury.

[7] It is true that the contract provided that the electric line was to become "the sole property of the applicant (City of Chico)." But the electric company reserved the use and control of the line for the purpose of transmitting over the wires electric energy for sale to a regular customer, namely, the golf club. From a consideration of the undisputed record, we must assume that the Pacific Gas & Electric Company reserved a joint control of the line with the city of Chico. At least these wires were used by the company without objection on the part of the city to transmit electricity to an independent customer of the company. It follows that the company therefore became responsible for failure to exercise due caution to inspect the line or to maintain a reasonably safe system and appliances for transmitting the electricity.

The duty of an electric company in conducting its business of handling and selling this dangerous commodity is stated in 9 Ruling Case Law, 1217, as follows:

> "It is well settled that it is the imperative duty of such a company not only to install proper appliances, but also to make reasonable and proper inspection of such appliances, and to use due diligence to discover and repair defects therein, and a failure to do so constitutes negligence. Notice of a defect, in order to charge the company with liability therefor, need not be direct and express; it is enough that the defect has existed for such a length of time that it should have been known."

[8] Ordinarily, the question of whether due care has been exercised to inspect electric equipment and discover defects in the appliances is a matter to be determined by the jury. 9 R. C. L. 1218, § 25; 1 Joyce on Elec. Law, 726, § 438b.

The verdict of the jury in this case implies a finding that both defendants were guilty of negligence for failure to inspect the line. It is not contended that either of the defendants ever did inspect it. The defendant electric company reserved control over its transformers and apparatus at the clubhouse, together with the privilege of transmitting the electricity over the park line for sale to its customer at the golf club. It was therefore bound to maintain reasonable inspection of the lines of which it was making use for its own benefit and profit. A casual inspection of the wires extending from the main line through the park and along the road to the clubhouse would have disclosed the fallen tree and wires. This failure on the part of the company, although a like duty was imposed upon the city of Chico, rendered it liable for negligence.

It is ordinarily true that a company which neither owns nor *controls* the wires or appliances over which it merely transmits electric energy is not obliged to inspect the line, and will not be liable for injuries sustained by reason of defective appliances. 9 R. C. L. 1204, § 15; Hoffman v. Leavenworth L., H. & P. Co., 91 Kan. 450, 138 P. 632, 50 L. R. A. (N. S.) 574; Memphis Cons. Gas & Elec. Co. v. Speers, 113 Tenn. 83, 81 S. W. 595; Bristol Gas & Elec. Co. v. Deckard (C. C. A.) 10 F.(2d) 66. Except for the reservation of control and use of the appliances and line to supply the golf club with light and power, the electric company would have been relieved of responsibility. But when control, or even joint control, of an electric line is reserved and exercised as in the present case, the electric company will be liable for a lack of due care.

[9] It is asserted by the electric company that, because the golf club to which it sold and furnished electricity was maintained on the park property under the supervision of the city park commission, and that the city paid for a part of the equipment thereof, therefore the sale of electricity to this golf organization was in truth a furnishing of energy to the city of Chico, and that the company, therefore, reserved no independent control over the line, and is exempt from liability. It is true that Bidwell Park was a gift to the city, consisting of 2,280 acres of land, which was conveyed by the donor with the express reservation that "the second party (city of Chico) shall use the same for the purpose of a public park for the benefit of the citizens and residents of said city of Chico," and that a violation of the conditions under which the park was conveyed would have the effect of causing the title to revert to the grantors. It is also true that the city never did convey title to the golf course. The city also paid for the construction of the electric line from the Five Mile dam to the clubhouse; for the foundation of the clubhouse and for sinking a well on the premises. But the record also shows that this golf club was an organization independent of the city or park administration. It consisted of a large number of members residing both in and outside of the city of Chico, who pay $18 each per year, as membership fees, together with the customary green fees. This club constructed and maintained the course and clubhouse at its own expense, and also contracted and paid for the electricity which it consumed. Mr. Williamson, the chairman of the Bidwell Park playground commission, testified in this regard:

"We have had nothing to do with the running of that Club House or with the running of the Golf Course. * * *

"Q. Isn't it a fact * * * that every dollar of expenditure for the support, maintenance, and upkeep of that Golf Course, the employees and all other incidental expenses of every nature and character are paid by what is known as the Chico Golf Club? A. Yes, as far as I have any knowledge; they are certainly not paid by the Bidwell Park and Playground Commission. * * *

"Q. Your Commission has nothing to do with the payment of, for instance, the caretaker of that Golf course? A. No.

"Q. Or the electrical energy that is supplied there? A. No, sir.

"Q. Or for paying for the road in the Golf Club or repairing it or fixing it or anything else on the place? A. No sir."

It also appears that, to avoid the forfeiture clause of the park deed of conveyance, it was arranged that no person should be denied the privilege of playing golf on the course, although they refused to pay the designated fees therefor. However, it does not appear that any one ever refused to pay these fees.

Under such circumstances, it seems clear that the golf club was an organization distinct from the city of Chico, and constituted an independent customer to whom the electric company regularly sold its electric energy. There is nothing in the record of this transaction which tends to show that the electric company relinquished its control of the line or appliances by means of which the golf club was furnished electricity, or that the city of Chico held or exercised the exclusive control thereof. The very fact that the terms of the contract provided that "all transformers, switches, (and) the meters furnished by the company for use in connection with said line shall at all times be and remain the sole property of the Company," indicates an express reservation of these appliances, so that the company might control the use and sale of electricity to the golf club or to any other independent customers which it might procure. We are of the opinion that the record does not disclose a relinquishment of the entire control of the electric line on the part of the company, and that the company is therefore not relieved from responsibility for negligent failure to inspect the line.

[10] It is claimed that the deceased was guilty of contributory negligence in going among the branches of the tree when the wires were plainly visible as they sagged down beneath the fallen tree from the crossarms on the poles from either side. The wires, however, were concealed by the foliage of the tree and by the vines. The deceased did not live in that immediate vicinity, and it does not appear he was familiar with the use of this electric line. As a reasonable man, he may have assumed that wires which were pulled down to the ground and lay beneath the fallen tree were either broken or carried no load of electricity. Under the circumstances of this case, the existence of contributory negligence was a question for the jury to determine. Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; Howell v. San Joaquin L. & P. Corp., 87 Cal. App. 44, 54, 261 P. 1107; Foley v. N. Cal. Power Co., 14 Cal. App. 401, 112 P. 467.

[11] The defendant electric company complains of two instructions, the first of which was given on the court's initiative and the second at the request of the plaintiff. The last paragraph of the following instruction is challenged as erroneous:

"I instruct you that under the application or contracts admitted in evidence, the City of Chico became the owner of the power line in question, with the exception of the transformers, meters and ground wires which were the property of defendant Power Company and in the absence of a provision otherwise, the duty of maintaining and repairing such power line devolved upon said City.

"And I further instruct you that if you find that the defendant Power Company was using said power line for the purpose of conducting electricity thereover, and through and by means of its own transformers, meters and other necessary devices and thereby furnishing and selling electric power and light to individuals or organizations other than or in addition to the City of Chico and its governmental agencies then, and in such event, the duty also devolved upon said Power Company to see to it that the said power line was maintained and kept in such repair as not to endanger those who may rightfully be in close proximity to the said power line."

It is asserted that the two paragraphs of the foregoing instruction are conflicting, in that the first paragraph assumes that the city of Chico was the sole owner of the electric line, and thereby became responsible for the maintenance and repair thereof, while the last paragraph charged the jury that, if they found that the electric company used the line to furnish its customers other than the city of Chico with electricity, it also owed the deceased a duty to keep the line free from defects and dangerous conditions. This was a correct statement of the law under the circumstances of this case. Assuming, as we have heretofore declared, that there is substantial evidence from which the jury could determine that the electric company did reserve the use and control of the line for the purpose of selling and transmitting its energy to the golf club, and that this organization constituted a customer separate and distinct from the city of Chico, then the electric company would be jointly liable with the city for failure to keep the line in a reasonably safe condition. This obligation on the part of the electric company exists because of its reservation of the use and joint control of the line, and in spite of the actual ownership of the wires and poles by the city. Under such circumstances this instruction was not conflicting or misleading.

[12] Finally, it is contended that the following instruction was erroneous and prejudicial:

"The jury is instructed that electric light companies which are permitted to use for their own purposes roads that are generally used and traveled by the public are required to exercise due care in the construction and inspection and maintenance of their wires and poles to the end that travelers along such roads will not be injured by their appliances. Where the danger to be reasonably apprehended is great, the care and vigilance must be commensurate."

This instruction correctly stated the law applicable to the facts of this case. The defendant company constructed the line contrary to contract, so that it extended for at least 2,300 feet along the public roadway, in which space the accident occurred. On the assumption that the company retained a joint right to use and control the line for the purpose of supplying its independent customer at a point beyond this place where the wires extended along the road and where the accident occurred, it would be required to use due diligence to protect those who traveled this road against a defective and dangerous condition of the wires. There was therefore no error in this instruction. The jury was fully and fairly charged. There was no miscarriage of justice.

The judgment is reversed in so far as it affects the defendant city of Chico. Otherwise the judgment is affirmed.

We concur: FINCH, P. J.; JAMISON, Justice pro tem.

102 Cal. App. 615

SWARTZ et ux. v. ACME EXPRESS & DRAYAGE CO. et al. (Civ. 7067.) ★

District Court of Appeal, First District, Division 2, California. Dec. 18, 1929.

Rehearing Denied Jan. 17, 1930. Hearing Denied by Supreme Court Feb. 13, 1930.

1. Appeal and error 🔑930(4)—On appeal from judgment on verdict for plaintiff, court must assume that jury found her not contributorily negligent and determine whether her admitted conduct constituted such negligence as matter of law.

On appeal from judgment on verdict for plaintiff, Court of Appeal must assume that jury found plaintiff not guilty of contributory negligence and determine whether her admitted conduct constituted contributory negligence as matter of law, as jury's verdict on fact issue must stand, unless record presents reversible error.

2. Negligence 🔑136(26)—Contributory negligence is ordinarily fact question for jury, unless there is standard of prudence, to which all persons similarly situated must conform.

Ordinarily, the question of contributory negligence is one of fact for jury, and not one of law, unless there is a standard of prudence, to which all persons similarly situated must conform.

3. Negligence 🔑136(26)—To take issue of contributory negligence from jury, defendant must show that plaintiff's acts failed to meet some standard of prudence.

Contributory negligence being an affirmative defense, burden of proving which is on defendant, defendant must show that plaintiff's acts failed to meet some standard of prudence to

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★Rehearing denied. Hearing denied by Supreme Court.

take such issue from jury as a question of law alone.

4. Negligence 🔑136(26)—Issue of contributory negligence must be submitted to jury, if facts do not justify nonsuit on such ground alone.

Issue of contributory negligence must be submitted to jury under proper instructions, if facts are not such as would justify trial court in granting a nonsuit because of such negligence alone.

5. Appeal and error 🔑842(4) — Particular method employed to avoid injury cannot be held contributory negligence as matter of law, in absence of established rule of conduct.

In absence of rule of conduct, established by statute, judicial decision, custom, or practice, Court of Appeal cannot say that any particular method employed to avoid injury is contributory negligence as matter of law because it is not the method the court would have used under same circumstances.

6. Appeal and error 🔑999(3)—Jury's finding for plaintiff on issue of contributory negligence is conclusive on appeal.

Jury's finding for plaintiff on issue of contributory negligence is as conclusive on appeal as its finding on issue of defendant's negligence.

7. Appeal and error 🔑201(2)—Claim that court's remarks brought to jurors' attention fact that defendant was insured cannot be considered on appeal, in absence of objection or request for instruction.

Defendant's claim that court's remark, during examination of prospective jurors, as to whether there was any insurance company in reference to which defendant's attorney wished to interrogate jurors, and opportunity to be given plaintiff's attorney to do so, brought to jury's attention fact that defendant was insured, cannot be considered on appeal, where defendant did not object or request instruction.

8. Trial 🔑296(4, 5)—Instruction as to elements of damage jury could consider if they found plaintiff entitled to verdict held not erroneous as ignoring defense of contributory negligence, fully covered in other instructions.

Instruction advising jurors as to what elements they could consider in assessing damages, "if you find from the evidence that the plaintiffs are entitled to a verdict," *held* not erroneous as permitting verdict for plaintiffs irrespective of defense of contributory negligence, where latter issue was fully covered in numerous other instructions.

9. Trial 🔑260(8)—Refusal of instructions on contributory negligence, covered by other instructions, held not reversible error.

Refusal of instructions on contributory negligence *held* not error, where subject-matter thereof was covered by other instructions given at plaintiff's request though language thereof was not as favorable to defendant as those refused and those respecting defendant's negligence were given at plaintiff's request and framed in language most favorable to plaintiff.

Appeal from Superior Court, Alameda County; J. T. B. Warne, Judge.

Action by H. R. Swartz and wife against the Acme Express & Drayage Company, an association, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellants.

Rothchild & Golden and J. A. Pritchard, all of San Francisco, for respondents.

NOURSE, J. Plaintiffs sued for damages for personal injuries. The cause was tried before a jury, which returned a verdict for plaintiffs for $5,000. From the judgment on the verdict the defendants appeal on typewritten transcripts.

Mrs. Swartz was driving her automobile in a westerly direction along the public highway between Walnut Creek and Lafayette, in Contra Costa county, when, in approaching a curve on the highway, she collided with a trailer attached to a truck operated by defendants and which was at the time being driven in an easterly direction along the same highway. The left wheel of the trailer struck the left front wheel of plaintiffs' car in such a manner that the steering gear was jammed. The Swartz car then proceeded slowly across the left-hand side of the highway a distance of about 35 feet to the edge of a creek, paused momentarily, and then plunged down to the stream bed, where it turned on its side and where Mrs. Swartz received the injuries complained of. The negligence charged to the defendants is the operation of the truck at an excessive rate of speed, about 26 miles an hour; the careless attachment of the trailer which permitted it to swing to the left on the curve; and the driving of the truck too near the center of the highway. The defendants denied all these charges of negligence and set up the contributory negligence of Mrs. Swartz, consisting in her driving with one hand and with eyes averted from the highway while giving attention to her small child seated in the rear of the automobile, and in her failure to apply either her foot or emergency brake after the collision or to take any other means to prevent her car from going into the creek bed.

[1, 2] On the issue of defendants' negligence the evidence was conflicting, but sufficient appears to support the jury's verdict adverse to the defendants. The first charge of contributory negligence was denied in a measure by Mrs. Swartz and the jury apparently accepted her testimony. The second charge comes directly from her own testimony and is without any contradiction in the record. No special issue was made of it and no special instruction was requested by the defendants. The point comes to us on this appeal to determine whether the admitted facts constitute contributory negligence as a matter

of law because, if the issue is one of fact only, the verdict of the jury must stand unless the record presents reversible error. Thus, if the verdict had been for the defendants the evidence of Mrs. Swartz's negligence in this respect would have been sufficient to sustain it, but with the verdict for plaintiffs we must assume that the jury found that Mrs. Swartz was not guilty of a failure to use ordinary care under the circumstances. Therefore the question is: Does the admitted conduct constitute contributory negligence as a matter of law? Ordinarily, in cases of this character, the language of Williams v. Pac. Elec. Ry. Co., 177 Cal. 235, 237, 238, 170 P. 423, 424, applies. It is there said: "The question of contributory negligence is one of fact for the jury to solve under proper instructions, and not one of law save in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. In such cases failure to reach that standard is contributory negligence as matter of law."

[3, 4] The defense of contributory negligence being an affirmative defense, the burden of proving which is on the defendant, it is necessary for the defendant to show that the acts of the plaintiff failed to meet some "standard of prudence" in order to take the issue from the jury as a question of law alone. One basis of determination of this question is: Are the facts such that they would justify the trial court in granting a nonsuit because of the plaintiffs' contributory negligence alone? If the facts were not of such a nature, then the issue must be submitted to the jury under proper instructions as one of the issues of fact for its determination. Here, though the evidence is clear that Mrs. Swartz did not apply her brakes after the impact and before her car plunged into the creek bed, there is no evidence to show that she did not use other means to prevent the plunge which at the time seemed most prudent to her. She testified that she endeavored to turn the steering wheel to get off the left-hand side of the highway. Her danger from stopping on the left side of the highway on a "blind curve" may have seemed greater than a plunge into the creek bed.

[5, 6] In any event, in the absence of some rule of conduct which is established by statute, by judicial decision, or by established custom or practice, we cannot say that any particular method employed to avoid injury is negligence as a matter of law because it is not the method that we would have used under the same circumstances. When therefore the issue is such that it must be left with the jury and the jury has returned a verdict for the plaintiff, we must assume that the jury found adversely to the defendant on the issue of contributory negligence. Such finding is just as conclusive on appeal as the jury's finding on the issue of defendant's negligence.

[7] Error is assigned to the following incident which occurred during the examination for the selection of the jury.

"The Court: * * * I might ask, Mr. Snook, if there is any insurance company mentioned in this case, any insurance carrier, that you want to interrogate the jurors in reference to?

"Mr. Snook: No, I don't, your Honor.

"Mr. Golden: I do, your Honor.

"The Court: Well, I will give you the opportunity hereafter."

The appellants claim that the remarks of the court brought to the attention of the jury that the defendants were insured, but they did not object or request an instruction and this forecloses consideration of the point on appeal. Anderson v. United Stages, Inc., 192 Cal. 250, 253, 219 P. 748; Hughes v. Hartman (Cal. Sup.) 273 P. 560.

[8] Appellants complain of instruction No. 25, which was given at the request of respondents. This instruction advised the jurors as to what elements they could consider in assessing damages "if you find from the evidence that the plaintiffs are entitled to a verdict." The appellants argue that the instruction was erroneous because it permitted a verdict for the respondents irrespective of the defense of contributory negligence. But the latter issue was full covered in numerous other instructions given.

[9] Further complaint is made of the refusal to give three listed instructions on the subject of contributory negligence. We find no error here, as the subject-matter of the requested instructions was covered by other instructions given at the request of the respondents. It is true that the instructions given were not worded in language as favorable to the appellants as were those refused, while those touching the issue of appellants' negligence were given at respondents' request and were framed in language most favorable to respondents, and, though we may not approve this practice, it has been held not to be reversible error. Bergen v. Tulare County Power Co., 173 Cal. 709, 721, 161 P. 269.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

102 Cal. App. 630

PRETZER v. CALIFORNIA TRANSIT CO.
(Civ. 278.)

District Court of Appeal, Fourth District, California. Dec. 18, 1929.

1. Appeal and error 🔑800—That brief is on file at time of notice of motion to dismiss appeal is alone sufficient to defeat motion (Court of Appeals Rule 5).

Under Court of Appeals Rule 5, fact that brief is on file at time notice of motion to dismiss appeal is given is alone sufficient to defeat motion, though appeal will be dismissed otherwise unless a reasonable excuse for delay is shown.

2. Appeal and error 🔑771—Sufficiency of showing as to reasonable excuse for delay in filing brief is for court.

Sufficiency of showing relative to reasonable excuse for delay in filing brief as respects motion to dismiss appeal is a question to be determined by court.

3. Appeal and error 🔑771—Pressure of business is not reasonable excuse for delay in filing brief.

Pressure of business does not constitute a reasonable excuse for failure to file brief on appeal within time.

4. Appeal and error 🔑771—Negotiations for settlement presented no reasonable excuse for delay in filing brief, when negotiations were definitely terminated before expiration of time for filing.

Fact that portion of time for filing brief on appeal was occupied with negotiations for a settlement did not present reasonable excuse for failure to file brief within time, where it appeared that all negotiations for settlement were definitely terminated in time to permit filing of brief.

5. Appeal and error 🔑771—Printer's refusal to work overtime to complete briefs presented no reasonable excuse for delay in filing brief.

Refusal of printer to work overtime in order to complete brief presents no reasonable excuse for failure to file brief on time, since it is incumbent on litigants to assume responsibility of getting briefs printed.

6. Appeal and error 🔑765—Time of arrival of brief at appellate district having jurisdiction before transfer may be taken as time for consideration in measuring default.

Where appellant's attorney had no knowledge of transfer of case to different appellate district, the time of arrival of brief at original appellate district may be taken as time to be considered in measuring default, if any, by reason of failure to file brief within time.

7. Appeal and error 🔑771—Lack of notice to appellant's attorney of transfer of case to different appellate district presented sufficient excuse for delay in filing brief.

Where appellant's attorney had no notice of transfer of case to different appellate district and would have been able to file brief before notice of motion to dismiss if he had known of transfer, there was sufficient excuse for failure to file brief in court to which case was transferred within time.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Jack Pretzer against the California Transit Company. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal. Motion denied.

Young & Young and De Forrest Home, all of Los Angeles, and Wakefield & Hansen, of Fresno, for appellant.

Theodore M. Stuart, of Fresno, for respondent.

BARNARD, J. This motion to dismiss the appeal herein was made on the ground that appellant had failed to file his opening brief within the time permitted by the rules of the court and the requirements of law. It appears from the record herein, and affidavits filed in connection with this motion, that the transcript upon this appeal was filed in the District Court of Appeal, First Appellate District, on July 29, 1929. The time for appellant to file its opening brief expired August 28, 1929. Respondent's counsel signed a stipulation extending this time to September 28, 1929, then another stipulation extending the time to October 28, 1929. On October 30, 1929, although the appellant was then in default, a third stipulation was signed, extending the time to November 18, 1929. Respondent signed this stipulation because appellant claimed to have been misled by previous negotiations for a settlement. On October 28, 1929, respondent's attorney had notified appellant's attorneys by letter that all negotiations for a settlement were terminated. On or about November 14, 1929, respondent's counsel refused a further extension. Appellant thereupon applied to the court for a 30-day extension, and on November 18, 1929, said court made an order extending the time to November 25, 1929. On November 19, 1929, an order was entered by said District Court of Appeal transferring this cause to the District Court of Appeal for the Fourth appellate district. Appellant's attorneys, not knowing the case had been transferred, mailed their brief at Los Angeles on November 25, 1929, addressed to the clerk of the First appellate district. It arrived at San Francisco on November 27, 1929, and was forwarded to the office of the clerk of the Fourth appellate district at Fresno, where it was received on November 29, 1929. The brief was not filed, pending the outcome of this motion. Notice of motion to dismiss the appeal was filed in Fresno on November 26, 1929. An order shortening the time for hearing was obtained on November 27, 1929, and the notice was received by the attorneys for appellant on November 27, 1929.

[1, 2] Under rule V of the Rules governing this court, if the brief is on file at the time the notice of the motion to dismiss the appeal is given, that fact alone is sufficient to defeat the motion. If the brief is not filed until after notice of the motion has been given, unless a reasonable excuse for the delay is shown, the appeal will be dismissed. The sufficiency of such showing is a question to be determined by the court. Carter v. Paige, 77 Cal. 64, 19 P. 2. Respondent cites Shain v. People's Lumber Co., 98 Cal. 120, 32 P. 878, and McCabe v. Healy, 139 Cal. 30, 72 P. 359, to support his contention that a motion to dismiss the appeal must be determined by the facts existing at the time the notice of motion was filed and served. These cases state the rule that applies where no sufficient excuse for the delay is shown. Where no sufficient excuse is shown, an appeal may be dismissed even though the brief is filed two days after service of the notice of the motion. Coats v. Coats, 146 Cal. 443, 80 P. 694. It has been held that, where a transcript was filed the same day a notice to dismiss an appeal was served, but at a later hour, the motion to dismiss must prevail, unless a sufficient excuse for delay is shown by the appellant. Chapman v. Bank of California, 88 Cal. 419, 26 P. 608. In passing upon the sufficiency of the showing made in the last-named case, the court said:

> "This shows that the appeal was taken and prosecuted in good faith. The delay in filing the transcript was trifling, and the hearing and decision of the cause on its merits will not thereby be delayed, at least not appreciably. The circumstances which occasioned the delay and oversight of counsel were such as to appeal strongly to the discretionary power of the court, and would, without doubt, have procured an order extending the time for filing the transcript if they had been brought to our attention before the motion to dismiss was made. If so, there is no reason why we may not after the motion relieve the appellant from the consequences of his delay when the facts show that before service of the motion to dismiss he was proceeding with all expedition to rectify his mistake."

[3-5] Under the circumstances existing in this case, it is entirely a question of whether or not a reasonable excuse for failure to comply with the rule is shown. Several grounds of excuse for his delay are here set up by appellant. One of these is the usual one of "pressure of business." This is without merit and need be given little consideration. Berendson v. Babdaty, 62 Cal. App. 185, 216 P. 385; Waugaman v. Richardson, 72 Cal. App. 10, 236 P. 207. Were the rule otherwise, it would probably be difficult to dismiss any appeal on the ground of delay, since it might be difficult to find attorneys who possess both leisure and the disposition to admit it. Another reason given for the delay is that a portion of the elapsed time was occupied with negotiations for a settlement. Since appellant's attorneys were definitely notified on October 28, 1929, that all negotiations for a settlement were terminated, we think the showing on this point would entitle it to no relief. Nor can it be accepted as an excuse that the printer refused to work overtime in order to complete the brief on time. It is incumbent upon litigants to assume the responsibility of getting their briefs printed on time.

[6] We are, however, of the opinion that some reasonable excuse for the apparent priority of the filing of the notice of this motion over the filing of appellant's opening brief appears here, in view of the fact that the attorneys for appellant had no knowledge of the transfer of this case from the First appellate district to the Fourth appellate district. The brief was mailed from Los Angeles to San Francisco on November 25, 1929, the day it should have been filed, and received by the clerk of the First appellate district on November 27, 1929. The notice of motion to dismiss this appeal was filed at Fresno on November 26, 1929, an order shortening the time for hearing was made on November 27, 1929, and the papers received by appellant's attorneys on November 27, 1929. In the absence of knowledge of the transfer, appellant had the right to send his brief to the First appellate district, and, for the purpose of this motion, the time of its arrival there may be taken as the time to be considered in measuring its default, if any. It arrived there the same day the notice of this motion was served on appellant's attorneys, though whether at an earlier or a later hour does not appear. There is some question whether, so far as this motion is concerned, the brief may not be considered as having been filed when the notice of this motion was *served.*

In any event, the delay in filing the brief was trifling, the hearing and decision of the case will not be appreciably delayed, and the attorney for appellant was making an apparently sincere effort to comply with the rule (Chapman v. Bank of California, supra) at the last minute, although his previous conduct indicates, not only a degree of negligence, but that he relied and counted upon the liberality of both court and counsel in the matter of time.

A further consideration is that it would have been easily possible for appellant to have filed this brief on November 25, 1929, in the office of the clerk of this court in San Bernardino, only 60 miles from Los Angeles, had the fact of the transfer of the case been known. Had it even been mailed to San Bernardino it would, in the regular course of events, have been on file when respondent's notice of this motion was filed in Fresno. And respondent's notice of this motion would have been filed in San Francisco at least a day later had he not known of the transfer.

[7] We feel that sufficient excuse and reason appears to make it advisable to deny the motion. But we justify our liberality in this matter, not by any merit in the excuses offered by appellant's attorneys, but by the peculiar circumstances existing here. There is too much tendency on the part of attorneys to excuse their failure to file briefs and transcripts on grounds similar to those here presented. The rule involved on this motion is for the benefit of both the court and litigants, and, in order that its value be not lost, it must ordinarily be enforced. Berendson v. Babdaty, supra.

For the reasons given, the motion to dismiss the appeal is denied.

We concur: SLOANE, P. J.; MARKS, J.

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102 Cal. App. 488

REDMAN et al. v. WEISENHEIMER. SAME v. USHER. SAME v. CABLE. ★

(Civ. 6263.)

District Court of Appeal, Second District, Division 2, California. Dec. 10, 1929.

Rehearing Denied Jan. 9, 1930. Hearing Denied by Supreme Court Feb. 6, 1930.

1. Appeal and error ⇨909(1)—In action to quiet title against certain tax deeds, appellate court indulged presumption that tax list was sufficient, where list was not included in bill of exceptions.

In action to quiet title against certain tax deeds where it was contended that delinquent tax list published pursuant to provisions of Pol. Code, § 3764, was insufficient, where such tax list was not included in bill of exceptions on appeal court indulged presumption that tax list was sufficient, since it is the duty of appellant to present record which affirmatively shows existence of error relied on, and where there is failure to show error, appellate court must indulge presumption that there is no error and that such judgment and findings were properly supported.

2. Taxation ⇨200—School district's maintenance of free circulating library did not exempt property in district from tax for support of county library (Pol. Code, §§ 1712–1717; Deering's Gen. Laws 1923, Acts 2750, 2751).

School district's maintenance of free circulating library as permitted by Pol. Code, §§ 1712–1717, did not exempt property in district from tax for support of county free library organized pursuant to provisions of Deering's Gen. Laws 1923, Acts 2750, 2751.

3. Taxation ⇨44—School tax held invalid as unequal, where tax was levied on four school districts but not on fifth.

Tax levied to provide sinking funds to meet interest on bonded high school indebtedness *held* invalid and unequal, where taxes were levied on property situated in four school districts, but not on fifth school district, which were included in high school district.

4. Taxation ⇨734(1)—Tax deed held void, where high school tax was invalid because of inequality.

Tax deed *held* void, where high school tax was invalid because of inequality in taxing four school districts in high school district and not fifth district.

Appeals from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Separate actions by E. C. Redman and another against F. L. Weisenheimer, against W. A. Usher, and against Louise Brunning Cable. Judgment for defendants, and plaintiffs appeal. Reversed.

Frank H. Snyder, of Los Angeles, for appellants.

Randall J. Hood, of Los Angeles, for respondents Usher and Weisenheimer.

C. F. Cable and L. R. Godward, both of Los Angeles, for respondent Cable.

IRA F. THOMPSON, J. Three separate actions were commenced in the court below by the plaintiffs against the defendants for the purpose of quieting their title against certain tax deeds running to the defendants. Inasmuch as they all involved the same alleged defects they were tried together; judgment in each case went for the defendant; and the appeals from the several judgments are presented to us by stipulation in one transcript. The property is all situated in the Redman elementary school district, the Antelope Valley union high school district, and in the county of Los Angeles. The sales were for delinquent taxes for the year 1916.

Three contentions are advanced by the appellants as reasons for the reversal of the judgments, and they are as follows:

First. That the delinquent tax list published by the tax collector in 1917, pursuant to the provisions of section 3764 of the Political Code, was insufficient.

Second. That the board of supervisors had no authority to levy a tax for the support of the county free library for the reason that the Redman elementary school district maintained a circulating library.

Third. That the tax levied to provide a sinking fund to meet the interest on the bonded indebtedness of the Antelope Valley union high school district was not uniform and was for that reason void, or at least that evidence to establish the invalidity was improperly rejected.

For the sake of clarity we have set down the above assertions in their order and shall follow them seriatim in our consideration of the cause.

[1] Turning to the claim that the delinquent tax list was insufficient because it specified that the amounts set opposite the descriptions of the parcels of property represented the "amount due for taxes and costs," without saying whether the sums al-

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★Rehearing denied. Hearing denied by Supreme Court.

so covered penalties, we find that the transcript does not disclose the situation which is argued. Counsel evidence an appreciation of their failure to have included in the bill of exceptions the delinquent tax list, by asking this court to order the document to be sent here for inspection. Of course such is not a proper proceeding. It devolves upon an appellant to present a record which affirmatively shows the existence of the error relied upon. Foster v. Young, 172 Cal. 317, 156 P. 476. Where there is a failure in this particular, the appellate tribunal must indulge the presumption that there is no error and that the judgment and findings are properly supported. Beck v. Schmidt, 13 Cal. App. 448, 110 P. 455.

[2] We are thus brought to the second question, namely, did the maintenance by the Redman elementary school district of a free circulating library exempt the property of that district from a tax for the support of the county free library? The question must be answered in the negative. The district school library which was maintained was a part of the system intended to be provided primarily for the schools by the provisions of sections 1712 to 1717, both inclusive, of the Political Code. The library for the support of which the tax was levied is known as the county free library established by the board of supervisors under the authority of "An act to provide for the establishment and maintenance of county free libraries in the state of California, * * *" Deering's Gen. Laws of 1923, p. 982. The last-named act empowers and directs the supervisors to annually levy a tax not exceeding one mill on each dollar of assessed valuation upon all property outside of incorporated cities and towns maintaining free libraries and outside of library districts maintaining district libraries. The library districts referred to are those organized pursuant to the provisions of "An act to allow unincorporated towns and villages to establish, equip and maintain public libraries, * * * etc." Deering's Gen. Laws of 1923, p. 992. Libraries so established are entirely separate and distinct from the school libraries to which reference has already been made.

[3] The last assault upon the judgments is on the ground that the assessment was not uniform because while a tax was levied upon the property situated in the school districts of Rogers, Del Sur, Redman, and Lancaster for the purpose of raising funds with which to pay interest upon outstanding bonds of the Antelope Valley union high school, no tax was levied for similar purposes upon the property in the Esperanza district although all of the districts are included within the high school district. It appears from the county auditor's certificate introduced without objection, that for the purpose mentioned the property in the first named districts was taxed at the rate of 14 cents on every $100 of assessed valuation, but that property in the Esperanza district was taxed nothing. The plaintiffs offered two resolutions of the board of supervisors, the first authorizing the issuance of bonds by the high school district and the second reciting their sale, but an objection to their reception was sustained. The question to be first determined is whether the omission of the property of Esperanza district voids the assessment. We find a very succinct definition of uniformity in taxation in the case of People v. Whyler, 41 Cal. 351, wherein it is said: "A tax is equal and uniform, which reaches and bears with the like burden upon all the property within the given district, county, etc. It bears the like burden, when the valuation of each parcel is ascertained in the same mode—the mode prescribed by law—and when it is subject to the same rate of taxation as other property within the district, county, etc." The converse of this statement may for our purposes be stated to be, that where the property is not subject to the same rate as other property within the district the tax is not equal and uniform. Other expressions illustrating the necessity of uniform taxation may be quoted. From People v. Eddy, 43 Cal. 339, 13 Am. Rep. 143, we cull the following: "It is impossible to conceive of any law which is more imperatively required by the principles of good government and the just rules of political economy to be equal and uniform than a revenue law. That the burdens of taxation should rest equally upon all property within the State ought to be axiomatic, not only in theory but in practice." We select an excerpt from Cottle v. Spitzer, 65 Cal. 456, 4 P. 435, 52 Am. Rep. 305, in these words: "It is the settled policy of all governments, republican in form, that the burdens of taxation shall fall equally upon their citizens. Where resort is made to direct ad valorem taxes, for the purpose of revenue, in order to carry out both the letter and spirit of that policy, it becomes necessary that property should be assessed for taxation, not only according to a just and uniform standard of value, but that all property should be thus assessed and taxed; for if the property of A. is taxed and that of B. is left to go untaxed, it is manifest that the burdens of taxation have been very unequally imposed upon the people. Consonant with this principle, which is a corner-stone in the structure of a free government, the constitution of the state provides that 'all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law.'" We might continue such quotations to greater lengths for the books abound with declarations of the fundamental principle. But sufficient has been said to accentuate the vice of the assessment under consideration. If the property in the Esperanza district could legally be left free from

the tax levied upon the remaining districts included within the high school district, then it must "follow as the night the day" that the total tax might with like effect be levied upon the property of only one of the elementary districts, while all of the others were permitted to escape their proper share of the burden.

[4] What effect then does the invalid assessment have upon the tax deed? The answer is found in Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, 260, L. R. A. 1915C, 492, as follows: "No proposition is better settled than this, that proceedings to sell property for taxes are to be strictly followed, and that, if there is any material irregularity in the assessment or in the subsequent proceedings, the sale, and the certificate and deed based thereon, are absolutely void."

Judgments reversed and new trials ordered.

We concur: CRAIG, Acting P. J.; BURNELL, Justice pro tem.

102 Cal. App. 578

KOZLOWSKI v. ADAMS. (Civ. 3970; L. A. 10230.)★

District Court of Appeal, Third District, California. Dec. 16, 1929.

Rehearing Denied Jan. 15, 1930. Hearing Denied by Supreme Court Feb. 13, 1930.

1. Pleading ⚷126—Vendor's denial that purchaser paid portion of price of lot, map of which was not recorded, in form of negative pregnant, constitutes admission of allegation.

Vendor's denial that purchaser, suing for money paid on purchase price of lot, map of which had not been recorded, had paid certain sum on purchase price, in form of negative pregnant, constitutes in effect an admission of that allegation.

2. Vendor and purchaser ⚷340—Seller is not precluded from defending claim for price payment because of unlawful act in selling lot on unrecorded map.

In action to recover money paid on price of lot, map of which was not recorded, defendant is not precluded from making defense to claim for damages because of his unlawful act in selling lot on an unrecorded map, which constitutes a misdemeanor.

3. Vendor and purchaser ⚷341(2)—Allegation that vendor represented map of lot purchased was recorded held immaterial, in action for money paid on purchase price, in absence of allegation plaintiff was without such knowledge.

Allegation, in complaint in action to recover money paid on purchase price of lot, that defendant represented to plaintiff's assignor that map in question was recorded, *held* immaterial, because it was not alleged that either plaintiff or assignor was without knowledge that map was unrecorded, or that either of them was misled or deceived by representations of vendor.

4. Vendor and purchaser ⚷39—Contract for sale of lot, map of which was unrecorded, was void, allowing purchaser's recovery of amount paid.

Contract for sale of lot, map of which was not recorded, *held* void, and purchaser is entitled to recover from vendor amount paid on purchase price.

5. Vendor and purchaser ⚷341(5)—Damages cannot be allowed for vendor's breach of contract in action for amount paid on lot, where contract was void because map was unrecorded.

Where contract for sale of lot was void, because map of lot was unrecorded, there was no basis for allowance of damages for breach of contract, in action by purchaser to recover amount paid on purchase price and for damages.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Kora Kozlowski against B. G. Adams. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

Arthur C. Fisher, of Los Angeles, for appellant.

George S. Hupp, of Los Angeles, for respondent.

FINCH, P. J. The complaint alleges that the defendant entered into an agreement with Rose Henderson, by the terms of which he agreed to sell and convey to her lot 84, tract 4754, in the city of Los Angeles, for $3,500; that he showed her a map of the tract, and told her that it "was the official and recorded map of said tract"; that thereafter Rose Henderson transferred all her rights under the contract to the plaintiff; that the plaintiff has paid the defendant on the purchase price of the lot the sum of $2,500; that the defendant thereafter informed the plaintiff that he would not convey the lot to her, because the said map had not been recorded; that thereafter the plaintiff tendered the balance due under the contract and demanded a conveyance of the lot to her, but that the defendant refused; that at the time of entering into the contract the defendant knew that the map was not recorded; that the plaintiff has been damaged, in addition to the amount paid upon the purchase price of the lot, in the sum of $6,500. The prayer is for the recovery of the amount so paid and damages in the sum of $6,500.

The answer, signed by the defendant "in propria persona," denies, among other things, "that the plaintiff has paid on account of said purchase price the sum of $2,500," admits that the alleged map was not recorded at the time the contract was executed, and alleges that the defendant has "offered to refund to plain-

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★Rehearing denied. Hearing denied by Supreme Court.

tiff all moneys paid on said contract plus 7 per cent. interest."

Judgment was entered in favor of the plaintiff for $4,933.70 and costs of suit, and the defendant has appealed.

The defendant was not personally present at the trial, but an attorney was in court attempting to act for the defendant. The court refused to permit the attorney to represent the defendant, apparently on the ground that he had not been regularly substituted as attorney in place of the defendant, acting as his own attorney, and stated: "You have no case at all here. The man sold a lot, and the map of the tract was never recorded, and under the law he has committed a misdemeanor. I will not permit you to put in any testimony whatever." The court refused to permit defendant's attorney to cross-examine the plaintiff's witnesses, or to introduce any evidence in defense. In reply to such attorney's statement that the defendant had a right to present his defense, the court said: "I will not permit the introduction of any evidence under your answer. * * * I cannot permit you to defend, because your answer shows that you have violated the law and are guilty of a misdemeanor. * * * If he was on a criminal trial, of course, he could defend; * * * but your own answer puts you out of court."

[1, 2] The denial of the allegation that the plaintiff had paid the sum of $2,500 on the purchase price of the lot is in the form of a negative pregnant, and constitutes, in effect, an admission of that allegation; but, if the language of the court is to be understood as stating that the defendant was precluded by his unlawful act from making any defense to the plaintiff's claim for damages, then the court was clearly in error. Whether counsel who attempted to represent the defendant at the trial had a right so to appear for him need not be determined on this appeal, because the judgment must be reversed on other grounds, and the question probably will not arise on a retrial of the case.

[3] The allegation in the complaint that the defendant represented to the plaintiff's assignor that the map in question was recorded is immaterial, because it is not alleged that either the plaintiff or her assignor was without knowledge of the fact that the map was unrecorded, or that either of them was misled or deceived by the representation.

[4, 5] It is clear that the alleged contract is void, and that the plaintiff is entitled to recover the purchase price paid thereon. Smith v. Bach, 183 Cal. 259, 191 P. 14; White v. Jacobs (Cal. Sup.) 267 P. 1087; Hartzell v. Doolittle (Cal. Sup.) 269 P. 527; Letteau v. Dumas (Cal. App.) 278 P. 459; Shortell v. Evans-Ferguson Corporation (Cal. App.) 277 P. 519; Krause v. Marine Trust & Savings Bank (Cal. App.) 270 P. 246. Plaintiff's claim for damages is for a breach of the alleged contract. An "action for a breach of contract is one based upon the contract." Lemle v. Barry, 181 Cal. 1, 3, 183 P. 150, 151. A so-called void contract is not a contract at all, and it is only the statement of a truism to say that there cannot be a breach of a contract which has no existence. There is no basis, therefore, for an allowance of damages for breach of contract. Evidence was introduced to show that the plaintiff had paid certain sums for taxes and interest. Evidence was also introduced as to the amount of damages suffered by the plaintiff.

Counsel for defendant asked the court to make findings, but the court refused, saying: "Findings are denied, by reason of the fact there was no appearance on the part of the defendant." There being no findings, it is impossible to ascertain upon what the judgment for $4,933.70 is based, but clearly the amount is greatly in excess of any sum properly allowable under the evidence. There being no basis upon which to modify the judgment, it is necessary to send the case back for a retrial.

The judgment is reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing of this cause in the Supreme Court is denied.

We are in accord with the District Court of Appeal in its ruling that the trial court was in error in denying the defendant the right to make his defense to the plaintiff's cause of action. We withhold our approval, however, of that portion of the opinion holding that the contract for the purchase of the lot described in the complaint in said action was void and the plaintiff could not, therefore, recover damages for its breach. As to this phase of the case, we express no opinion.

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102 Cal. App. 650

In re HUNT'S ESTATE.★

LUCAS et al. v. VALZ et al.

(Civ. 6645.)

District Court of Appeal, Second District, Division 1, California. Dec. 19, 1929.

Rehearing Denied Jan. 14, 1930. Hearing Denied by Supreme Court Feb. 17, 1930.

Judgment ⇐91—After compromise of pending actions involving controversies under testamentary trust and consent decree, parties thereto held estopped to contest validity of trust.

Where compromise of several pending actions between parties thereto was effected by

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★Rehearing denied. Hearing denied by Supreme Court.

which controversies regarding validity of charitable trust created under will were settled as well as all claims of parties against testator's estate and in one action consent decree was entered directing establishment of trust, parties to actions compromised *held* estopped to subsequently contest validity of trust, either in its inception at testator's death, or after death of trustees nominated by will.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

In the matter of the estate of John W. Hunt, deceased. Action by Henry Gaillard Lucas and others against Fred M. Valz and another, as trustees under the will of John W. Hunt, deceased. Judgment for defendants, and plaintiffs appeal. Affirmed.

Wellborn, Wellborn & Wellborn, of Los Angeles, for appellants.

Kenyon F. Lee, of Los Angeles, and A. Pratt Adams, of Savannah, Ga. (Bradner W. Lee, Jr., of Los Angeles, Stanton Walker, of Jacksonville, Fla., and Samuel B. Adams, of Savannah, Ga., of counsel), for respondents.

HOUSER, J. The facts involved in this controversy are somewhat complicated, but so far only as relates to this decision it may be sufficient to state that by the will of John W. Hunt the residue of his estate was given, bequeathed, and devised to two named persons in trust "for the purpose of using the proceeds therefrom in establishing and maintaining such charitable and benevolent institution as they may see fit, as a memorial" to said Hunt. Following the death of the testator several different actions were brought for the ultimate purpose of testing the validity of such trust. In the federal court, where one of such actions was instituted, the identical persons (or their predecessors in interest) who are parties to the proceeding on which the instant appeal is based, were made parties, and the complaint or bill in effect included the allegation that the trust in question was void for the reason that had the trustees died or resigned, or refused to act, or disagreed, before acceptance of the trust, or after its acceptance, but before executing the terms of the will, neither the court, nor any substituted trustee appointed by the court, could administer the trust fund. Before either of said several actions was brought to a hearing, a compromise agreement was entered into among the parties to such litigation, which agreement included the recital that it was made "in settlement of all pending controversies and of all claims and demands against the estate. * * *" Thereupon it was covenanted that "the gift to establish and maintain a charitable or benevolent institution * * * be held to be a valid gift to charitable use; * * * and (after providing for the payment of all legacies mentioned in the will, together with a bonus of a sum of money to each of the respective litigants), that the balance of the estate should be applied to the establishment of the trust." With the object of carrying out the purpose hereinbefore indicated, the agreement further provided that appropriate assignments, releases, and deeds be executed by the proper parties, as well as for the execution "at any time upon request any and all other papers of whatsoever sort which may be necessary or proper for the consummation of this settlement." In complying with the express terms of the agreement, among other things, a "consent decree" was obtained from the supreme court of the state of New York, which was one of the courts having jurisdiction of the subject matter and the parties, and in which one of the actions between the parties was pending. One of the provisions of such decree was that "the executors of and trustees under the last will and testament of John W. Hunt, deceased, *and their successors*, are hereby directed to establish and maintain the charitable or benevolent institution therein provided for in accordance with said provisions of the said will." Some seven years after said agreement was executed both of the originally appointed trustees died without having actually established the "memorial" which was the object of the trust. Approximately five years after the demise of the said trustees the proceeding which is the basis for the instant appeal was commenced by the assumed heirs at law of the testator against one Valz and Citizens' & Southern Bank, a corporation (who theretofore had been appointed trustees by the superior court of the state of Georgia in lieu of the original trustees under the will), for the purpose of having the trust declared invalid on the ground that the trust was personal and confidential in its nature, and that by reason of the death of the original trustees the trust had lapsed and terminated. After an extended trial of the several issues presented by the pleadings, the lower court rendered its judgment against the plaintiffs; and this appeal is prosecuted therefrom.

Appellants make no claim that the trust attempted to be established by the will of the testator did not constitute "a lawful and valid gift for charitable purposes," as was adjudged by the New York court to which reference has been had. They do, however, by the citation of many legal principles and the adjudications of courts in various jurisdictions, seriously attack the right to the existence and enforcement of the trust following the date of the death of the originally appointed trustees. Although such points are ably presented and furnish many interesting questions of law which hitherto either have been wholly undetermined by the courts of last resort of this state, or which, as to other jurisdictions, are in an unsettled or unsatisfactory state so far as approaching unanimity of decision is concerned—because of the conclusion reached by this court as to the legal or equitable right of the plaintiffs to prosecute the proceeding in the lower court—if not altogether useless, it becomes at least inadvisable to devote the attention and energy necessary to a discussion and decision of points which may be but incidentally involved herein.

As hereinbefore indicated, the legality of the trust, so far as its attempt to create a valid gift for charitable purposes is concerned, is not at issue in this appeal. That particular feature of the original controversy, as conceded, has been compromised and settled by agreement of the parties, as well as by the adjudication of the supreme court of the state of New York.

In the case of Keating v. Smith, 154 Cal. 186, 97 P. 300, where the authorities with reference thereto are cited, the law relating to the conclusiveness of a final decree in such matters, is stated in the syllabus as follows: "Notwithstanding the invalidity of a trust attempted to be created by a will, a final decree distributing the estate to trustees upon certain trusts is a conclusive adjudication of the validity of the disposition made by the testator, and is equally conclusive as an ascertainment and adjudication of the terms of the trust, and of the rights of all parties claiming any legal or equitable interest under the will." See, also, French v. Phelps, 20 Cal. App. 101, 128 P. 772; In re Scrimger's Estate, 188 Cal. 158, 206 P. 65.

As hereinbefore noted, a compromise of the several actions pending between the parties was effected by which to all intents and purposes the plaintiffs agreed to settle, and thereby did settle, "all pending controversies and (of) all claims and demands against the estate." One of the controversies then pending, as shown by the pleadings in one of the actions between the parties, was the identical question which is presented by the plaintiffs in this proceeding. In addition thereto, the "consent" decree entered by a court having jurisdiction so to do contained the adjudication and direction that the originally appointed trustees "*and their successors* * * * establish and maintain the charitable or benevolent institution" provided by the will of the testator. It is the conclusion of this court that, in view of such executed agreement of the parties and the decree of court entered pursuant thereto, the plaintiffs were estopped and precluded from thereafter contesting in a court of equity or elsewhere either the validity of the trust in its inception as occurring on the demise of the testator, or after the death of the trustees nominated and appointed by the will.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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102 Cal. App. 647

PEOPLE v. WHITE et al. (Cr. 1876.)

District Court of Appeal, Second District, Division 1, California. Dec. 19, 1929.

1. Robbery 🔑24(3)—Evidence held sufficient to identify defendants as persons committing robbery and firing a gun.

Evidence *held* sufficient to identify defendants as persons who committed robbery and one of them as man who fired gun.

2. Robbery 🔑24(1)—Evidence held to sustain conviction for first degree robbery of filling station at point of pistol (Pen. Code, § 211a).

Evidence of robbery of filling station, during which one person was shot and wounded, *held* to sustain conviction for first degree robbery, under Pen. Code, § 211a.

3. Criminal law 🔑1144(14)—It will be assumed, where other instructions on same subject are not properly printed in brief, that court appropriately instructed upon subject of refused requested instructions.

Where there is no compliance with rule 8, requiring that, where error is predicated upon erroneous refusal of instruction, all other instructions given bearing on subject of refused instruction must be printed in appellant's brief in full, or substance thereof clearly stated, with citation to line and page of transcript where such instructions may be found, it will be assumed on appeal that court properly instructed upon subject to which request was addressed.

4. Criminal law 🔑1130(5)—Brief must present each point separately under appropriate heading showing nature of question to be presented.

Proper briefing under the rules requires that each point must be separately presented under appropriate heading showing nature of question to be presented.

5. Criminal law 🔑1158(4)—Error cannot be predicated on reception of confessions, where evidence as to whether they were free and voluntary was conflicting.

Conflicting evidence as to whether confessions were free and voluntary precludes review of error assigned to their reception.

6. Witnesses 🔑214—Attorney may testify as to communications with accused in presence of third person under circumstances indicating they were not intended to be confidential.

Communications by attorney for accused in presence of third person, and under circumstances indicating that they were not intended to be of confidential nature, are not privileged, and the attorney may testify to same.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Franklin W. White and another were convicted of first degree robbery, and they appeal. Affirmed.

James W. Pierce, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, P. J. On the evening of April 23, 1929, one Roy Bass was the attendant in charge of a gasoline station at Avalon boulevard and Forty-Seventh street, in the city of Los Angeles. Jack Church, a 16 year old newsboy, had come in for the purpose of asking Bass to change a bill for him. Church had $9 in hand and there was the sum of $22 in the till. Soon after the arrival of Church, and while the situation was that above stated, two men drove up to the station and committed the crimes charged in the information. Church was robbed of the $9 and was wounded by a pistol shot. Bass was robbed of the $22.

[1] Appellants contend that there is no evidence tending to connect the defendants, or either of them, with these crimes. The argument on this point rests chiefly upon the assertion that the witnesses completely failed to identify the defendants. It may be that some of the admissions made by the witnesses, such as the admission by Bass that he never saw Price's face at all, furnish some excuse for this contention. But a reading of the testimony develops at most a contradiction in the evidence. The testimony of Jack Church alone is sufficient as an identification of White and Price as the persons who committed the robbery and of Price as the man who fired the gun.

[2, 3] The next point is that the evidence is not sufficient to justify the verdict of robbery in the first degree. In this connection complaint is made that the court refused to instruct the jury that, before they could find defendants guilty of robbery in the first degree, the jury must be satisfied, beyond any reasonable doubt, that the money was taken by the defendants from the possession of the person robbed, "at the point of the gun or that the gun was exhibited to them before the money was taken." The degrees in robbery are defined in the Penal Code as follows: "Section 211a. *Degrees of Robbery.* All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree." The court did not err in refusing the requested instruction. Counsel for appellants have not complied in that part of rule VIII which requires that, where it is claimed that instructions requested were erroneously refused, all other instructions given, bearing upon the subjects covered by the refused instructions, must be printed in appellant's brief in full, or the substance thereof clearly stated, with citation to the line and page of the transcript where such instructions may be found. Counsel having failed to show anything to the contrary, we shall assume that somewhere within the voluminous mass of instructions given the court did appropriately instruct upon the subject of the degrees in robbery.

[4, 5] We further note that appellants in their brief have failed to comply with the rule which requires that a brief must present each point separately, under an appropriate heading, showing the nature of the question to be presented. Counsel have left it to the court to dig out the points from the text of the brief. The next point seems to be that certain confessions were not free and voluntary, and that the court erred in receiving them. The evidence on the subject was conflicting, and may not here be reviewed.

[6] The fourth and last point is that the court erred in overruling objections to the testimony of the witness Coen, who at the preliminary examination had appeared as attorney for the defendants. Although the brief fails to give the transcript pages where this evidence and ruling may be found, we have made the investigation. See Rep. Trans. p. 272 et seq. The court ruled that, in view of the confidential relation of attorney and client, as between the witness and defendants, the evidence of conversations between witness and defendants alone would be excluded; but further held that the witness might state conversations which he had with defendants in the presence of third persons. The evidence was given under this ruling. In this there was no error. The communications about which Coen testified were made in the presence of third persons, and under such circumstances that the court was justified in holding that they were not intended to be of a confidential nature. Such communications are not privileged. Mission Film Corporation v. Chadwick Pictures Corporation (Cal. Sup.) 278 P. 855.

The judgments and orders are affirmed. The attempted appeals from the several verdicts are dismissed for the reason that a verdict is not a proper subject of appeal.

I concur: HOUSER, J.

102 Cal. App. 110

IRWIN v. NEWBY et al. (Civ. 7099.)★

District Court of Appeal, First District, Division 2, California. Dec. 19, 1929.

Hearing Denied by Supreme Court Jan. 16, 1930.

Libel and slander 🔑80—Complaint in libel action, showing publication was made in court as integral part of judicial proceedings and germane and relevant to cause on trial, held not to state cause of action (Civ. Code, § 47).

Complaint in action for libel, showing both that publication was made in court and also that it was an integral part of judicial proceeding and that it was germane and relevant to cause on trial within meaning of law of privileged communications, as defined by Civ. Code § 47, *held* insufficient to state good cause of action.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

On petition for rehearing. Petition denied. For former opinion, see 282 P. 810.

Wm. A. Alderson and John C. Packard, both of Los Angeles, for appellant.

Newby & Palmer and Newby & Newby, all of Los Angeles, for respondent Stockwell.

Dee Holder, of Los Angeles, for respondents Palmer and Newby.

PER CURIAM. There is some confusion in the minds of counsel for the parties hereto as to the use of the terms absolute and qualified privilege which appear in some of the decisions cited in the opinion filed herein. The privileged publications defined in subdivisions 1 and 2 of Civil Code, section 47, are called cases of absolute privilege. Those defined in subdivisions 3, 4, and 5 of that section are called cases of qualified privilege because the section expressly limits the privilege to publications made without malice. Stevens v. Snow, 191 Cal. 58, 64, 214 P. 968; The Hale Co. v. Lea, 191 Cal. 202, 205, 215 P. 900. A publication in a judicial proceeding is absolute because subdivision 2 gives no qualification. Appellant herein claims that the court in the case of Carpenter v. Ashley, 148 Cal. 422, 83 P. 444, 7 Ann. Cas. 601, has by judicial decision ingrafted an exception to the privilege of subdivision 2.

The expressions "not absolute and unqualified" and "not absolute but is limited" as used in the Carpenter Case, do not have the same meaning as when used in comparing the first two subdivisions of Civil Code section 47 with the other subdivisions. As used in the case cited, they simply convey the meaning that if the defamatory words "have no relation or reference to the cause in hand or to any subject matter involved therein" then such defamatory words are not *in fact* published *in a judicial proceeding* even though such defamatory words are published during the progress of a trial and in the very court room where the cause is on trial. Comparable to the Carpenter v. Ashley Case would be a decision that a publication without malice in a communication to a person interested therein would not be privileged under subdivision 3 if it was held under certain facts that the person said to be interested was not in fact interested; or that a report which had the appearance of having been published in a public journal was not in fact made in a journal which was a public one within the meaning of subdivision 4.

If a complaint pleads facts which show the publication was made in a judicial proceeding, it does not state a cause of action unless it goes further and pleads other facts which show that in contemplation of law the publication was not in fact made in a judicial proceeding although made in court. In the instant case the complaint shows both that the publication was made in court and also that it was an integral part of a judicial proceeding and that it was germane and relevant to the cause on trial within the meaning and contemplation of the law of privileged communications.

The petition for rehearing is denied.

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102 Cal. App. 716

BURRELL v. CAPT. H. A. CROW POST NO. 884, VETERANS OF FOREIGN WARS CONVENTION COMMITTEE et al. (Civ. 6967.)

District Court of Appeal, First District, Division 2, California. Dec. 23, 1929.

1. Principal and agent 🔑136(1)—Liability under written contract must be determined from contract itself.

In the law of agency, the question of liability under a written contract must be determined from the contract itself.

2. Associations 🔑20(5)—Complaint against convention committee of veterans' organization held to state action against individual defendants as members of unincorporated association (Code Civ. Proc. § 388).

Complaint, in action on contract against individual defendant, *held* to state cause of action under Code Civ. Proc. § 388, against defendants as members of unincorporated association; the contract purporting to be made, not by C. Post of Veterans of Foreign Wars, but by C. Post Veterans of Foreign Wars Convention Committee, and complaint alleging that such committee was unincorporated association of which defendants were members.

3. Pleading 🔑214(1)—On demurrer, fact allegations of complaint are to be taken as true.

Fact allegations of complaint are to be taken as true for purposes of demurrer.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Cuff Burrell against Capt. H. A. Crow Post No. 884, Veterans of Foreign Wars

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★Hearing denied by Supreme Court.

Convention Committee, Percy C. Church, and another. From a judgment for defendants sustaining a demurrer to the second amended complaint, plaintiff appeals. Reversed and remanded, with directions.

Clarence H. Wilson, of Los Angeles, for appellant.

B. M. Benson, of Fresno, for respondents.

BURROUGHS, Justice pro tem. This is an appeal by the plaintiff from a judgment entered in favor of the defendants Church and Neuman after an order made by the trial court sustaining a demurrer to the second amended complaint.

The said complaint is entitled Cuff Burrell, Plaintiff, v. Capt. H. A. Crow Post No. 884, Veterans of Foreign Wars Convention Committee, Percy C. Church, and B. A. Neuman, Defendants. It is alleged therein: That said Convention Committee at all times mentioned in the complaint was an unincorporated association of persons associated together under the fictitious name above set forth for the purpose of making arrangements for a state convention of the Veterans of Foreign Wars, to be held in Fresno during the month of June, 1926, and for the purpose of providing suitable entertainment and recreation for said convention. That the defendants Church and Neuman were members of said convention committee. That on June 6, 1926, as a part of said entertainment, the defendants conducted a rodeo. That for the purpose of holding said rodeo the defendants Church and Neuman entered into a contract with the plaintiff, a copy being annexed to the said complaint. By the terms thereof the plaintiff contracted to furnish certain live stock, etc., and perform other services for which the committee and Church and Neuman agreed to pay plaintiff $1,550. That the plaintiff performed all of the terms of the contract required to be performed by him. That the defendants have paid plaintiff in accordance with the terms of the agreement $563, but have failed and refused to pay the balance of $987 now due and unpaid, although demand therefor has been made of each of the defendants. The agreement is entitled Cuff Burrell, as the party of the first part, and the Captain H. A. Crow Post No. 884, Veterans of Foreign Wars Convention Committee, the party of the second part. In the body of the contract they are referred to as the "party of the first part" and "party of second part." The instrument is signed "Cuff Burrell, Party of the 1st Part" and "V. F. W. Convention Com. Party of the 2nd Part, By Percy C. Church, Party of the 2nd Part, and Bentley A. Neuman Party of 2nd Part."

[1] The only question presented for consideration and decision is this: Were the two defendants, in making the contract, acting as agents for the Captain H. A. Crow Post of the Veterans of Foreign Wars or were they acting for and as members of an unincorporated association known as the Capt. H. A. Crow Post No. 884, Veterans of Foreign Wars, Convention Committee. If the former, then the said complaint fails to state a cause of action. If the latter, then a cause of action has been alleged. It is well settled that in the law of agency the question of liability under a written contract must be determined from the contract itself. 2 Cor. Jur. 671; Heringer v. Schumacher, 88 Cal. App. 349, 263 P. 550; 1 Cal. Jur., p. 821.

[2, 3] The contract purports to be made by the convention committee; no reference whatever is made to the post itself. It is specifically stated that the contract is between the plaintiff and the convention committee, and it is so signed by the committee by Church and Neuman. It does not necessarily follow that in staging a convention of a particular organization the committees in charge are either members thereof or acting under the direction of such organization. In the case at bar there is nothing whatever to show any connection between the post and the committee, except that the post was holding a state convention in Fresno. The complaint upon which this action was decided alleges that the committee was an unincorporated association of which the defendants were members, and such allegations for the purposes of the demurrer are true; therefore, under the provisions of section 388 of the Code of Civil Procedure, the said complaint states a cause of action. Zimmerman v. Prior, 46 Cal. App. 40, 188 P. 836; Leake v. City of Venice, 50 Cal. App. 462, 195 P. 440.

The demurrer was submitted with a stipulation by the parties that final judgment should be entered by the court in accordance with the decision upon the demurrer.

It is ordered that the judgment be and it is, reversed, and the cause is remanded to the trial court, with directions to overrule the demurrer of the defendants Church and Neuman to the second amended complaint, and in accordance with said stipulation to enter judgment in favor of the plaintiff and against the defendants Church and Neuman, in accordance with the prayer of said second amended complaint.

We concur: KOFORD, P. J.; NOURSE, J.

102 Cal. App. 686

F. E. BOOTH CO., Inc., et al. v. ZELLERBACH et al., Fish and Game Commission. (Civ. 7286.)

District Court of Appeal, First District, Division 1, California. Dec. 20, 1929.

1. Prohibition 🔑6(2)—Granting of permit to take fish for manufacture of edible products is administrative act, to which writ of prohibition will not run; "judicial function" (Code Civ. Proc. § 1102).

Granting of permit by fish and game commission to take and use fish by a reduction or extraction process for manufacture of edible products was not a judicial function within meaning of Code Civ. Proc. § 1102, but purely an administrative or executive act to which writ of prohibition would not run.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Judicial Function.]

2. Prohibition 🔑6(2)—Writ of prohibition will not lie as to permit by fish and game commission granted prior to issuance of alternative writ.

Where permit by fish and game commission to take and use fish by a reduction or extraction process for manufacture of edible products was granted prior to issuance of alternative writ of prohibition, the writ will not lie.

Original application by the F. E. Booth Company, Inc., and others, for an alternative writ of prohibition directed to I. Zellerbach and others, as the Fish and Game Commission. Petition denied, and restraining order discharged.

B. D. Marx Greene and Carl Westerfeld, both of San Francisco, for petitioners.

Eugene D. Bennett, Wm. B. Hornblower and Fabian D. Brown, all of San Francisco, for respondents.

PER CURIAM. [1, 2] Petitioners herein prayed for an alternative writ of prohibition, directed to I. Zellerbach, George B. Clarkson, and Reginald G. Fernald, as and constituting the fish and game commission of the state of California, and all persons acting by and through said respondents herein, directing and commanding the said respondents and each of them, their officers and agents, to desist and refrain from issuing to Globe Grain & Milling Company any permit to take and use fish by a reduction or extraction process for the manufacture of edible products, and to show cause before the above-entitled court why the said I. Zellerbach, George B. Clarkson, and Reginald G. Fernald, their officers and agents, should not be absolutely and forever restrained from taking any further or other proceedings towards granting such permit to Globe Grain & Milling Company to take and use fish by a reduction or extraction process for the manufacture of edible products, and for such other and further relief as petitioners may be entitled to.

Respondents have appeared and demurred and answered to the petition.

They claim that the granting of the permit to said Globe Grain & Milling Company, or to any other person, is not a judicial function, being purely an administrative or executive act to which the writ of prohibition will not run, and is in no way reviewable in this proceeding. Respondents also contend that the permit authorizing them to act had been granted prior to the issuance of the alternative writ, and for which further reason the writ will not lie.

We are of the opinion that respondents are correct in their contentions. Globe Cotton Oil Mills v. Zellerbach, etc., 200 Cal. 276, 252 P. 1038; Code Civ. Proc. § 1102; 21 Cal. Jur. 591.

The petition is denied and restraining order discharged.

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102 Cal. App. 691

PYLE et al. v. BENJAMIN. (Civ. 3863.)

District Court of Appeal, Third District, California. Dec. 20, 1929.

1. Damages 🔑79(1)—Court must examine circumstances attending execution, as well as terms, of contract, to determine whether it was impracticable or extremely difficult to fix actual damage by breach thereof, as required to authorize prior agreement on amount (Civ. Code, § 1671).

To determine whether it would be impracticable or extremely difficult to fix actual damage, as required by Civ. Code, § 1671, to authorize agreement on amount of damages by parties to contract before breach thereof, court must examine attendant and surrounding circumstances under which contract was made, as well as terms of contract itself.

2. Damages 🔑85—Exchange contract, requiring payment of stated commission to brokers and liquidated damages for refusal to consummate contract, held void as to latter provision (Civ. Code, §§ 1670, 1671).

Contract for exchange of lands, providing for payment of $800 commission to broker by parties and payment of $100 as liquidated damages by party refusing to complete or consummate contract, *held* void as to provision for liquidated damages, under Civ. Code, § 1670; there being no uncertainty as to amount of damages, as required by section 1671, to authorize agreement thereon by parties.

3. Exchange of property 🔑6—Exchange contract, giving sufficient additional time to remove defects in title, precluded default before expiration of reasonable time.

Land exchange contract, giving parties sufficient additional time to remove defects in title after expiration of time fixed for completing exchange, precluded default thereunder until expiration of at least a reasonable time for removing defects.

4. Exchange of property ⚷6—Party's repudiation of exchange contract before time limit relieved other party from further performance (Civ. Code, § 1440).

Where one party to contract for exchange of land repudiated it, by refusing to carry out its terms before time fixed for completing exchange, and so notified other party, the latter was under no obligation to continue to perform his obligation, under Civ. Code, § 1440.

5. Brokers ⚷60—Action for commission on land exchange contract held not barred by mutual rescission, where defendant refused, and notified other party of refusal, to perform, and never gave notice of rescission.

Action for commission on exchange of real estate *held* not barred by Civ. Code, § 1559, on theory that contract was rescinded, under section 1689, before action was commenced, by open, mutual abandonment thereof, where defendant refused to perform before expiration of time limit, never gave any notice of rescission, and notified other party, before expiration of reasonable further time allowed to remove defects in title, that he would not perform contract.

6. Contracts ⚷267—Only party without default can rescind contract.

The right to rescind a contract rests only with the party who is without default.

Appeal from Superior Court, Sonoma County; Hugh L. Preston, Judge.

Action by Ira D. Pyle and another against William E. Benjamin. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bryce Swartfager and Harry T. Kyle, both of Santa Rosa, for appellant.

Wallace L. Ware and George W. Murphy, both of Santa Rosa, for respondents.

JAMISON, Justice pro tem. Respondents, as real estate agents, recovered judgment against appellant for $600; $500 of said judgment being for commission on the exchange of real estate and $100 for attorney's fees. From this judgment, appellant has appealed.

It appears from the evidence that about the 1st day of October, 1926, appellant called on respondents at their office and told them that he had a tract of land which he desired to sell or exchange. Through the efforts of respondents a party was found, a Mr. Fred C. Feltz, who was willing to exchange some land he owned for that of appellant, and thereafter, on October 25, 1926, appellant and said Feltz entered into a contract for the exchange of certain tracts of land owned by each, respectively, the exchange to be completed by November 1, 1926. Thereafter a new contract was entered into between them, extending the time for completing the exchange to November 15, 1926. By the terms of these contracts respondents were made the joint agents of appellant and Feltz in the said matter of exchange, and it was therein provided that, upon both appellant and Feltz signing the contracts, they would pay respondents a commission of $800, appellant's share thereof to be $500, and Feltz's share to be $300, with the further provision that if either of the parties to said contracts refused to complete or consummate the contract, or any part thereof, the party so refusing should pay said agents $100 as liquidated damages for services rendered. The said contracts also contained a provision that, in the event of a suit to enforce the collection of the commission, the party in default should pay an attorney fee of $100. The new contract also provided that the exchange was to take place on or before November 15, 1926, giving sufficient additional time to remove defects in the title, if any, to the property to be exchanged, and providing that, if such defects were not so removed or adjusted, then the party at fault should pay the said commission as agreed. The new contract was signed by respondents and appellant on November 9, 1926, and upon the following day each of them executed deeds to the other for the land to be exchanged, and said deeds were placed in escrow with the Sonoma County Abstract Bureau, to be recorded after the title to the property of each party had been corrected.

Feltz testified that on November 13, 1926, appellant called on him at the office of respondents, and asked him for the key to the property that Feltz had deeded to him, stating to Feltz that he would visit this property the next day, and would take with him, to look at said property, a party to whom there was a prospect of trading same. Feltz delivered the key to appellant, but it was never returned to him. Respondent Wright testified that he was present on November 13, 1926, when the key was delivered to appellant; that on November 14, 1926, appellant telephoned him that he would call the deal off; that he was not going through with it, and from said last-named date refused to carry through the deal for the exchange of said property; that appellant gave as his reason for said refusal that the Feltz property was too cold, too many shade trees upon it. Appellant testified that he did not change his mind about the deal until November 16, 1926, and that the reason he changed his mind and refused to go ahead with the deal was because he learned that the $5,000 mortgage or deed of trust he was to assume called for 8 per cent. interest, instead of 7 per cent.

[1, 2] Appellant assigns as error the finding of the court that upon the signing of the contract by appellant and the said Feltz, appellant agreed to pay respondents the sum of $500. He contends that, if any liability attaches by virtue of the contract, that liability would be the sum of $100, instead of $500, for the reason that it is provided in said contract

that the party who refuses to complete the said contract shall pay to the agents the sum of $100 as liquidated damages for the services rendered. Section 1670 of the Civil Code declares that contracts wherein the amount of damage to be paid for breach of the obligation is determined in anticipation thereof are void to that extent, except as provided in section 1671 of said Code, and this latter section provides that parties to the contract may agree upon the amount of the damages, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damages.

In the case of McInerney v. Mack, 34 Cal. App. 153, 166 P. 867, 868, the court said: "In such action as this, as a matter of defense, defendant must show to the court by proper pleadings and competent proof that the contract falls 'within' the law permitting liquidated damages. This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid, because 'from the nature of the case it would be impracticable or extremely difficult to fix the actual damage.'" Sherman v. Gray, 11 Cal. App. 348, 104 P. 1004; Long Beach, etc., Dist. v. Dodge, 135 Cal. 401, 67 P. 499; Sunmaid Raisin Growers of California v. Paul A. Mosesian & Son, 90 Cal. App. 1, 265 P. 828; Hanlon Drydock, etc., Co. v. McNear, 70 Cal. App. 204, 232 P. 1002.

In the case under consideration the defendant has wholly failed to disclose, either by pleading or proof, anything to bring this alleged defense within the provision of the said section 1671 of the Civil Code. For the purpose of determining whether or not "from the nature of the case it would be impracticable or extremely difficult to fix the actual damage," the court must examine the attendant and surrounding circumstances under which the contract was entered into, as well as the terms of the contract itself. Pacific Factor Co. v. Adler, 90 Cal. 110, 27 P. 36, 25 Am. St. Rep. 102. By the terms of the contract which they each signed, the appellant and Feltz both agreed that the value of the service of respondents in bringing the deal to the point where both parties signed the contract for the exchange was the sum of $800. There could be no uncertainty as to the amount of damages respondents would sustain by the refusal of either of the parties to said contract to carry out and perform it after signing same. By the very terms of the contract respondents were entitled to receive from the contracting parties the full commission of $800 upon the signing of the contract. It therefore clearly appears that the attempt to fix the damage respondents would suffer by the failure or refusal of appellant or Feltz to complete the contract would not fall within the provisions of said section 1671 of the Civil Code, but that it does fall within the provisions of section 1670 of said code.

[3-6] Appellant next contends that respondents' cause of action is barred by section 1559 of the Civil Code, upon the theory that, the contract having been made for the benefit of respondents, they not being parties thereto, it was rescinded before this action was commenced. The said section 1559 is as follows: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Section 1689 of the Civil Code sets forth the conditions under which a party to a contract may rescind it. These conditions are contained in five subdivisions of said section. Appellant does not indicate in his brief under which of those subdivisions the alleged rescission resulted. He simply states that the contract of exchange was rescinded before November 25, 1927, the date this action was commenced, and that this rescission was effectuated by the open, mutual abandonment of the contract, made manifest by the conduct and action of the parties.

The court found that at the time said contract was executed, and for many months subsequent thereto, the said Feltz was ready, able, and willing to make the exchange, and to perform all the terms and covenants of said contract, agreed by him to be performed, but that on the 14th day of November, 1926, appellant refused, and ever since then has refused, to make the exchange, or to perform any of the terms, covenants, and conditions of said contract which he agreed to perform, and this finding is supported by substantial evidence. Appellant never at any time gave any notice of the rescission of said contract. He admits that he told respondent Wright, on November 18, 1926, that he would not carry out the contract, and had his attorney, on November 30, 1926, appear at the office of the Sonoma County Abstract Bureau, with whom his deed was deposited in escrow, and mark across the face of said deed the word "Canceled." He claims, however, as justifying his repudiation of the contract, that Feltz had not removed all defects from the title to the land which Feltz was deeding him, as by the terms of said contract Feltz was required to do.

Admitting that this was true, yet the contract, while providing that the time limit was November 15, 1926, also provided that either of said parties was given sufficient additional time to remove such defects, and therefore neither of them could have been in default under said contract until at least a reasonable time for removing the defects had expired. Then, again, the trial court having found, upon substantial evidence, that appellant, on the 14th day of November, 1926, which was prior to the time limit named in the contract, had breached and repudiated it by refusing to carry out its terms, and had so notified the said Feltz through his agent, the said Feltz was under no obligation to continue to perform his obligations thereunder. Section 1440, Civ. Code; Donlon v. Meyer, 35 Cal. App. 225, 169 P. 447; Mulborn v. Montezuma Imp. Co., 69 Cal. App. 621, 232 P. 162. There is no evidence upon which appellant can base the claim that the contract was rescinded. Respondents did not rescind it, or in any way attempt to do so. Even had appellant attempted to rescind the contract, he could not have done so after he breached and repudiated it. The rule is general that the right to rescind a contract rests only with the party who is without default. Fairchild, etc., Co. v. Southern, etc., Co., 158 Cal. 264, 110 P. 951; California Sugar, etc., Agency v. Penoyar, 167 Cal. 274, 139 P. 671; North American Co. v. Outer Harbor Co., 178 Cal. 406, 173 P. 756.

There is no merit in the contention of appellant that the court erred in overruling his demurrer.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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102 Cal. App. 499

CROMWELL v. LOS ANGELES RY. CORPORATION. (Civ. 3960.)★

District Court of Appeal, Third District, California. Dec. 11, 1929.

Rehearing Denied Jan. 10, 1930. Hearing Denied by Supreme Court Feb. 6, 1930.

1. Carriers ⚩320(4)—Evidence presented jury issue whether conductor, who, in boarding street car, knocked down prospective passenger, boarded car to relieve conductor thereon.

In action against street railroad for injuries to prospective passenger, when conductor, waiting to relieve conductor on approaching street car, in attempting to board car before it stopped, knocked plaintiff down, evidence *held* sufficient to present jury issue whether purpose of conductor in boarding car at that place was to relieve conductor on street car, and whether former immediately took charge of the car, on issue whether accident occurred while he was acting within scope of his employment.

2. Carriers ⚩283(1)—If conductor boarded street car to take immediate charge thereof, he was acting within scope of employment while boarding car.

If conductor boarded street car before it stopped for purpose of taking immediate charge thereof, and to relieve conductor thereon, he was acting within scope of employment, and street car company would be liable for his negligence in knocking down prospective passenger while boarding car.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Mary Cromwell against the Los Angeles Railway Corporation. From an order granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellant.

William A. Freeman, of Los Angeles, for respondent.

FINCH, P. J. The following statement is taken from appellant's opening brief:

"This is an appeal from an order granting plaintiff's motion for a new trial. The action is for damages for alleged injuries sustained by plaintiff at the intersection of Third and Spring streets, while she was waiting in the safety zone to board a southbound car. This car was in charge of Conductor Boehm. He was to be relieved by Conductor Groth at Ninth and Spring, though occasionally, as a matter of accommodation to Mr. Boehm, Groth would relieve him at Fifth and Spring. As the car approached, Groth was standing in the street slightly to the left of the plaintiff, and as the rear steps of the car reached him, and before it stopped, he attempted to board the car, and in doing so struck the plaintiff, knocking her down, and inflicting some injuries upon her. Plaintiff, in her complaint, charged that the negligence of the defendant consisted in the fact that the conductor upon the car, the servant and agent of the defendant, was standing on the steps of the car and negligently swung his body out and away from the car.

"While we do not agree with the views of the learned court as to the weight of the evidence on the issues of negligence and contributory negligence, we do not intend to challenge them on this appeal. We concede that, if the act of Groth in boarding the car can be held to have been within the scope of his employment as a matter of law, or as a question of fact for the determination of the jury, the order granting a new trial should be affirmed. We believe, however, that Groth's act in attempting to board the car must be held as a matter of law not to have been within the scope of his employment."

[1] The foregoing statement, commendably frank and fair, relieves the court of the necessity of passing upon any question except the single one of whether the evidence shows, as a matter of law, that Groth was acting outside the scope of his employment at the time of the accident. The plaintiff testified:

"When this man [Groth] helped me in the car [after the accident], he took his place as the conductor—back of the fare box. I am not sure whether this was before or after the car left Third and Spring. I saw him take his place, but I could not tell whether just exactly on the minute whether he rang the bell and started the car or not; I don't know, but it was before we reached Fourth street. The conductor that had been on the

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★Rehearing denied. Hearing denied by Supreme Court.

car got off, either at Fourth street or just before we got there; when I got on the car before it started, he was getting around in front of the cash box. When the conductor who helped me on the car took his place back of the cash box, I did not see him exchange any transfers with the other conductor. I was so nearly fainting I could not notice things like that. I could not say positively that he collected any fares. I was not watching him."

Another witness testified:

"The conductor got in with Mrs. Cromwell. He took my fare as I entered the car. * * * After the conductor who struck Mrs. Cromwell got on the car, he just took fares. I saw another conductor on this car. He got off after I boarded the car. I don't know whether he got off at Third or Fourth street. I did not pay any attention to that. * * * When I paid my fare, I dropped it in the box. I didn't give it to the conductor. * * * I saw the conductor whom Mr. Groth relieved get off the car; he got off either at Third or Fourth street. I know he got off. I cannot state positively whether he was on the car when we reached Fifth and Spring; he got off at Third or Fourth street, according to my recollection. I saw no other conductor behind the fare box, other than Mr. Groth. I don't remember seeing the other conductor at all. He was standing at the side when I paid my fare. * * * I saw Mr. Groth behind the cash box when I paid my fare. I think the other conductor got off the car at Third and Spring streets."

Both of the conductors testified that Boehm was relieved by Groth at Fifth and Spring streets, and that the former "continued to collect fares and issue transfers on the car from Third street to Fifth street."

It cannot be held, as a matter of law, that the foregoing evidence is insufficient to warrant the inference that Groth boarded the car at Third street for the purpose of there relieving Boehm, and that the former immediately took charge of the car. The question to be determined on this appeal, for the purposes of the appeal, is whetner Groth, in boarding the car for the purpose stated, was acting within the scope of his employment. Appellant cites cases arising under the Workmen's Compensation Act to the effect that, while an employee is traveling to and from his place of employment, he is not acting within the scope of his employment. But in this case Groth had reached the place of his employment, if the evidence produced by the plaintiff is true, and was entering the car by a means of access provided by his employer.

"It is not necessary, in order to entitle the employee to compensation, that at the time of accident he have reached the place of employment and have actually begun there to render service. It is sufficient if he has come to the employer's premises and is seeking entrance thereto by a means of access provided by the employer or reasonably used by the employee. * * * On the other hand, it is not doubted that if the employee is merely on his way to his employment and is injured, the injury is not one sustained in the course of his employment." Starr Piano Co. v. Industrial Acc. Com., 181 Cal. 433, 435, 184 P. 860; Makins v. Industrial Acc. Com., 198 Cal. 698, 701, 247 P. 202, 49 A. L. R. 411.

"The employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done." Bountiful Brick Co. v. Giles, 276 U. S. 154, 48 S. Ct. 221, 72 L. Ed. 507.

[2] Under the cases cited, it is clear that, if Groth was boarding the car for the purpose of taking immediate charge thereof, he was acting within the scope of his employment.

The order granting a new trial is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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102 Cal. App. 417

SIM v. PETERSON et al. (Civ. 6264.)

District Court of Appeal, Second District, Division 2, California. Dec. 9, 1929.

1. Municipal corporations 🔑581—Where landowner's name and address were matters of public record, but notice to redeem was posted on lot, tax sale did not deprive owner of property.

Where lot was sold for delinquent street improvement assessments, and lot owner's name and address were matters of general public record, they being found on records of assessor and of tax collector of city of Long Beach and of Los Angeles county and in telephone directory of Los Angeles, but search was made only in directories of Long Beach where lot was located, and inquiry was made of adjoining lot owner without success, and notice to redeem was posted on lot, and lot was thereafter conveyed to defendant, evidence did not show exercise of due diligence required in such cases, and plaintiff owner was not deprived of his property.

2. Quieting title 🔑12(8)—Maintenance of title to vacant realty does not depend on proof of possession.

Maintenance of title to vacant realty is not dependent on proof of actual and notorious possession.

3. Municipal corporations 🔑579—Where plaintiff established ownership subject to lien, followed by questionable sale, burden shifted to defendant on appearance of defects in proceedings on which prima facie title depended.

In suit to quiet title, where plaintiff proved legal title by purchase and its maintenance in all respects except as to assessment for which is was sold, thereby establishing ownership subject to lien followed by questionable sale, burden shifted to defendant on appearance of defects in proceedings on which his prima facie title was dependent.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action to quiet title by Walter B. Sim against C. M. Peterson and others. From a decree for plaintiff, defendant named appeals. Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Samuel J. Crawford, of Ocean Park, and Joseph Hansen, of Los Angeles, for respondent.

CRAIG, Acting P. J. Certain uncontroverted facts may be stated in this case. It appears that on May 5, 1910, John F. Brachman and wife conveyed to Walter B. Sim and Alexander Sim lot 16 of the Euclid avenue tract, in the city of Long Beach, and that on November 13, 1911, the latter conveyed to said Walter B. Sim his undivided one-half interest therein. On December 5, 1924, the lot was sold for delinquent street improvement assessments; on November 23, 1925, one C. D. Warden made affidavit that he had made inquiry of the county assessor, and of one of Sim's adjoining owners, and had searched the current directories of the city of Long Beach, but was unable to ascertain his address or whereabouts, and that he posted upon said lot a notice to redeem. On December 30, 1925, the director of public service conveyed the property to C. M. Peterson. Walter B. Sim instituted this proceeding to quite title as against Mrs. Peterson, and was awarded a decree, from which she appealed.

[1] From the testimony and documentary evidence it appears that plaintiff's name and address at the time of the alleged search and making of the affidavit mentioned were matters of general public record. They were to be found upon the records of the assessor and of the tax collector of the city of Long Beach and of the tax collector and tax assessor of Los Angeles county, and in the telephone directory of the city of Los Angeles. Warden admitted that he merely inquired of a clerk at the counter in the assessor's office for the name of the owner, but was unable to testify that he asked for the address or referred to the records for this information. Receipted tax bills for the years 1920 to 1925, both inclusive, bearing respondent's name and address, were introduced in evidence. The affidavit of Warden merely recited that the lot in question was vacant and unoccupied, that he searched the Long Beach city and telephone directories, inquired of a person residing upon an adjoining lot as to Sim's whereabouts, and did "not know of any other place or person of whom to make inquiry." The evidentiary foundation requisite to a valid conveyance must fully measure up to statutory requirements. There is here an absence of proof of the exercise of due diligence required in such cases, and the trial court was right in holding that consequently the owner cannot be deprived of his property. Hennessy v. Hall, 14 Cal. App. 759, 113 P. 350.

[2] Appellant asserts that the want of showing of actual possession or of derivation of title from an owner in possession requires that the judgment be reversed. The maintenance of title to vacant realty is not dependent upon proof of actual and notorious possession. Denning v. Green, 88 Cal. App. 379, 263 P. 819.

[3] It is strenuously insisted that, respondent having failed to establish the fact last mentioned, or to offer proof of title by grant from the state, the rule requiring that he rely upon the strength of his own, rather than upon the weakness of his adversary's title, precludes a recovery in this case, and that the judgment for that reason should not be sustained. However, the plaintiff, having proved legal title by purchase and its maintenance in all respects, except as to the assessment in controversy, established ownership subject to a lien followed by a questionable sale. The burden shifted to the defendant upon the appearance of defects in the proceedings upon which his prima facie title was dependent. Parsons v. Weis, 144 Cal. 410, 77 P. 1007; Stoddart v. Burge, 53 Cal. 394. Any such rule must necessarily presume the existence of facts which are by statute made indispensable to its assertion, and is not available to one whose own showing corroborates evidence strongly tending to indicate their nonexistence.

The decree of the trial court is affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

102 Cal. App. 549

PEOPLE v. FYFE. (Cr. 1553.)★

District Court of Appeal, First District, Division 2, California. Dec. 16, 1929.

Rehearing Denied Dec. 31, 1929. Hearing Denied by Supreme Court Jan. 13, 1930.

1. **Criminal law 🔑1163(1)—State appealing from judgment of dismissal, entered after oral notice of appeal from order allowing demurrer to information, must show error causing miscarriage of justice.**

As superior court had jurisdiction to enter judgment of dismissal after oral notice of appeal from order allowing demurrer to amended information, it was incumbent on state to show on appeal from such judgment that it was error resulting in miscarriage of justice.

2. **Indictment and information 🔑122(2)—Defendant cannot be tried on information not supported by evidence at preliminary hearing (Const. art. I, § 8; Pen. Code, § 1008).**

The purpose of Const. art. 1, § 8, and Pen. Code § 1008 as amended by St. 1911, p. 436, was to give accused preliminary hearing before grand jury or committing magistrate and deny district attorney right to force him to trial before jury on either original or amended information not within scope of evidence taken at such hearing.

3. **Indictment and information 🔑122(2)—Evidence at preliminary examination held not to warrant information for procuring loan through false representations of assets and false promises of payment therefrom.**

Uncontradicted evidence taken at preliminary examination *held* to preclude trial of defendant on amended information charging procurement of loan through false representations as to his assets and false promises that loan would be paid therefrom at maturity.

4. **Indictment and information 🔑122(2)—Statute prohibiting amendment of information to charge offense not shown by evidence at preliminary examination is mandatory (Pen. Code, § 1008).**

Pen. Code, § 1008, declaring that information "cannot" be amended so as to charge an offense not shown by evidence taken at preliminary examination, is mandatory.

5. **Indictment and information 🔑122(2)—Count of amended information charging grand theft held insufficient, in view of allegation that count for obtaining money by false pretenses, not supported by evidence at preliminary examination, charged same offense (Pen. Code, §§ 484, 952, as amended by St. 1927, pp. 1046, 1043).**

First count of amended information charging grand theft *held* insufficient, notwithstanding amendments to Pen. Code, §§ 484, 952, by St. 1927, pp. 1046, 1043, in view of allegation that offense of obtaining money by false pretenses charged in second count which was not supported by evidence at preliminary examination, is different statement of same offense set forth in first count.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Joseph Fyfe, Jr., was charged with grand theft and obtaining money under false pretenses, and, from a judgment of dismissal, the State appeals. Affirmed.

U. S. Webb, Atty. Gen., Lionel Browne, Deputy Atty. Gen., and Mathew Brady, Dist. Atty., and William W. Murphy, Asst. Dist. Atty., both of San Francisco, for the People.

Maxwell McNutt, of San Francisco, for respondent.

NOURSE, J. The state appeals from a judgment of dismissal entered after defendant's demurrer was allowed to a second amended information.

On June 15, 1928, an information was filed charging the defendant with the crime of obtaining $3,000 by false pretenses. This information alleged that on or about the 8th day of July, 1925, the defendant made certain representations to Max L. Rosenfeld as to his ownership of stocks and contracts, some of which were alleged to have been false, and that, relying upon said representations, the said Rosenfeld delivered to the defendant the sum of $3,000. A demurrer to this information was sustained upon the authority of People v. Canfield, 28 Cal. App. 792, 154 P. 33, and other cases holding that an information is insufficient when it fails to show a casual connection between the payment of the money and the representation.

Leave to amend having been granted, the district attorney on August 11, 1928, filed an amended information framed in two counts, the first charging grand theft of the sum of $15,000, in the language of section 484, Penal Code, as amended in 1927 (St. 1927, p. 1046) and the second count charging the offense of obtaining $15,000 by false pretenses. A demurrer to the first amended information was also sustained with leave to amend, and on June 10, 1929, the district attorney filed his second amended information which was also framed in two counts. The first count charged grand theft and the second obtaining money under false pretenses. To this information the defendant demurred and also filed a motion to set it aside. The demurrer and the motion were heard at the same time, and on July 10, 1929, the court made its order allowing the demurrer as to both counts, and denying defendant's motion to set aside the information. At the time the order allowing the demurrer was made in open court the district attorney gave oral notice of appeal therefrom. Thereafter formal judgment was entered reciting that the demurrer was heard upon the ground that the second amended information did not state facts sufficient to constitute a public offense, and that it attempted to charge an offense not shown by the evi-

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★Rehearing denied. Hearing denied by Supreme Court.

dence taken at the preliminary examination and ordering the dismissal of the proceedings and the discharge of the defendant. It would appear that the state assumes that its appeal was taken from the judgment as the order is not an appealable one under the provisions of section 1238, Penal Code. We assume this to be the position, because no point is raised as to the notice of appeal, and the record presented by the state contains a complete bill of exceptions of all the evidence taken before the committing magistrate as well as a record of the evidence before the grand jury. This evidence has been brought up in an endeavor to meet the objection to the second amended information which charges an offense the evidence of which was not taken at the preliminary examination, and in the briefs the state concedes that there are but two issues presented on the appeal, one whether the information charges a public offense, and the second whether the offense charged is one not shown by the testimony at the preliminary examination.

Such being the case, all questions relating to the sufficiency of the original and first amended informations and the question of the application of the statute of limitations may be disregarded, because, if the second amended information attempts to charge an offense not shown by the evidence taken at the preliminary examination, it should not have been filed. This follows from the express provisions of section 1008, Penal Code, declaring that an information "cannot be amended" so as to charge an offense not shown by the evidence taken at the preliminary examination. Therefore, disregarding the question whether this issue can be raised by a demurrer to an amended information and treating the question as one which comes to us on an appeal from the final judgment of dismissal, we are confronted with the question whether this judgment should be affirmed or reversed.

[1] Inasmuch as the trial court has jurisdiction to enter a judgment of dismissal, it is incumbent upon the state on this appeal to show that that judgment was error which has resulted in a miscarriage of justice. Thus, again, assuming that the appeal was properly taken from the final judgment of dismissal, that judgment must be affirmed unless the appellant is able to show that some error has crept into the judgment which has resulted in a miscarriage of justice.

[2] The rights of the defendant in a case of this kind are statutory. Section 8 of article 1 of the Constitution provides that offenses "shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment. * * *" Section 1008, Penal Code, as it read in 1880 provided that when a demurrer was allowed to an indictment, the trial court might direct the case to be resubmitted to the grand jury or direct a new information to be filed, provided that after the order of resubmission the defendant may be examined before a magistrate. In 1911 this section was amended (St. 1911, p. 436), adding the proviso that an information could not be amended so as to charge an offense not shown by the evidence taken at the preliminary examination. The clear purpose of these enactments is to give the accused a preliminary hearing either before a grand jury or before a committing magistrate, and to deny to the district attorney the right to force a defendant to trial before a jury upon an information which is not within the scope of the evidence taken.

[3] The case presented here on the part of the respondent is that the second amended information states a charge not disclosed by the evidence, in that it purports to charge that the defendant procured a loan of $15,000 from Rosenfeld through false representations as to his assets and false promises that they were sufficient to insure the repayment of the loan at its maturity, and that said loan would be repaid at maturity out of such assets. Now the undisputed and conceded facts as developed at the preliminary examination are that no such transaction occurred at all, but on the other hand the admitted facts are that Rosenfeld and defendant were lifelong friends who had been associated in numerous business transactions, and that for some time prior to July, 1925, defendant had frequently informed Rosenfeld of his financial difficulties, and that he had suggested to Rosenfeld the organization of a new corporation for the purpose of carrying on the business of selling lumber on commissions. The defendant informed Rosenfeld that $15,000 would be needed for this purpose; that the defendant was obligated to such an extent that $7,500 would have to be used immediately for the payment of outstanding indebtedness, and that the remaining $7,500 would be needed to finance any accounts which would have to be carried while the business was being started. Numerous letters were exchanged between the parties, all showing unmistakably that Rosenfeld knew the financial condition of the defendant, and notwithstanding such condition he planned to go into business with him. The arrangements for the loan were evidenced by the written offer and acceptance dated July 7, 1925, which reads as follows: "San Francisco, July 7, 1925, Tuesday. Mr. Max Rosenfeld, San Francisco, California. Dear Sir: In consideration of your advancing $15,000 of which $7,500 is to be retained in the company and $7,500 paid out on old accounts which we wish to pay, it is understood that the writer will give you his one-day note, at six per cent. up to $15,000, or whatever amount is advanced, and insurance policies up to $20,000. We will incorporate a company in which you

will have one-third of the stock and the writer will have two-thirds of the stock, but he will put his two-thirds of the stock up as collateral security on the above note. It is understood that you are to draw $300 monthly salary as an official and the writer is to draw $600 monthly salary as an official, and that we are to keep the overhead expense as low as possible. All dividends on all stock up to $15,000 to be applied to liquidate the above mentioned note and interest before any other dividends are paid out, and meanwhile the writer will keep up the premiums personally on the insurance in your favor. Neither party is to dispose of his stock without the consent of the other, and this agreement to be binding on their heirs for six years from date. In the event of any difference of opinion, same to be left to Mr. Henry Rosenfeld to settle, and his decision to be final. Yours very truly, Joseph F. Fyfe, Jr. J. F. S. Accepted: Max F. Rosenfeld." In explanation of the writing, testimony was given by the complaining witness Max Rosenfeld and by Henry Rosenfeld, his brother, showing that the insurance policies mentioned in the writing and the defendant's share of the stock in the company to be incorporated were the only collateral ever suggested or contemplated as security for the loan. The evidence undisputedly shows that the defendant did not at any time suggest or offer to put up any of his other assets as security for the loan, but on the other hand there is not so much as a conflict in the evidence that the complaining witness entered into this business agreement with the defendant fully informed as to the conditions and with the expectation of repayment out of the profits of the corporation which was to be formed.

In face of this uncontradicted evidence it is inconceivable that a district attorney should allege that the defendant represented and promised "all of said shares of stock and contracts and the values thereof and the said indebtedness to him, the said Joseph Fyfe, Jr., was and were and would be security to said Max L. Rosenfeld for the repayment of said loan at its maturity; that each and all of the said shares of stock and said contracts and agreements and the said indebtedness to him the said Joseph Fyfe, Jr., were then and there such that the said loan of fifteen thousand dollars ($15,000) *might and could be repaid therefrom* by him, the said Joseph Fyfe, Jr., to said Max L. Rosenfeld, *at the maturity* of said loan, and said Joseph Fyfe, Jr., did then and there request of said Max L. Rosenfeld a loan in the sum of fifteen thousand dollars ($15,000) *upon the security aforesaid.*" The vice of the pleading is particularly patent from the fact that the maturity of the loan was evidenced by a one-day note whereby the written contract of the parties provided for the future payments out of the profits of the corporation to be formed.

[4] The procedure followed in this case is concrete evidence of the purpose and wisdom of the provisions of section 1008, Penal Code, which expressly prohibit an amendment to an information which would prejudice the substantial rights of the defendant. In declaring that an information "cannot" be amended so as to charge an offense not shown by the evidence taken at the preliminary examination, the terms of the section are mandatory. They are in whole harmony with the provisions of section 8 of article 1 of the Constitution requiring an examination and commitment by a magistrate as a prerequisite to the filing of an information by the district attorney. We had occasion to consider the provision of the code in Mitchell v. Superior Court, 76 Cal. App. 734, 737, 245 P. 1109, where it is said that, where the information fails to plead some material element in the alleged offense which goes to the substantial rights of the defendant, "no amendment, in the proper use of that expression, can be made." But in such a case "the statute provides that the trial court may order the cause resubmitted to the grand jury, and in that event the statute authorizes the prosecuting officer so to proceed as to get another indictment returned or cause another examination to be held and later file another information. People v. Cockrill, 62 Cal. App. 22, 216 P. 78, 81. But in no proper sense can it be said that when the second pleading comes in it is within the contemplation of the statute an amended indictment or an amended information, but it is a new indictment or a new information."

[5] There is some argument in the briefs to the point that because of recent amendments to sections 484 and 952 of the Penal Code (St. 1927, pp. 1046, 1043) the first count in the amended information charging grand theft is sufficient and that, therefore, the demurrer to that count should have been overruled. If the information contained the first count of grand theft only, there would be some merit to the point, but the pleading contained the allegation that "the offense set forth in the second count of this information is a different statement of the same offense set forth in the first count hereof." Because of this allegation we must read the first count as pleading the offense of grand theft under the particular facts and circumstances set forth in the second count. It is not a question, therefore, of the sufficiency of the pleading to state a public offense against this defendant. The sole question which we pass on is the propriety of the judgment of dismissal which was based upon the ground that the amended information pleaded an offense not shown by the evidence taken at the preliminary examination, but was filed contrary to the provisions of the code, and that there was, therefore, no information before

the court upon which the defendant could be tried.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

SONOMA COUNTY v. DE WINTON.*

(Civ. 3847.)

District Court of Appeal, Third District, California. Dec. 26, 1929.

Rehearing Granted Jan. 25, 1930.

1. Eminent domain 🔑124—Where condemnation proceeding commenced in August, 1927, was not tried until December, 1928, damages held ascertainable as of date of trial (Code Civ. Proc. § 1249).

Where condemnation proceeding was commenced on August 17, 1927, and was tried on December 17, 1928, damage to land not taken *held* ascertainable as of date of trial by stipulation and under express provision of Code Civ. Proc. § 1249.

2. Eminent domain 🔑204—Evidence showing benefit held not objectionable on ground that condemnor could not offset damage to landowner by benefit arising through trespass, there being no evidence of trespass.

Permitting county in condemnation proceedings to produce evidence showing benefit conferred on land not taken for construction of road *held* not objectionable on ground that county was trespasser and therefore could not offset any damage to landowner by benefit conferred arising through trespass, where there was no evidence that county was trespasser.

3. Judgment 🔑720—Judgment roll, in landowner's action to enjoin county from using road, held admissible in condemnation proceeding to show whether county had constructed road with landowner's permission (Code Civ. Proc. § 1908, subd. 2, and § 1911).

In condemnation proceedings by county, judgment roll, in action by landowner to enjoin county from using land sought to be condemned, *held* admissible to show whether county had constructed road with landowner's permission, since Code Civ. Proc. § 1908, by subdivision 2, provides that judgment is conclusive in respect to matters adjudicated, and by section 1911 that only is deemed to have been adjudicated in former action which appears on its face to have been so adjudicated or which was actually and necessarily included therein.

4. Judgment 🔑720—That judgment may constitute estoppel against parties thereto, it must appear that identical questions are involved.

That judgment in one action may constitute an estoppel against parties thereto in subsequent action it must be made to appear, either on face of record or by extrinsic evidence, that identical questions involved in issues to be tried were determined in former action.

5. Eminent domain 🔑124—Where condemnation proceeding was tried more than year after commencement thereof, landowner's instruction to assess damages as of date of commencement held properly refused.

Where county's condemnation proceedings were commenced on August 17, 1927, and was tried December 17, 1928, refusing landowner's requested instruction to assess damages as of date of commencement of action instead as of date of trial *held* proper.

6. Eminent domain 🔑221—Refusing landowner's requested instruction that county constructed road without his permission held proper, where evidence was otherwise.

Landowner's requested instruction, which told jury that county had constructed road over land without owner's consent, *held* properly refused, where only evidence was that road was constructed with owner's permission.

7. Eminent domain 🔑223—Landowner waived jury's failure to assess benefit to land not taken by not making request therefor when verdict was returned (Code Civ. Proc. §§ 619, 1248).

Landowner *held* to have waived requirement of Code Civ. Proc. § 1248, that jury assess amount of benefit to land not taken by county under right of eminent domain by failure to inform the court at time verdict was returned that he desired specification of amount of such benefit, since under section 619, if verdict is insufficient in not covering issues submitted, jury may be sent out again.

8. Eminent domain 🔑223—Landowner's instruction that jury might deduct amount of benefit from damages to land waived right to require that jury assess amount of benefit (Code Civ. Proc. § 1248).

Landowner *held* to have waived requirements of Code Civ. Proc. § 1248, that jury assess amount of benefit to land not taken under right of eminent domain by instruction that benefit by reason of construction of road could be deducted from damages to land.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Condemnation proceedings by the County of Sonoma against W. W. De Winton. From a judgment for an amount less than sum demanded, defendant appeals. Affirmed.

Fabius T. Finch, of San Francisco, and Barrett & McConnell, of Santa Rosa, for appellant.

Carl Barnard, of Santa Rosa, and E. J. Dole, of Petaluma, for respondent.

JAMISON, Justice pro tem. This action was brought by respondent to condemn a right of way for a county road over the land of appellant. The issues as to the value of the land taken, severance damage, and benefit to the land not taken, were submitted to a jury which returned a verdict in favor of appellant for the sum of $354 for the land taken and no damages for the severance from the land not taken. From the judgment rendered upon this verdict appellant has appealed. This appeal was brought upon a bill of exceptions. Appellant produced evidence tending to prove that the land taken was of the value of $1,500; that the damage to the land not taken by reason of the severance was from $25,000 to $45,360; and that no benefit was derived by the land not taken by virtue of the construction of the road. Appellant then offered in evidence the judgment roll in the action of appellant against respondent, theretofore tried and determined. It appears from this judgment roll that this last-named action grew out of an agreement entered into between appellant and respondent in the year 1919, by the terms of which appellant agreed, in consideration of the sum of $250, to grant to respondent a right of way 40 feet wide over and across his land; respondent agreeing to construct a road on said right of way within a year from the date of said contract. Respondent did some work toward opening up a roadway on said right of way, but did not complete said road within the year, nor pay appellant the said $250, nor, as claimed by appellant, did respondent place the road where it had agreed to place it. It appears, however, that respondent continued to use the road so far as same was then constructed as a public road; that on August 15, 1922, respondent still desiring to secure the right of way for said road over appellant's land, and respondent and appellant being unable to agree as to the amount of compensation that should be paid appellant for same, agreed to submit the matter to arbitration, and thereupon selected arbitrators to determine the said compensation. The arbitrators so selected placed the compensation that should be paid to appellant by respondent for said right of way at $500. Thereupon, appellant executed a deed to respondent for said right of way and placed same in escrow to be delivered to respondent upon the completion of said road and upon payment to him of said sum of $500. Thereafter, about the year 1924, respondent practically completed the construction of the road, but failed and neglected to pay appellant the said sum of $500. On October 25, 1925, appellant commenced an action against respondent, reciting in his complaint the aforesaid facts, and demanding that respondent be enjoined from the further use and occupation of said right of way, and for damages for injuries caused to appellant's land by the construction of said road. Upon the trial of the issues involved in that action judgment was rendered in favor of appellant enjoining respondent from the further use of said road, and for damages in the sum of $100. This judgment was rendered July 21, 1927, and the present action was commenced on August 11, 1927. The strip of land sought to be condemned by the present action is the same strip over which the road was theretofore constructed. When the said judgment roll was offered in evidence, the attorney for appellant suggested to the court that it be considered as a record to the court, and not to the jury, for the reason that the said judgment roll consisted of long documents which would be difficult for the jury to follow, and that the court should, in its instructions to the jury, set forth the legal effect of said judgment roll, or such portions as might be applicable to the case; and to this suggestion the attorney for respondent assented. The record then recites that the judgment roll was thereupon admitted in evidence under the aforesaid circumstances and for said purposes. Respondent then produced testimony as to the value of the land taken, and also evidence as to the benefit conferred upon the property not taken by the construction of the road. The entire tract of land owned by appellant through which the right of way runs is twenty acres, and the amount within the said right of way is 1.4 acres.

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* Rehearing granted. 287 P. 121.

Appellant does not question the sufficiency of the evidence to support the verdict. He maintains, however, that the court erred in admitting certain evidence, and in giving and refusing to give certain instructions hereinafter referred to, and that the verdict of the jury upon which the judgment is based is incomplete and insufficient to support the judgment.

[1] It was stipulated by the parties to the present action that the right of way sought to be condemned in this action follows the lines of the road constructed by respondent under the agreement of 1919. And it was also stipulated that the value of the appellant's land sought to be taken by the present action and damages to land not taken should be ascertained as of the date of the trial, to-wit, December 17, 1928. This last stipulation was unnecessary for the reason that section 1249 of the Code of Civil Procedure provides that where the issue is not tried within one year from the date of the commencement of the action, unless the delay was caused by the defendant, and in this case there is no evidence of any such delay, the compensation and damages shall be deemed to have accrued at the date of the trial. This action was commenced August 17, 1927, and was tried December 17, 1928.

[2] Appellant contends that the court erred in permitting respondent, over his objection, to produce evidence tending to show the value of the benefit conferred upon the land not taken by reason of the construction of said road. He bases this contention upon the ground that respondent, at all times since it began the construction of said road, has been a trespasser on his said lands, and therefore cannot offset any damage to which appellant may be entitled by proof of benefits conferred upon the land arising by or through the trespass. He cites several cases in his

effort to support this contention. The one upon which he appears mainly to rely is that of Pinney v. Borough of Winsted, 83 Conn. 411, 76 A. 994, 20 Ann. Cas. 923. This was a case where the town wrongfully entered upon Pinney's land and constructed a street thereon without condemnation proceedings and without Pinney's consent. Pinney brought an action against the town for damages arising from this trespass. The case was tried upon the theory that the taking was permanent. No proof was offered by the town tending to show that the construction of the street benefited the remaining land. Judgment was given the plaintiff for the value of his land that was taken, only. However, in that case the court held that even if benefits had been proven, they could not have been offset against plaintiff's judgment, for the reason that the law is well established that a trespasser cannot, when compensation is sought for his trespass, be heard to say, in his defense, that he has benefited plaintiff by his wrongful act. These cases are not in point for the reason that there is no evidence produced or offered in this case now being considered, tending to prove that respondent was a trespasser in the construction of the road. Appellant states in his opening brief that the judgment roll in the former case was introduced in this case to establish facts which had previously been adjudicated and determined in the former case and had therefore become res adjudicata. Admitting that to be true, then in that event, so far as appellant's claim that respondent was a trespasser in constructing said road is concerned, he has, by his own act, in introducing the judgment roll in evidence "hoisted himself by his own petard," for in that case we find that the court specifically found that respondent went upon appellant's land and took possession of the said land, in the year 1919, by permission of appellant, and since that date has continuously used same as a public highway, by and with such permission. The objection to the introduction of this evidence was properly overruled.

[3, 4] Appellant also claims that the court erred in giving instruction No. 5, which was given by the court of its own motion. By this instruction the jury was told that the judgment roll in the former action was admitted in evidence upon the issue joined by the allegation contained in the complaint in the instant action, to the effect that respondent entered upon appellant's land and constructed said road with his permission, and appellant's denial thereof and assertion that an injunction was granted appellant in the former action because permission was not granted to construct the roadway exactly as it was constructed. That issue being thus joined on this allegation permitted the reception in evidence of said judgment roll, but that this did not alter the issue which the jury was to determine, namely, the market value of the land sought to be condemned, and the damage, if any, to the remaining land by severance of the land sought to be condemned from the remainder of the tract. Apparently, the object the court had in view in giving this instruction was to inform the jury, complying with appellant's suggestion made at the time said judgment roll was admitted in evidence, of the extent to which the jury should give consideration to the said judgment roll in the determination of the issues before it. In the former trial no issues were involved regarding the value of the land occupied by the road, nor of damages to the land not taken by reason of severance therefrom of the land occupied by the road, nor of benefits conferred upon the land not taken by the construction of the road. It appears to have been an action to enjoin respondent from further occupying or using said road because it had failed to perform its agreements thereto relating, and for damages arising from such failure. By section 1908 of subdivision 2 of the Code of Civil Procedure, the effect of a judgment is conclusive in respect to the matters adjudicated, and by section 1911 of said Code, that only is deemed to have been adjudged in a former action which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 79 Am. St. Rep. 118; Agnifili v. Lagna (Cal. Sup.) 267 P. 705. We are unable to see wherein appellant was in any way injured by the giving of this instruction.

[5, 6] Appellant contends that the court erred in refusing to give his proposed instructions Nos. 1 and 2. Instruction No. 1 was properly refused: First, because it required the jury to assess the damages as of the date of the commencement of the action, instead as of the date of the trial of the action; and, secondly, because it told the jury that respondent had constructed the road over appellant's land without his consent, whereas, the only evidence upon that point was contained in the findings of the court in the former trial introduced by appellant himself, and those findings clearly and positively set forth that this road had been constructed by respondent by permission of appellant, and for this last reason, instruction No. 2 was properly refused.

[7, 8] Lastly, appellant contends that the judgment in the present action is void for the reason that the jury failed to find by its verdict the amount of the benefit which the land not taken will receive by the construction of

the road. Section 1248, Code of Civil Procedure, provides that the court or jury must ascertain and assess, first, the value of the land taken; second, the damage which will accrue to the land not taken by reason of the severance, and third, the benefit, if any, which the construction of the road may be to the land not taken. The verdict of the jury was in the following words: "We, the jury in the above entitled action, render the following verdict: Question No. 1. What is the value of the strip of land of defendant W. W. De Winton, sought to be condemned by plaintiff? Answer, $354.00. Question No. 2. What is the damage, if any, to the balance of the land not sought to be condemned by reason of its severance from the land sought to be condemned by plaintiff? Answer. None." Appellant cites cases from other states, notably, Michigan and Colorado, to the effect that the aforesaid requirements are mandatory, and calls attention to the case of Butte County v. Boydston, 64 Cal. 110, 29 P. 511, which he claims supports this contention. In this latter case no assessment of the value of the land taken, nor damages to that not taken, nor benefits, by the improvement, to the land not taken, were assessed at all, nor payment, or tender of compensation made, and under those circumstances the court held that the owner could not be deprived of his land, and that any judgment rendered against him would be illegal and void, while at the same time the court said: "But the value of the land, the damage, if any, and the benefit, if any, must be separately assessed, in order that the compensation may be adjudged and paid." While section 1248 of the Code of Civil Procedure plainly requires that the value of the land taken, the damage to that not taken, and the benefit, if any, to the remaining land should be separately stated, yet in this case we find that the omission from the verdict of the value of the benefit to the remaining land by the construction of the road was mainly brought about by appellant himself.

Instruction No. 24, which was given to the jury at the request of appellant, reads in part as follows: "If you believe that Mr. De Winton's property, on either or both sides of the proposed right of way, has sustained any special benefit by reason of the construction of this road, you may deduct the value of such benefits from the damages to be awarded to the land on each side of the right of way." Then again, when the jury returned into court with the aforesaid verdict, defendant made no objection to the fact that it failed to state the amount of the benefit, if any, to the remaining land. The case of Ft. Lyons Canal Co. v. Farnan, 48 Colo. 414, 109 P. 861, 862, was an action in eminent domain, where the jury failed to find the benefit to the remaining land, and no objection was made thereto at the time the verdict was returned. The court there said: "Had counsel for petitioner, as it was his duty to do, at the time the verdict was returned and before the jury was discharged, if of opinion that the same was not sufficiently certain, made that objection, the verdict doubtless would have been forthwith corrected to show, with greater particularity if that were necessary, exactly what the jury did in fact pass upon and find. * * * Besides it may well be held that petitioner waived his right to question it, either as to form or substance, by failing to urge objection thereto in apt time." If the verdict is insufficient in not covering the issues submitted, the jury may again be sent out. Section 619, Code Civ. Proc. Had appellant desired to have the verdict of the jury specify the amount of the benefit, if any, to the land not taken by the construction of the road, he should have so informed the court at the time the verdict was returned; otherwise, he waived this requirement. Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948; Bloomberg v. Laventhal, 179 Cal. 616, 178 P. 496; Van Damme v. McGilvray Stone Co., 22 Cal. App. 191, 133 P. 995. He also waived it by his instruction No. 24 hereinbefore quoted. It is a fair presumption that following this instruction the jury, in assessing the damage to the land not taken, by reason of the severance, and in assessing the benefits accruing to the remaining land, found that the benefits equaled or exceeded the damage, and therefore could give appellant no damage for the severance.

From an examination of the entire case, including the evidence, we are of the opinion that the alleged errors of which complaint is made, did not result in a miscarriage of justice. Section 4½, art. 6, Const.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

WILKINSON v. LUND, County Treasurer et al. (Civ. 3986.)★

District Court of Appeal, Third District, California. Dec. 27, 1929.

Rehearing Denied Jan. 25, 1930. Hearing Denied by Supreme Court Feb. 24, 1930.

1. Counties 🔑190(2)—Limitation in county charter that state and county tax rate should not exceed certain amount included taxes mandatory under Constitution and statutes (Butte County Charter, art. 8, § 12).

Under Butte County Charter, art. 8, § 12 (St. 1917, p. 1803), providing that beginning with certain year state and county tax rate should be limited to $2 per hundred of assessed valuation of property on assessment roll, except that in case of an emergency the board of supervisors by unanimous vote may exceed tax rate, limitation included all of mandatory rates under constitutional and statutory provisions.

2. Counties 🔑24—County may impose duties upon supervisors and other officers in addition to but not inconsistent with those prescribed by general laws (Const. art. 11, § 7½).

Under Const. art. 11, § 7½, providing that county may frame charter for own government consistent with and subject to Constitution and that charter shall supersede all laws inconsistent with charter relative to matters provided for in charter, county may by charter impose duties upon supervisors and other county officers in addition to rules prescribed by general laws but not inconsistent or in conflict therewith.

3. Counties 🔑24—Legislature's power to prescribe duties of county officers is not affected by constitutional provisions authorizing county to frame charters for own government (Const. art. 11, § 7½).

Power of Legislature to enact general laws prescribing duties of officers of counties is not affected or impaired by Const. art. 11, § 7½, authorizing counties to frame and adopt charters for their own government.

4. Counties 🔑1—"County" is governmental agency or political subdivision of state exercising some functions of state government.

A "county" is a governmental agency or political subdivision of state organized for purposes of exercising some functions of the state government.

5. Counties 🔑21½—Powers and functions of county government have direct and exclusive reference to general policy of state as branch of general administration thereof.

All functions and powers of county government organization have direct and exclusive reference to the general policy of the state and are in fact but branch of general administration of the policy.

6. Counties 🔑24—Legislature is without power directly by statute to relieve one county from obligation imposed on others and cannot do so by approving county charter limiting tax rate (Const. art. 11, § 7½; Butte County Charter, art. 8, § 12).

State Legislature is without power directly by statute to relieve one county from obligations which it imposes on all others, and it cannot do so by approval of Butte County Charter, art. 8, § 12 (St. 1917, p. 1803), which would indirectly accomplish same thing by limiting amount of state and county tax rate, which would be in violation of Const. art. 11, § 7½.

7. Statutes 🔑76(6)—Provision of county charter limiting state and county tax rate held invalid as taking control from general laws (Const. art. 11, § 7½).

Under Const. art. 11, § 7½, providing that any county may frame charter for own government consistent with and subject to Constitution and that provision of charter relating to powers and duties of board of supervisors and all county officers shall be subject to and controlled by general laws, provision of charter of county limiting county and state tax rate to $2 per hundred of assessed valuation of property on assessment roll of county *held* invalid as taking control thereof from general laws.

Application by Guy Wilkinson for writ of mandate to be directed to Mattie Lund, as Treasurer and ex officio Tax Collector of the County of Butte, State of California, and others, to compel respondents to accept certain money as full payment of taxes of petitioner. Application denied.

Carr & Kennedy, of Redding, for petitioner.
George F. Jones, of Oroville, for respondents.

FINCH, P. J. This is an original application for a writ of mandate to compel the tax collector of Butte county to accept, in full payment of petitioner's taxes for the current fiscal year, a sum of money tendered by the petitioner and to issue an official receipt in full for such taxes. The sum so tendered is the amount of the petitioner's taxes, according to his contention, computed at the rate of "two dollars per hundred of the assessed valuation" of his property. The rate fixed by the board of supervisors is $3.15 on each $100 of the assessed value. The county is operating under a charter adopted pursuant to the provisions of section 7½, article 11, of the Constitution. Article 8, § 12, of the charter reads as follows: "Beginning with the fiscal year 1919–1920, the State and County tax rate for the County of Butte shall be limited to Two Dollars per hundred of the assessed valuation of the property on the assessment roll of the county, provided that in case of an emergency the Board of Supervisors, by unanimous vote, may exceed this tax rate. The term emergency, as used in this section shall be limited to an act of God, such as flood, fire or earthquake or of the public enemy, which necessitates the replacement of county property destroyed." (Stats. 1917, p. 1803.)

No part of the taxes in question was levied to meet an emergency. The resolution of the board of supervisors fixing the tax rate reads as follows:

"Whereas, the board of supervisors of the

★Rehearing denied. Hearing denied by Supreme Court.

county of Butte, acting under the provisions of section 3714 of the Political Code of the state of California, has heretofore, to-wit: on August 30, 1929, adopted a budget for the expenditures of the county of Butte, state of California, for the fiscal year 1929–1930 and

"Whereas, it is necessary to fix the rates of county and district taxes necessary to raise the amount of the estimated expenditures as finally determined in said budget.

"Now, therefore, it is hereby resolved that the tax rate for Butte county for the fiscal year 1929–1930 be and is hereby fixed as follows:

County General Fund	$ .75
Salary Fund	.30
Hospital Maintenance	.13
Junior College Tuition	.02
County Highway Maintenance	.18
General Reserve	.01
Budgeted Reserve	.09
Elementary Schools	.48
High Schools	.32
County Highway Bond Redemption	.32
County Highway Bond Interest	.11
Road	.40
Library	.04
Total County Rate	$3.15"

It appears to be conceded, and necessarily so under various constitutional and statutory provisions, that the following rates, included in the foregoing total rate, are mandatory, the board of supervisors having no discretion as to the amounts to be raised for the purposes named:

Junior College Tuition	$ .02
Elementary Schools	.48
High Schools	.32
County Highway Bond Redemption	.32
County Highway Bond Interest	.11
Total	$1.25

[1] Respondents contend that the tax limitation quoted is not applicable to these mandatory taxes, but only to such taxes as are discretionary with the board of supervisors. The limitation appears to be too plain and certain in its terms to admit of such interpretation. Josselyn v. City and County of San Francisco, 168 Cal. 436, 443, 143 P. 705. The term "county tax rate" clearly includes all of the mandatory rates mentioned.

Respondents' further contention, however, that the Constitution does not authorize the county so to limit its tax rate by its charter presents a more serious question. Section 7½ provides: "Any county may frame a charter for its own government consistent with and subject to the Constitution * * * and relating to matters authorized by provisions of the Constitution. * * * Such charter shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided, * * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter."

It requires no argument to show that only such provisions of a county charter as are authorized by the Constitution supersede state laws in conflict therewith and then only to the extent that such provisions are not limited by the Constitution. Such a limitation is found in subdivision 4 of section 7½ authorizing provisions in a county charter: "For the powers and duties of boards of supervisors and all other county officers, for their removal and for the consolidation and segregation of county officers, and for the manner of filling all vacancies occurring therein; provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws."

The limitation quoted is not modified or weakened by any other provision of section 7½. It is true that in subdivision 6 it is provided: "Whenever any county has framed and adopted a charter, and the same shall have been approved by the legislature, as herein provided, the general laws adopted by the legislature in pursuance of sections four and five of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided."

[2, 3] Section 4, referred to in the language last quoted, provides that the Legislature shall establish a system of county governments and, by general laws, provide for township organizations. Section 5 directs the Legislature to provide for the election or appointment of boards of supervisors and other county officers and township officers and "prescribe their duties and fix their terms of office." If it were not for the limitation contained in subdivision 4 of section 7½ it might be argued with much force that the provisions of a county charter supersede "the general laws adopted by the legislature" prescribing the duties of supervisors and other county officers; but since that subdivision expressly provides that such provisions, in so far as they relate to the duties of supervisors and other county officers, "shall be subject to and controlled by general laws," such limitation must be construed to be one of the exceptions referred to in subdivision 6 as "otherwise expressly provided." When the various provisions of section 7½ are construed as indicated herein, they are in entire harmony. A county may by charter impose duties upon supervisors and other county officers in addition to those prescribed by general laws but not inconsistent or in conflict therewith. The power of the Legislature to enact general laws prescribing the duties of such officers is not affected or impaired by the constitutional provisions authorizing counties to frame and adopt charters for their own government. Esberg v. Badaracco, 202 Cal. 110, 259 P. 730; Nicholl v. Koster, 157 Cal. 416, 108 P. 302. "Whatever political autonomy a county may

enjoy and whatever means it may employ in exercising self-government must be consistent with the grants and limitations of such powers prescribed by the organic law of the state." Shay v. Roth, 64 Cal. App. 314, 321, 221 P. 967, 970.

[4, 5] "A county is a governmental agency or political subdivison of the state, organized for purposes of exercising some functions of the state government." County of San Mateo v. Coburn, 130 Cal. 631, 636, 63 P. 78, 80, 621; Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 679, 154 P. 845. "The authorities are quite uniform upon the proposition that all the powers and functions of a county government organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." Singh v. Superior Court, 44 Cal. App. 64, 66, 185 P. 985, 986. "All the people of the state, while not directly interested in the administration of the affairs of municipal corporations of which they are not members, are so interested in the administration of the governmental affairs of a county, whether they reside or own property therein or not, because, * * * such administration involves, * * * the administration of the affairs and policy of the state." County of Sacramento v. Chambers, 33 Cal. App. 142, 149, 164 P. 613, 616; Central Pac. Ry. Co. v. Costa, 84 Cal. App. 577, 586, 258 P. 991; Watson v. Greely, 67 Cal. App. 328, 337, 227 P. 664.

The state has expressly made it compulsory for a county to raise sufficient funds to maintain its public schools and pay its bonded indebtedness. All the people of the state are equally interested in the enforcement of law and order by every county, the administration of justice therein, the conduct of official business, the preservation of public health, the maintenance of hospitals, the support of the old and helpless, the care of dependent children, the protection of domestic animals against disease and of plant life against pests, the maintenance of highways and bridges, and the many other state functions which can be more efficiently exercised by the counties than by the state, but which the state may at any time "resume and directly exercise." 7 Cal. Jur. 389.

The state having delegated the exercise of these important functions to the several counties as state agencies, only the clearest language in the Constitution would warrant the conclusion that, by any of the terms thereof, it was intended to authorize a county, by its organic law, to defeat the purposes of the state by providing, directly or indirectly, that it will not exercise such functions. No one would attempt to uphold a provision in a county charter directly prohibiting the appropriation of public moneys for the preservation of the public health, for the maintenance of hospitals, the support of indigents, the care of dependent children, or for the performance of other duties imposed upon counties by the state. Looking at substance rather than form, it seems equally clear that it is beyond the power of a county indirectly to repudiate its obligation to discharge such duties by providing in its charter for such a limitation of its tax rate as to render the performance of those duties impossible. If Butte county may so limit its tax rate to $2, no reason appears why it may not limit it to $1.25, which would raise only sufficient money to maintain its public schools and make the payments falling due on its bonded indebtedness and would render the county incapable of performing the other functions imposed upon it by the state. That a county may not so incapacitate itself is recognized in Keyes v. City and County of San Francisco, 177 Cal. 313, 324, 173 P. 475, 479, cited by petitioner, wherein it is said: "It is argued by respondent that the limitation on the rate of taxation cannot apply to taxes used for what are normally county purposes because they are prescribed by the state and no discretion as to their performance by the city and county of San Francisco would be permitted; consequently, the dollar limit would apply only to taxation for municipal purposes, and it is not alleged that the tax rate for such purposes exceeds the limit. Granting that the city and county cannot by a limitation upon its tax rate disable itself from performing the functions properly imposed upon it by the state, it does not appear that the limit fixed in this instance is insufficient to enable such functions to be performed. The question of the due performance of county duties being eliminated, the abstract right to place a limit upon the rate of county taxation becomes unimportant." Granting that in order to raise a constitutional question a party must be interested and concerned in such question in a legal sense (5 Cal. Jur. 622), in this case it reasonably appears from an examination of the budget, showing the receipts and expenditures of the preceding fiscal year and the estimated receipts and expenditures for the current year, that the receipts from taxes at the maximum rate fixed by the charter, together with receipts from other sources, will be insufficient to enable the county to perform the functions imposed upon it by the state, and therefore the question here involved is not one of mere abstract right.

The limitation contained in subdivision 4 of section 7½ is clear and explicit. The fixing of the county tax rate is one of the duties of the board of supervisors. All inconsistency and confusion may be avoided by taking the constitutional limitation to mean exactly what it expressly provides, that the provisions of county charters "relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws."

Petitioner relies on Burr v. San Francisco, 186 Cal. 508, 199 P. 1034, 17 A. L. R. 581;

Josselyn v. San Francisco, 168 Cal. 436, 143 P. 705; San Christina, etc., Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 52 L. R. A. (N. S.) 67; and other similar cases. The question considered in those cases was not the validity of the tax limit in the San Francisco charter, but the character of emergency which would justify a tax rate in excess of such limit. The decisions in those cases, therefore, throw little light upon the question involved herein.

[6] The approval of the Butte county charter by the Legislature has no bearing on the question of the validity of the tax limit therein. Since the Legislature is without power directly by statute to relieve one county from obligations which it imposes on all others, it logically follows that it cannot do so by approval of a county charter which would indirectly accomplish the same thing.

[7] For the reasons stated, it must be held that in matters of taxation, boards of supervisors are controlled by general laws, and that the provision of the charter of Butte county purporting to limit the tax rate therein is invalid.

The petition for a peremptory writ of mandate is denied, and the alternative writ is discharged.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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102 Cal. App. 688

PEOPLE v. SOTELO. (Cr. 1556.)

District Court of Appeal, First District, Division 1, California. Dec. 20, 1929.

1. Homicide 🔑254—Evidence held to sustain conviction for second degree murder.

Evidence in prosecution for murder *held* sufficient to sustain conviction for murder in the second degree.

2. Criminal law 🔑554—Jury was not compelled to believe defendant's uncontradicted testimony where circumstances reasonably justified inference of guilt.

Mere fact that testimony of defendant in murder prosecution was not improbable and was uncontradicted by direct testimony did not compel jury to believe it, where circumstances were such as to reasonably justify an inference of guilt.

3. Criminal law 🔑1174(2)—Jurors consulting law books for definition held not prejudicial, where there was difference of opinion thereafter and request for further instruction.

Action of jurors in murder trial in consulting law books in order to ascertain meaning of term "malice aforethought" *held* not prejudicial, in view of fact that, after reading book, there was still a difference of opinion, and jury asked for and received further instruction upon the subject, particularly in view of fact that consulting of law books in and of itself by members of jury does not constitute error.

4. Criminal law 🔑957(3)—Generally jurors cannot impeach verdict by affidavits showing misconduct, unless verdict is reached by resort to determination of chance.

Generally jurors are not permitted to impeach their own verdict by their affidavits showing misconduct on part of members, except where verdict is reached by resort to determination of chance.

5. Criminal law 🔑1156(1)—Order denying new trial for misconduct will not be disturbed unless clearly an abuse of discretion.

Appellate court will not disturb an order denying a motion for a new trial on ground of misconduct, unless there is manifestly and clearly an unmistakable abuse of discretion.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Rufo Sotelo was convicted of murder in the second degree, and he appeals. Affirmed.

John A. Murphy, of Salinas, and Ed. J. Clark, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellant was charged in an information filed by the district attorney of Monterey county with the crime of murder, for the killing of one Bartoleme Cabaltera. A verdict of murder in the second degree was returned by the jury. Motion for a new trial was made and denied. From the judgment entered upon the verdict and from the order denying a new trial appellant prosecutes this appeal.

[1, 2] The main point relied upon for a reversal is that the evidence is insufficient to support the verdict. Defendant and the deceased, Filipinos, were employed in a camp in the vicinity of the town of Spreckels, Monterey county, Cal. Deceased was the cook at the camp, and defendant, so he testified, visited him for the purpose of collecting a certain sum of money which he claimed the deceased owed him. What transpired between them was testified to by defendant, who took the stand in his own behalf. In substance he claimed that, upon demanding payment of the sum due him, deceased became angry, denied the indebtedness, and commenced throwing stove wood at him, which struck him on certain parts of his head and body. After throwing the wood, deceased attempted to obtain possession of an iron poker with which to strike defendant, whereupon defendant, in order to protect himself, stepped toward the deceased and threw a knife at him which penetrated his back, producing a wound which shortly thereafter caused death. There were no eyewitnesses to the killing, and defendant claims that, as his testimony was not directly contradicted, the jury was bound to accept

it and should have acquitted him. There were other circumstances, however, from which the jury was fully justified in rendering the verdict which it did. It appeared in evidence that deceased ran from the kitchen with the knife in his back, calling for help, and that he was closely followed by the defendant. Defendant ran away from the scene of the killing, and, in the course of his flight, threw away a loaded revolver. He afterward concealed himself, but was subsequently arrested in an adjacent town. The knife with which the killing was done entered the back of the deceased between the third and fourth ribs for a depth of about six inches. It was the claim of the prosecution that it would have been impossible for the knife to have produced this character of a wound under the circumstances described by defendant, or that it could have penetrated the body of the deceased to the depth that it did. It was the theory of the prosecution that defendant had approached the deceased while he was bending over his stove and deliberately stabbed him. Defendant admitted that at the time the wound was inflicted the deceased had his back turned toward him. The nature and character of the wound and the fact that the knife remained imbedded in the back of the deceased, together with the other circumstances above related, were legitimate matters to be considered by the jury in reaching its conclusion. The mere fact that defendant's testimony was not improbable and was uncontradicted by direct testimony did not compel the jury to believe it, where the circumstances were such as to reasonably justify an inference of guilt. People v. Neary, 104 Cal. 373, 37 P. 943. As was said in People v. Hall, 87 Cal. App. 634, 262 P. 50, few criminals would ever be convicted if their explanations were always accepted as gospel truth.

[3-5] Appellant next complains of the giving and refusal to give certain instructions to the jury. These instructions relate to the question of flight by a defendant immediately after the commission of a crime, as tending in some degree to prove a consciousness of guilt, and also to the questions of self-defense and circumstantial evidence. We have read the instructions carefully. The jury was fully and fairly instructed upon these questions, and we find no error in this connection. And, finally, appellant complains of the action of the trial court in refusing to grant a new trial. When the motion came on for hearing, there was offered in evidence two affidavits of members of the jury which appellant claims show that the jury was guilty of misconduct during its deliberation. The misconduct relates to the fact that certain of the jurors consulted law books which were in the jury room to ascertain the meaning of the term "malice aforethought." After reading the same, there was still a difference of opinion among the jurors as to the meaning of the term, and the jury asked for and received further instruction upon the subject. Under these circumstances it is apparent that the defendant was not prejudiced by the action of the jurors. In and of itself, the consulting of law books by members of the jury has been repeatedly held not to constitute error. Durham v. State, 70 Ga. 264; People v. Draper, 28 Hun. (N. Y.) 1. Moreover, the general rule is that jurors are not permitted to impeach their own verdict by their affidavits showing misconduct on the part of its members, except where the verdict is reached by a resort to the determination of chance, and this is particularly so where the misconduct has been submitted to the trial court and passed upon by that tribunal, as the law is settled that the appellate court will not disturb an order denying a motion for a new trial on the ground of misconduct, unless there is manifestly and clearly an unmistakable abuse of discretion. People v. Maggio, 90 Cal. App. 683, 266 P. 813.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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102 Cal. App. 608

PEOPLE v. LINTON. (Cr. 1516.) ★

District Court of Appeal, First District, Division 1, California. Dec. 18, 1929.

Hearing Denied by Supreme Court Jan. 16, 1930.

1. Indictment and information ⚷139—Denying motion to set aside information not made until after plea of not guilty held not error (Pen. Code, §§ 288, 288a).

Where motion to set aside information was made after entry of plea of not guilty in prosecution for violation of Pen. Code, §§ 288, 288a, it came too late and denial thereof was not error.

2. Criminal law ⚷286—Allowing plea of insanity to be withdrawn to hear and determine motion to set aside information is discretionary with trial judge.

Though court has power to allow plea of insanity to be withdrawn for purpose of hearing and determining motion to set aside information accusing defendant of crime, exercise of that power necessarily is left to discretion of trial judge.

3. Indictment and information ⚷139—Denying motion made after plea of not guilty to set aside information held not abuse of discretion, where two weeks elapsed between arraignment and entry of plea (Pen. Code, §§ 288, 288a).

Where there was period of more than two weeks between date of arraignment of defendant for violation of Pen. Code, §§ 288, 288a, and entry of plea within which defendant could have availed himself of motion to set aside information if he had so desired, court did not abuse dis-

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★Hearing denied by Supreme Court.

cretion in denying motion made after entry of plea of not guilty.

4. Indictment and information 🔑149—Denying permission to interpose demurrer after defendant pleaded not guilty as accused held not error (Pen. Code, §§ 288, 288a).

Refusing to allow defendant, in prosecution for violation of Pen. Code, §§ 288, 288a, to interpose demurrer after entry of plea of not guilty, *held* not error.

5. Criminal law 🔑1032(5)—Defendant not filing motion to set aside information for not following commitment until after pleading guilty held precluded from objecting by including in brief copy of commitment excluded (Pen. Code, §§ 288, 288a, 996, and § 809, as amended by St. 1927, p. 1045; Const. art. I, § 8).

Where defendant, in prosecution for committing upon female child 10 years of age crimes defined by Pen. Code, §§ 288, 288a, did not file motion to set aside information until after entry of plea of not guilty, he was precluded by Pen. Code, § 996, from afterwards asserting objection by setting forth copy of commitment which was excluded in brief upon which he might have relied to show that information filed under Pen. Code, § 809, as amended by St. 1927, p. 1045, did not follow commitment and charged two offenses different from those of which defendant was charged in violation of Const. art. 1, § 8.

6. Criminal law 🔑624—Reading during trial on insanity issue information upon which defendant was convicted held not error (Pen. Code, §§ 288, 288a).

Reading information to jury upon which defendant, in prosecution for violation of Pen. Code, §§ 288, 288a, was tried and found guilty during trial of issue of insanity, as pleaded by defendant, *held* not error, since purpose of insanity trial was to ascertain whether defendant had reasoning capacity sufficient to distinguish between right and wrong as to particular acts he was charged with having committed by information.

7. Infants 🔑20—Evidence in prosecution for committing lascivious crimes upon female child that defendant exhibited obscene pictures, corroborated by police officer's testimony as to obscenity, held admissible to show lewdness of purpose (Pen. Code, §§ 288, 288a).

In prosecution for commission upon female child 10 years of age crimes defined by Pen. Code, §§ 288, 288a, testimony by child that at time defendant exhibited certain pictures, which according to her description were obscene, and testimony by police officer that he found two such pictures among defendant's effects at time of arrest, *held* not error, since exhibition tended to show lewdness of purpose, and officer's testimony was corroborative of girl's assertion that appellant exhibited pictures.

8. Criminal law 🔑1178—Bare assignments of error unsupported by argument or citation of authorities cannot be considered (Pen. Code, §§ 288, 288a).

Bare assignments of error, unsupported by argument or citation of authority on appeal of defendant from conviction for violation of Pen. Code §§ 288, 288a, for commission of lascivious crimes upon female child 10 years of age, may not be considered.

9. Criminal law 🔑479—Appointment of physician to investigate sanity of accused pleading insanity, and permitting his opinion, held not violative of defendant's constitutional rights (Pen. Code, §§ 288, 288a).

Appointment of physician, who was superintendent of state hospital, to investigate insanity of accused in prosecution for violation of Pen. Code, §§ 288, 288a, by committing lascivious crimes upon female child 10 years of age, and permitting physician to testify that in his opinion defendant was not insane, and that opinion was based upon personal examination and observation of defendant and also upon testimony given at trial by several witnesses as to defendant's actions and conduct, *held* not error or violating constitutional rights of defendant; testimony being competent, relevant, and material to issue then being tried.

10. Criminal law 🔑605—Denying application for continuance made morning trial commenced held not error, where six weeks elapsed between entry of plea of insanity and trial (Pen. Code, §§ 288, 288a).

Denying application for continuance of prosecution for committing upon female child 10 years of age crime defined by Pen. Code, §§ 288, 288a, to procure testimony of defendant's sister to be used in trial as to his sanity, where defendant pleaded insanity, *held* not error, where application was not made until morning of commencement of trial, and period of six weeks elapsed between time of entry of plea and commencement of trial on issue.

11. Criminal law 🔑452(2)—Opinions of witnesses not alienists, intimate friends, or acquaintances of accused, being tried on issue of insanity as to sanity, held inadmissible.

Opinions of witnesses who were not alienists, intimate friends, or acquaintances of accused, being tried for insanity, based upon observation of conduct of accused while he was in jail, *held* not admissible.

12. Criminal law 🔑1169(9)—Where court allowed witnesses not alienists, intimate friends, or acquaintances of accused, pleading insanity, to describe conduct of defendant, no error was committed.

Where witnesses who were not alienists, intimate friends, or acquaintances of accused, being tried on issue of insanity, were allowed to describe fully actions and conduct of accused, no error was committed, though opinions as to insanity of accused by those witnesses was admissible.

13. Criminal law 🔑722½—District attorney's comments in trial on issue of defendant's insanity, upon acts information charged of which defendant was convicted held not error.

Comments by district attorney during trial of issue of insanity of defendant upon acts alleged in information, constituting crimes of which defendant had been convicted, *held* not error, since issue before jury was whether defendant had sufficient reasoning capacity to distinguish between right and wrong as to commission of acts charged.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Walter Linton was convicted of the violation of Penal Code, §§ 288 and 288a, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KNIGHT, J. Appellant was charged by an information containing two counts with having committed upon a female child 10 years of age the crimes defined by sections 288 and 288a of the Penal Code. When asked to plead to the charges he stood mute, and thereupon the court directed pleas of not guilty and not guilty by reason of insanity to be entered in his behalf to both charges. Upon the first trial a jury found him guilty on both counts, and subsequently another jury declared him sane at the time of the commission of the acts charged. The appeal is taken from the judgment of conviction and the order denying his motion for a new trial, 24 points being urged as grounds for reversal. In considering these points they will be grouped according to the subjects to which they relate.

Appellant was arraigned on July 17, 1928, at which time he was represented by his present counsel, who requested that appellant be sent to the detention hospital for observation as to his sanity. Such an order was made, and the time to plead was continued to August 4, 1928. At that time the examining physicians declared him to be sane. He was then asked to plead to the charges, but, as stated, he stood mute, and the court caused the pleas above mentioned to be entered in his behalf; whereupon August 31, 1928, was set as the date for trial. On August 27, 1928, appellant asked leave to file a motion to set aside count two of the information upon the ground that he had not been legally committed by a magistrate, and twice in connection with said motion he sought to introduce in evidence the commitment of the magistrate holding him to answer. He asked also that he be allowed to interpose a demurrer, and at the opening of the trial he objected to the introduction of any evidence in substantiation of the second count upon the ground that the facts stated therein did not constitute a public offense. The trial court ruled adversely on all of the foregoing matters, and we find no error in its rulings.

[1-4] As said in People v. Magee, 60 Cal. App. 459, 213 P. 513, 514: "The motion [to set aside the information] having been made after entry of the plea of not guilty, came too late, and it was properly denied." True, the court has power to allow the plea to be withdrawn for the purpose of hearing and determining such a motion, but the exercise of that power necessarily is left to the discretion of the trial judge (People v. Ronsse, 26 Cal. App. 100, 146 P. 65); and in the present case it cannot be said that there was any abuse of such discretion, because there was a period of more than two weeks between the dates of the arraignment and the entry of the pleas within which appellant could have availed himself of such motion, if he had so desired. What has been said with reference to the motion to set aside the information applies with equal force to the ruling as to the demurrer, and conceding that a defendant may, at any time during trial, raise the objection that the facts stated in the information do not constitute a public offense (Pen. Code, § 1012), an examination of the information in the present case discloses that the objection made thereto, upon the ground stated, was without merit.

[5] Despite the two rulings of the trial court excluding the commitment from the record, appellant has set forth a copy thereof in full in his brief, and with respect thereto he contends that "the information filed under section 809, Penal Code, as amended in 1927 (St. 1927, p. 1045) did not follow the commitment and charged two offenses different from which the defendant had been held to answer, and in violation of article 1, § 8, of the state Constitution, and denied defendant due process and the equal protection of the law and violated the Fourteenth Amendment to the United States Constitution"; and incidentally he challenges the constitutionality of the code section above mentioned. Respondent argues that, since the commitment was definitely excluded from the record, appellant is precluded on appeal from raising any questions based thereon. In other words, it is contended that appellant is seeking to present for determination on appeal the points which he might have urged in the trial court, if his motion to set aside the information had been seasonably presented. We are of the opinion that respondent's position must be sustained, for, as declared in section 996 of the Penal Code, the failure to file a motion to set aside an information precludes the defendant from afterwards asserting the objections upon which he might have relied in furtherance of such a motion. It may be stated, however, that, owing to the nature of the crimes charged and the period of imprisonment prescribed as a punishment upon conviction thereof, we have inquired into said points, and in our opinion they would have been legally insufficient to justify the trial court in setting aside the information, even though a motion for such purpose had been seasonably presented.

During the trial upon the issue of appellant's guilt he sought to introduce evidence relating to his mental condition at the time the crimes were alleged to have been committed, claiming that section 1026 of the Penal Code excluding that character of evidence was unconstitutional. All of the points urged in support of such claim have been definitely disposed of adversely to his contentions in the case of People v. Troche (Cal. Sup.) 273 P. 767.

[6] At the trial on the issue of insanity the information upon which appellant was tried and found guilty was read to the jury, and appellant claims that this was error. Obviously, however, the very purpose of the insanity trial was to ascertain whether appellant had reasoning capacity sufficient to distinguish between right and wrong as to the particular acts he was charged with having committed (People v. Troche, supra), and manifestly the jury could not intelligently determine that question without being first informed as to the nature and character of such acts.

[7] The child testified that at the time the alleged criminal acts were committed upon her appellant exhibited certain pictures, which, according to her description of them, were obscene; and subsequently one of the arresting police officers testified that he found two such pictures among appellant's effects at the time of his arrest. The admission of the evidence was not error for the reason that the exhibition of the pictures tended to show a lewdness of purpose with which appellant accosted the girl, and the officer's testimony was corroborative of the girl's assertion that appellant had exhibited such pictures.

[8] In making the next three points (9, 10, and 11), appellant merely sets forth the bare assignments of error, unsupported by argument or citation of authority, and for that reason said points do not require special attention. All are without merit.

[9] Appellant claims that the court refused to appoint, at the state's expense, a physician to observe his mental condition and to testify as a witness in his behalf, and he contends that this was error. At the time this trial took place the law did not require the court to appoint alienists; nevertheless, the record herein shows that the court of its own motion appointed Dr. Leonard Stocking, medical superintendent of Agnews State Hospital for 20 years, to investigate the sanity of the accused; and afterwards Dr. Stocking testified that in his opinion appellant was sane, and that his opinion was based upon his personal examination and observation of the appellant, and also upon the testimony given at the trial by the several witnesses as to the appellant's actions and conduct. In our opinion the course taken by the court was not improper, and none of appellant's constitutional rights were violated thereby; furthermore, it is apparent that the testimony given by Dr. Stocking in this behalf was competent, relevant, and material to the issue then being tried.

[10] Contention is made also that the court erred in denying appellant's application for a continuance to procure the testimony of appellant's sister to be used upon the trial as to his sanity. But with reference thereto the record discloses that the application was not made until the morning of the commencement of the trial, and that a period of six weeks elapsed between the time of the entry of the plea and the commencement of the trial on said issue, which was ample to procure such testimony if appellant had so desired; moreover, the showing made in support of the application was wholly insufficient to warrant the court in granting the same.

[11, 12] Appellant produced certain witnesses who had observed his conduct and actions while he was in jail, and he sought to have these witnesses give their opinions as to his sanity. Admittedly the witnesses were not alienists, nor were they able to qualify as intimate friends and acquaintances; consequently, their opinions were not admissible. In conformity with the rule in such cases, however, the court allowed said witnesses to describe fully the actions and conduct of the appellant; consequently no error was committed.

[13] In his argument to the jury during the trial on the issue of insanity the district attorney commented upon the acts alleged in the information constituting the crimes of which appellant had been convicted, and such comment is assigned as error. As heretofore stated, the issue before that jury was whether appellant had sufficient reasoning capacity to distinguish between right and wrong as to these particular acts he was charged with having committed. Clearly, therefore, the district attorney had the right to comment upon the nature of such acts. The remaining points urged in appellant's brief either have been disposed of in connection with those already considered, or do not possess sufficient merit to require discussion.

After examining the entire record, including the evidence, it is our opinion that appellant has been fairly tried, that the evidence is legally sufficient to sustain the verdicts rendered, and that such verdicts have not resulted in a miscarriage of justice. The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

102 Cal. App. 623

ANDREWS et al. v. DE LORM et al.★
(Civ. 53.)

District Court of Appeal, Fourth District, California. Dec. 18, 1929.

Rehearing Denied Jan. 13, 1930. Hearing Denied by Supreme Court Feb. 13, 1930.

1. **Sales 🔑479(7)—In conditional seller's action to recover automobile, evidence supported finding that car offered as down payment by buyer was never delivered to seller.**

In action by seller in claim and delivery to recover possession of automobile sold under conditional sales contract, evidence *held* to support finding that automobile to be delivered to plaintiff as down payment was not delivered, where buyer, after being offered $450 for such car, was unable to deliver, and later recovered $180 from company which held it.

2. **Evidence 🔑419(13)—Evidence of true consideration for conditional sales contract held admissible, notwithstanding recital therein acknowledging receipt of $450 down payment.**

Seller's recital, in conditional sales contract for automobile, acknowledging receipt of $450 as down payment, *held* not to preclude admission of evidence showing true consideration, and that stipulated down payment was not received; such evidence being admissible as showing why sellers deemed themselves insecure, in connection with breach of contract and as showing true consideration, parol evidence rule being inapplicable.

3. **Sales 🔑479(2)—Conditional seller of automobile could retake car, regardless of default in payment, where buyer violated contract by removing car from state and selling it.**

Seller of automobile under conditional sales contract *held* to have right to take car, regardless of any default in payment provided for in contract, where contract was violated in two other respects by removal from state and sale without permission, in view of provision that seller could terminate contract and retake possession, if purchaser failed to comply with any of terms, or seller should deem himself insecure.

4. **Sales 🔑479(1)—Conditional seller held not limited to foreclosure of lien as remedy for buyer's breach of contract.**

Remedy of seller of automobile under conditional sales contract was not limited to foreclosure of lien, on theory that contract was in effect chattel mortgage, in view of provision permitting seller to terminate contract and retake possession of property, if purchaser failed to comply with any of terms, or if seller deemed himself insecure.

5. **Appeal and error 🔑1033(9)—In conditional seller's action in claim and delivery to recover automobile, finding value at less than only evidence showed held not prejudicial to defendants.**

In action in claim and delivery, brought by conditional seller for possession of automobile, error, if any, in finding value of automobile in question was $600, *held* not prejudicial to defendants, where only evidence on such point placed value at $750 to $800.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action in claim and delivery, by H. H. Andrews and another, doing business under the firm name and style of Andrews Motor Company, against R. H. De Lorm and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. A. Gardiner, of Santa Ana, for appellants.

Head, Rutan & Scovel, of Santa Ana, for respondents.

BARNARD, J. This is an action in claim and delivery for the possession of an automobile, which was purchased by the defendant De Lorm from the plaintiffs, under a conditional sales contract entered into by the parties in Yakima county, Washington, on June 19, 1925. The automobile in question was delivered to De Lorm when the contract was signed. The contract provides for a purchase price of $1,164, acknowledges receipt of $450 down payment, and provides that the balance of $714 shall be payable, $400 on the 1st day of November, 1925, and $314 on the 1st day of March, 1926. The contract further provides that until the purchaser has fully complied with all of the terms thereof, and made all payments provided for therein, the title to said automobile shall remain in the seller; also, it provides that the purchaser agrees not to sell, attempt to sell, lease, mortgage, hypothecate or otherwise dispose of or incumber said personal property, nor take the same out of the county of Yakima, state of Washington, during the life of the contract. It further provides that the purchaser shall not assign this contract, or any of his rights thereunder, and that any such assignment shall, at the option of the seller, terminate all of the purchaser's rights under said contract, or the rights of any person holding or claiming the same.

The evidence shows that, at the time this agreement was entered into, the defendant De Lorm agreed to deliver to the plaintiffs a Ford automobile, which was to be accepted by them at the appraised value of $450, and the contract recited a first payment of $450, which represented the appraised value of this Ford automobile. At that time, the Ford car was in the possession of the Dobson Motor Company, having been placed there by the defendant De Lorm. De Lorm gave to plaintiffs an order upon the Dobson Motor Company for the Ford car, but stated he was going down that afternoon to get it. Nothing was said about the plaintiffs getting the Ford from the Dobson Motor Company. The Ford car was never delivered to the plaintiffs, but De Lorm employed an attorney and filed an action against the Dobson Motor Car Company, to recover his Ford or the value thereof. At this trial De Lorm testified that he

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★Rehearing denied. Hearing denied by Supreme Court.

was the owner of the Ford in question, and the trial resulted in his receiving $180 from the Dobson Motor Company. He had previously told the plaintiffs they would have to wait until this lawsuit was over to see whether he could get the car, or money with which to make the down payment. The $180 thus received by De Lorm was paid to plaintiffs upon the down payment. The plaintiffs requested him to execute a new contract, reciting the true facts and agreeing to make the payments easier, and upon a different basis; the new contract to include the balance of $270 on the first payment, and the remaining payments that were unpaid. De Lorm agreed to execute such a new contract, but failed to do so.

After the execution of the conditional sales contract, the plaintiffs sold and transferred the same to the General Credit Company. On December 18, 1925, the defendant De Lorm paid to the General Credit Company the $400 which was due November 1st. At that time De Lorm told the General Credit Company that he would like to take the car to California, and there refinance the deal. He was told by them that he would not be allowed to take the car from the state until it was fully paid for. Shortly thereafter, without the consent of the plaintiffs, or the General Credit Company, defendant De Lorm took the automobile in question from the state of Washington to the state of California, and a little later sold the car to the defendant Mendenhall, receiving a Buick car for his equity therein. In January, 1926, defendant Mendenhall wired the General Credit Company, inquiring as to the amount due on the contract, and stating that, if the balance due was $314, he would mail a check for the amount. About that time the General Credit Company reassigned the contract to the plaintiffs and advised defendant Mendenhall of this action. The plaintiffs wired defendant Mendenhall that the amount due on the car was $580, plus interest on $270, being the balance they claimed to be due on the first payment, from the preceding June. On January 21, 1926, the attorney for defendants wrote plaintiffs that the defendants had advised him they were ready to pay the sum of $314. At the trial of the action, defendants tendered to plaintiffs the sum of $314 in cash. From a judgment in favor of plaintiffs, the defendants have appealed.

[1] Appellants present the questions they raise under three general heads, but one of them really determines the issues presented. This is as to whether or not the court erred in finding that the $450 down payment on the purchase price of said automobile was not made at the time the conditional sales contract was entered into by the parties thereto, and whether the court erred in finding that the Ford car was not delivered to the plaintiffs, as agreed between the parties. Appellants introduced evidence to the effect that, at the time the contract was entered into, it was agreed that plaintiffs should get the Ford car from the Dobson Motor Company, and that their salesman said to defendant De Lorm, "Now, so far as you are concerned with this deal, you are through; we will get the Ford coupé." However there was ample evidence of the state of facts as heretofore set forth. Plaintiffs' salesman, who sold the car to defendant De Lorm, testified that De Lorm said he was going down that afternoon to get the Ford car, and that nothing was said at that time, or any other time, about the plaintiffs getting the car; also, the defendant De Lorm later told them they would have to await the result of the lawsuit, to see if he recovered the car, or whether he could get money to make a down payment. An attorney at law, who prosecuted the action to recover the Ford car from the Dobson Motor Company, testified that he instituted the action at the request of defendant De Lorm, and that he was not employed by the plaintiffs. It is also in evidence that defendant De Lorm testified in that action that he was the owner of the Ford in question, and at the conclusion of the action he received $180 therefrom, which he paid to the plaintiffs upon the down payment on the car involved in this action. Not only was there a conflict in the evidence, but the preponderance thereof appears to be in favor of the plaintiffs.

[2] Appellants insist that respondents were bound by the recital in the conditional sales contract, acknowledging receipt of the $450 as a down payment, and that the evidence as to the transaction in connection with the Ford car was not admissible, for the reason that it was the purpose of this evidence to vary the terms of a written contract by oral evidence. Appellants cite a number of authorities in support of this contention, which, however, are not in point. Not only was this evidence admissible, as showing a reason why respondents deemed themselves insecure, in connection with the breach of the contract in removing the automobile from the state, and in selling the same, but the evidence was also admissible to show the true consideration of the contract.

"Parol evidence is admissible to show that the true consideration of a contract was not that which the contract recites; that it was something different, either a different valuable consideration, or a good consideration such as love and affection, instead of the valuable consideration recited. Code Civ. Proc. § 1962, subd. 2." Winchester v. Winchester, 175 Cal. 391, at page 393, 165 P. 965, 966. See, also, Harding v. Robinson, 175 Cal. 534, 166 P. 808.

"That the law in California permits parol proof to show the want of consideration in written executory contracts is beyond question. This follows from a consideration of sections 1614 and 1615 of the Civil Code, and section 1962, subdivision 2, of the Code of Civil Procedure. Moreover, it has been so decisively held by the courts of this state. In Stanton v. Weldy, 19 Cal. App. 374, 126 P. 175, the court points out that the rule is the same whether the named consideration be money or any other article of personal property. Therein it is said: 'On principle, we can discover no reason for allowing proof of no consideration where money is the consideration named and denying it where some article of personal property is named as the consideration. If the promisor received nothing in either case, he may show the fact in defense.'" Braselton v. Vokal, 53 Cal. App. 582, at 584, 200 P. 670, 671.

"But the rule is that the parties are not estopped by recitals in an agreement with respect to its consideration. The true consideration, or the want of consideration, may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts which show a valuable consideration [citing cases]." Royer v. Kelly, 174 Cal. 70, at page 72, 161 P. 1148, 1149.

"* * * It has always been held that the amount or kind of consideration recited in a deed is open to contradiction or explanation. White v. Schader, 185 Cal. 606, 198 P. 19, 21 A. L. R. 499; 10 R. C. L. p. 1042, § 236. The same rule applies to the instrument setting forth the preliminary contract. The amount or kind of consideration is not considered an essential part of a contract and is open to contradiction or explanation like a common receipt." Robson v. O'Toole, 60 Cal. App. 710, at page 716, 214 P. 278, 280.

It is apparent that in this case plaintiffs did not get the first payment agreed upon, and if the evidence introduced by the plaintiff is to be believed, as it was believed by the trial court, the defendants were taking advantage of what was nothing more than a receipt in the contract, to avoid paying the full purchase price agreed upon. Oral testimony was admissible to show what was actually received by the plaintiffs upon the purchase price named in the contract. Under the evidence there was a partial failure of consideration, and the true amount paid was properly shown by parol. It was proper to show what was the true consideration, so far as the first payment is concerned, and that the same was not delivered, or its equivalent paid.

[3, 4] The contract in question was also violated in two other respects, the evidence showing that the defendant De Lorm, without permission, removed the automobile from the state of Washington to the state of California, and thereafter sold the same, or his interest therein. At that time the car had not been paid for. The contract between the parties provided that in the event the purchaser failed to comply with any of the terms thereof, or in the event the seller should at any time deem himself insecure, he should have the right, without notice, to terminate the contract and retake possession of the property, wherever the same might be found, and that all money theretofore paid should be retained by the seller as and for the use of the property, and as liquidated damages for the nonfulfillment of the contract. Under the circumstances, plaintiffs were justified in feeling themselves insecure. They therefore had the right to retake the car regardless of any default in any payments provided for in the contract. Bice v. Harold L. Arnold, Incorporated, 75 Cal. App. 629, 243 P. 468. In this connection, appellants argue that the contract involved here is, in effect, a chattel mortgage, and that the only remedy of plaintiffs was to foreclose their lien. This contention is without merit. Bice v. Harold L. Arnold, Incorporated, supra.

[5] It is further argued that the court erred in finding that the value of the automobile in question, at the time respondents demanded the return of the same from appellants, was $600. The only evidence appearing in the record on this point places this value at from $750 to $800. No prejudice to the appellants is here shown. This was a claim and delivery action, asking for the return of the property, or the value thereof, in case the property could not be returned. In this case the automobile itself was actually returned. If it had not been returned, plaintiffs would then have had a judgment against them for $600, instead of for $750 or $800. The error, if any, being in their favor, would in any event not justify a reversal (Moore v. Borgfeldt [Cal. App.] 273 P. 1114), but, under the circumstances shown in the record, is immaterial.

The judgment is affirmed.

I concur: SLOANE, P. J.

MARKS, J., being disqualified in this case, takes no part in its decision.

208 Cal. 590

LANE et al. v. PELLISSIER et al.
(L. A. 11556.)★

Supreme Court of California. Dec. 17, 1929.

As Modified, on Denial of Rehearing, Jan. 16, 1930.

1. Appeal and error ⚷347(1)—Clerk's attempt to cancel judgment entered was without effect as respected filing notice of appeal within statutory limits (Code Civ. Proc. § 939).

Action of clerk in charge of judgments in attempting to cancel first entry of judgment was without effect, as respected filing notice of appeal within statutory limits set by Code Civ. Proc. § 939, since effect of original entry could not be altered by any act of clerk solely in pursuance of his ministerial authority.

2. Judgment ⚷270—Judgment, to be effectual, must be entered by clerk as required (Code Civ. Proc. § 664).

A judgment, in order to be effectual, must be entered by clerk in accordance with requirements of Code Civ. Proc. § 664.

3. Appeal and error ⚷356—Appeal initiated after prescribed period after entry of judgment confers no jurisdiction.

Jurisdiction of Supreme Court to entertain appeals is dependent on a compliance with statutory prerequisites in relation thereto, and an appeal initiated after prescribed period after entry of judgment has lapsed confers no jurisdiction on Supreme Court.

4. Appeal and error ⚷347(1)—Errors of clerk in respect to entry of judgment do not extend jurisdiction on appeal by indirection or estoppel (Code Civ. Proc. §§ 664, 668, 670, 671, 1052).

Clerk exercises no judicial function in performing duties in respect to entry of judgment, in accordance with Code Civ. Proc. §§ 664, 668, 670, 671, 1052, and his errors do not extend jurisdiction on appeal therefrom by indirection or estoppel.

Shenk, Curtis, and Langdon, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Albert Lane and others against Marie Julie Pellissier and others. Judgment for defendants, and plaintiffs appeal. On motion to dismiss appeal. Motion granted, and appeal dismissed.

Rehearing denied; Shenk, Curtis, and Langdon, JJ., dissenting.

Morgrage & Stanley, R. K. Barrows, Chandler, Wright & Ward, Chandler P. Ward, and Arthur F. Coe, all of Los Angeles, for appellants.

Lawler & Degnan, Max Felix, Newby & Newby, Nathan Newby, Williams & Parks, and Eugene Williams, all of Los Angeles, for respondents.

★Rehearing denied.

PRESTON, J. All appeals in this action not heretofore dismissed upon stipulation are now hereby dismissed. Enumeration of a long list of names is unnecessary. The basis of this conclusion is that the notices of appeal were not filed within the statutory limit set by section 939 of the Code of Civil Procedure. The judgment was entered September 6, 1928. The notices were filed on and subsequent to February 6, 1929. The time for filing notices of appeal expired November 5, 1928. Proceedings on motion for a new trial were not initiated prior to the last-mentioned date. Manifestly, without some additional showing, the notices came too late.

But it is said that the judgment was entered September 12, 1928; that notices of intention to move for a new trial were filed on November 10, 1928, and were heard and denied February 26, 1929; hence it is claimed the notices of appeal above referred to were in time. It appears, however, that on August 31, 1928, findings of fact and conclusions of law were filed, as was also the judgment, and this fact was noted in the register of actions kept by the clerk. On the 6th day of September, 1928, the clerk spread the said judgment at length upon the judgment book, and also noted this fact in his register of actions. However, the clerk in charge of judgments, intending to have the date of making up of the judgment roll and docket entries correspond with the date of entry of judgment, essayed on his own account, without order of court, to re-enter the identical judgment in the judgment book on September 12, 1928. He then undertook to cancel his first entry of the judgment by writing across the face thereof these words, "Canceled, September 12, 1928," and making a marginal note thereon, reading as follows: "This judgment after being entered, was returned to court before docketing, and is now entered under date of September 12, 1928, in Book 689, Page 391. [Signed] A. R. Groenke, Chief Judgment Clerk pro tem. September 12, 1928."

On February 26, 1929, a motion was duly noticed, having for its object the correction of the records of the action to speak the truth, by expunging therefrom the purported entry of September 12th, and also expunging the attempted cancellation, as well as the marginal and other matter purporting to nullify the previous entry of the judgment on September 6th. The application was supported by affidavits, and a hearing was had thereon, and thereafter, on March 20, 1929, the court made an order in full accord with the notice, the effect of which was to remove all clouds from around and about said entry of September 6th, and to declare it to be the true date of entry of said judgment.

[1] We see nothing whatsoever upon which to question the propriety of this action of the trial court. Manifestly the judgment was entered September 6th, and manifestly, also, the clerk may not alter the effect of the entry by any act of his own solely in pursuance of his ministerial authority. The loss or destruction of the judgment book would not alter the effect of the entry of judgment nor the constructive notice which it imparts. 23 R. C. L. p. 268.

Counsel on both sides have spent much time and energy in presenting us with voluminous briefs, but to us the question is determined by the statute and by well-settled decisions of this court. It may be conceded that, if we could say that the action of the court in making the order expunging the purported entry of September 12th was void, we would, in aid of our own jurisdiction, so declare, thereby sustaining these appeals; but certainly the burden rests upon appellants to show wherein such order was invalid, and no such showing is made or attempted. These motions are presented and resisted upon certificates and first and second supplemental certificates made by the clerk of the court. From them it is our conclusion, as above stated, that the court acted properly within its powers, and nothing is shown to in any wise make even questionable its action.

The duty of the clerk to enter the judgment in conformity with the decision of the court is declared in section 664 of the Code of Civil Procedure. The duty to keep a judgment book and enter therein the judgments rendered is declared in section 668 of said Code. The duty to make up and file the judgment roll is declared in section 670 of said Code. This is to be followed by proper entries in the docket to be kept by said clerk. Section 671, Code Civ. Proc. The register of actions and its notations are provided for in section 1052 of the Code of Civil Procedure.

[2] To be effectual the judgment must be entered. Code Civ. Proc. § 664; Schurtz v. Romer and Kerkow, 81 Cal. 244, 247, 22 P. 657. This is the initial point from which rights thereunder respecting appeals arise. Coon v. United Order of Honor, 76 Cal. 354, 355, 18 P. 384; Menzies v. Watson, 105 Cal. 109, 38 P. 641; Estate of Scott, 124 Cal. 671, 675, 57 P. 654; Dore v. Klumpke, 140 Cal. 356, 73 P. 1064; Wood, Curtis & Co. v. Missouri, etc., Ry. Co., 152 Cal. 344, 92 P. 868.

[3, 4] Our jurisdiction to entertain appeals is dependent upon a compliance with the statutory prerequisites. Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; Estate of Turner, 139 Cal. 85, 72 P. 718; Williams v. Long, 130 Cal. 58, 62 P. 264, 80 Am. St. Rep. 68. Section 939 has been liberalized to allow an appeal after rendition and before entry, but an appeal initiated after the prescribed period after entry has lapsed confers no jurisdiction on this court. The clerk exercises no judicial function, and his errors do not extend jurisdiction by indirection or estoppel.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.

SHENK, J. I dissent. It is a conceded fact in this case that, at the time the appeal was taken, the clerk's record showed that the judgment was entered on September 12, 1928. The notice of appeal should therefore be held to have been filed in time. When the proceedings on motion for a new trial were commenced, to wit, on November 10, 1928, and on February 6, 1929, when the notice of appeal was filed, the register of actions contained the following entry: "1928, Sept. 12. Judgment entered, docketed and roll filed. Judgment Book 689, page 391." It is not disputed that the judgment was copied at length in Judgment Book 689, at page 391, in the form required by law. The motion of the respondents to cause the records to show that the judgment was entered on September 6, 1928, was noticed for March 4, 1929, and was granted on March 20, 1929, which was long after the time for taking the appeal had expired. In other words, from September 12, 1928, until March 20, 1929, the records of the superior court in this action showed that the judgment was entered on September 12, 1928. Until this record was amended, it imported absolute verity. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Bernhard v. Wall, 184 Cal. 612, 621, 194 P. 1020.

The official duties of the clerk in keeping the judgment book and the register of actions are prescribed by sections 668 and 1052 of the Code of Civil Procedure. The presumption of regularity in the performance of those duties attached under subdivision 15 of section 1963 of the same Code. This presumption and the face of the records of the clerk of the court are of paramount importance to lawyers and litigants, for they provide the test of jurisdiction of the appellate tribunal, and the correctness of the record may not be disputed collaterally. City of Los Angeles v. Glassell, 203 Cal. 44, 49, 262 P. 1084. The lawyer, the litigant, and the reviewing court are bound by such a record, until it is modified, or amended, or impeached. The practitioner at the bar ought to be permitted to rely absolutely on such a record.

It may not be disputed that the trial court had the power to entertain and pass upon the respondents' motion to correct the record, but its order in the premises was necessarily without prejudice to the rights of these appellants, who had relied on the correctness of the record in the meantime. The order of the trial court was effective, either from and after its date of March 20, 1929, when it was made, in which event it did not disturb the rights of the parties already accrued under the statute, or it was in substance a nunc pro tunc order, effective as of September 6, 1928. If the latter, it falls within the unvarying rule in this state that one of the functions of a nunc pro tunc order is to preserve substantial rights, and is never used to impair the rights of litigants. Osmont v. All Persons, etc., 165 Cal. 587, 592, 133 P. 480, and cases therein cited.

The question to be decided on this motion to dismiss is one determining the appellate jurisdiction of this court. Its solution depends on the facts presented. The trial court could not, by the entry of the order correcting the records, deprive this court of its power on the present motion to determine its own appellate jurisdiction. If no such order had been entered, and the motion to dismiss the appeal herein had been made, on the ground that the judgment had actually been entered on September 6th, and therefore the appeal was too late, and the same showing were attempted to be made in this court as was made in the trial court on the motion to correct the record, I hesitate to believe that this court would do the appellants the injustice of dismissing their appeals, when they had relied, in taking their appeals, on the unimpeached record of the clerk of the superior court. Rather would it be held, I apprehend, that, in the face of the unimpeached record, showing the entry of the judgment on September 12, the motion to dismiss would be in the nature of a collateral attack upon the record of the trial court, and would necessarily have to be denied.

Furthermore, the right of appeal in this case is conferred by the Constitution and statutes, and rules of procedure for its exercise are strictly construed in favor of the party desiring the review. Estate of Nelson, 128 Cal. 242, 245, 60 P. 772; Lewis' Sutherland on Statutory Construction (2d Ed.) vol. 2, § 545. The opinion of the majority construes the record strictly against the right of appeal, and in my opinion does an injustice to litigants who have diligently and in good faith endeavored to present their cause to this court. Lawyers and litigants are indeed in a precarious position, if they may not, in determining when to file notice of appeal, rely on the prima facie correct and unimpeached record of the clerk of the superior court, setting forth the date of the entry of a judgment.

We concur: CURTIS, J.; LANGDON, J.

OSOSKE v. KALINOWSKY et ux.★
(S. F. 12773.)

Supreme Court of California. Dec. 31, 1929.

Rehearing Granted Jan. 30, 1930.

1. Husband and wife 🔑267(1)—Husband could sell community property prior to 1913 without wife's consent (Civ. Code, § 172, prior to 1917 amendment).

Where community property was deeded to husband in 1907, its status was fixed by Civ. Code, § 172, prior to 1917 amendment, which gave husband the right to sell without his wife's consent, and the amendment did not change the vesting of the property or give the wife any greater rights than she previously possessed.

2. Husband and wife 🔑262(1)—Presumption that property acquired after marriage is community property is rebuttable.

Presumption that real property acquired after marriage is community property is a rebuttable presumption, which either party claiming to the contrary may controvert and offer evidence to overcome.

3. Husband and wife 🔑264—Presumption that property aquired after marriage is community property will support finding when controverting evidence does not convince court.

While only such evidence as under all the circumstances would ordinarily produce conviction in an unprejudiced mind is needed to overcome presumption that property acquired after marriage is community property, the presumption will support a finding in accordance therewith, when evidence to overcome it does not convince the court.

4. Records 🔑18(10)—Decree under McEnerney Act is conclusive on those claiming equitable interests (McEnerney Act, §§ 1, 11).

Decree under the McEnerney Act (St. 1906, Ex. Sess. p. 78), providing for the establishment and quieting of title to real property in case of loss or destruction of public records, in view of sections 1 and 11, is binding on one claiming to own an equitable interest as well as those claiming under the legal title.

5. Records 🔑18(10)—Decree under McEnerney Act in favor of husband was conclusive against equitable claims of wife when its validity was not attacked (McEnerney Act).

Decree declaring and establishing husband's title to real property under the McEnerney Act (St. 1906, Ex. Sess. p. 78), was conclusive as against wife's claim that property was bought with her separate money and that husband was trustee, notwithstanding confidential relationship, where validity of the decree was not attacked for fraud or mistake.

6. Husband and wife 🔑265—Wife is entitled at any time to institute action to have husband declared trustee of her separate property held in trust for her by him.

Wife is entitled at any time to institute action against her husband to have him declared trustee of her separate property held in trust for her by him, though she is not entitled during his life to have her interest in the community property ascertained and declared.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by David Ososke against Otto Kalinowsky and wife for specific performance of agreement for sale of real estate. From a judgment and decree in favor of plaintiff, defendants appeal. Affirmed.

Marion Vecki, of San Francisco, for appellants.

I. Karmel, of San Francisco, for respondent.

Henry E. Monroe, of San Francisco, amicus curiæ.

CURTIS, J. This is an appeal from a judgment and decree in favor of the plaintiff for specific performance of an agreement for the sale of a certain lot in San Francisco. There is no dispute with regard to the facts of the agreement. On May 3, 1924, Otto Kalinowsky entered into an agreement with the plaintiff to sell a certain lot situate on Augusta street in the city of San Francisco for the sum of $500. He received from the plaintiff the sum of $25 on account, and gave him a receipt therefor. The body of the receipt was entirely in the handwriting of the plaintiff, who testified that he had copied it from a blank form used by real estate brokers. Said receipt reads as follows:

> "San Francisco, Calif., May 3, 1924.
>
> "Received from David Ososke the sum of twenty-five ($25.00) dollars, being deposit on account of five hundred dollars ($500.00) U. S. gold coin, the purchase price of the property this day sold to David Ososke and subject to the owners' approval, situated in the City and County of San Francisco, State of California, and described as follows, to-wit:
>
> "All that certain lot property commencing at a point on the south side of Augusta Street fifty feet west of Boutwell St. thence seventy-five feet south, thence twenty-five feet west, thence seventy-five feet north, thence twenty-five feet east to point of commencement.
>
> "Title to be perfect, McEnerney decree required. Sixty days time required to search title. [Signed] Otto Kalinowsky.
> "David Ososke."

This contract and agreement was on May 9, 1924, duly recorded in the office of the county recorder of the city and county of San Francisco.

It will be noted that this receipt was not signed by Bertha Kalinowsky, the wife of Otto Kalinowsky. She refused to sign a conveyance of said property to the plaintiff upon

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★Rehearing granted. 285 P. 318.

the ground that said property was her separate property, having been purchased with funds acquired by her prior to her marriage, and that, inasmuch as her husband, Otto Kalinowsky, had not been given authority by her to arrange for the sale of said property, the contract entered into between him and the plaintiff was not binding upon her.

The plaintiff tendered to the defendants the balance of the purchase price, and upon their refusal to accept same commenced this action for specific performance. No issue was made in the lower court as to the legality of the contract or the adequacy of the consideration. The sole issue there presented was whether the property was or was not, at the time of the making of the contract of sale, the separate property of the defendant Bertha Kalinowsky.

The finding of fact with reference to the ownership of the property is as follows: "It is not true that Bertha Kalinowsky, the wife of defendant Otto Kalinowsky, is or at any time was the owner of said property, except as to her community interest therein." And the conclusion of law based thereon is as follows: "That at all of the times herein and more particularly on and after April 7, 1908, the defendant Otto Kalinowsky was the owner of the property referred to in said complaint holding the same as the community property of himself and his wife, Bertha Kalinowsky."

It was an admitted fact in the court below that defendants Otto Kalinowsky and Bertha Kalinowsky were husband and wife on December 14, 1907, the date upon which the real property in suit was conveyed from B. Paige & Co., a corporation, to the defendant Otto Kalinowsky. This deed was duly recorded on December 19, 1907. It is also an admitted fact in the case that, after the acquisition of the property, Otto Kalinowsky instituted an action in the superior court of the state of California, in and for the city and county of San Francisco, under the act popularly known as the "McEnerney Act" (St. 1906, Ex. Sess. p. 78), and secured a decree, made and entered on April 7, 1908, declaring and establishing the title to the said property to be in him, the plaintiff therein. In said decree it was adjudged that he was the owner in fee simple, and that no other person had any right, title, or interest therein, either legal or equitable. The validity of this judgment was not questioned by the defendants in the court below. There can be no question, therefore, but that, at the time of the making of the agreement and the recordation thereof, the legal title to said property was in Otto Kalinowsky.

Subsequent to the recordation of the said contract of sale, on October 6, 1924, Otto Kalinowsky conveyed the said property to his wife, Bertha Kalinowsky. This conveyance being subsequent to the making of the contract of sale, is, of course, wholly immaterial to a determination of the question of the ownership of the property at the time of the making of the agreement.

[1] According to the record, this property was acquired by Otto Kalinowsky by deed from B. Paige & Co. on December 14, 1907. Section 172 of the Civil Code, prior to the 1917 amendment, gave to the husband the absolute management and control of the community real property with the right of sale without the wife's consent. The status of the property was fixed by the law as it existed at the time of its acquisition (Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 57 Am. St. Rep. 170) and the amendment did not change the vesting nor give to the wife any greater right in the property than she possessed therein prior to the amendment (Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22). If, therefore, as found by the trial court, this property was the community property of the defendants, the husband, Otto Kalinowsky, could make a valid contract for the sale, the wife's consent was not necessary, and the contract was binding upon both of them.

The only evidence introduced by the plaintiff relative to the status of the property was the judgment roll in the "McEnerney" suit entitled "Otto Kalinowsky v. All Persons." Plaintiff did, however, introduce additional evidence to the effect that the contract was a just and equitable one, and that the sum of $500 was a fair price to pay for the lot. This latter evidence was not contradicted by the defendants. They confined their evidence to the status of the property, and each of them testified, in support of their claim, that the property was the separate property of Bertha Kalinowsky; that the property had been purchased with funds acquired by the defendant Bertha Kalinowsky prior to her marriage to Otto Kalinowsky. Bertha Kalinowsky testified that the money was money which she had brought from Germany, together with money which she had earned before her marriage. Her testimony was corroborated to some slight extent by the testimony of a witness who testified that she had known Mrs. Kalinowsky before Mrs. Kalinowsky's marriage, and that Mrs. Kalinowsky "worked hard and she brought some money from Germany with her." The defendants also relied upon the phrase "subject to the owners' approval," incorporated in the written receipt, as substantiating their claim that the plaintiff was aware at the time he entered into the agreement that the property belonged to some person other than Otto Kalinowsky. However, the explanation given by the plaintiff that he copied a blank form used by real estate brokers in making up the receipt is plausible, and was evidently accepted as true by the trial court.

The judgment being in favor of the plaintiff, based upon its finding that the property in controversy was the community property of the defendants, the sole question presented upon this appeal is whether or not there is sufficient evidence in the record to support this finding. Plaintiff contends in support of the judgment that there is a substantial conflict in the evidence as to whether said property was the community property of the defendant. He also relies upon the conclusive effect of the "McEnerney" judgment as an adjudication of the ownership of the property embraced in its decree. It is appellants' position, however, that the "McEnerney" decree did not adjudicate the rights of Bertha Kalinowsky; that the judgment in that action that Otto Kalinowsky was the owner in fee and that no person had any right, title, or interest therein, either legal or equitable, was consistent with their theory that Otto Kalinowsky was holding the title in trust for his wife; that, this being so, as the respondent offered no evidence which contradicted, or tended to contradict, their testimony, the presumption that the property was community property, title thereto having been acquired in the name of the husband during coverture, disappeared from the case, and it thereupon became the duty of the trial court to enter judgment in favor of the appellants.

[2, 3] Ignoring the "McEnerney" decree, they take the position that the judgment of the trial court was based solely upon the disputable presumption that the property, having been acquired after their marriage, was community property, and they therefore concentrate their efforts upon attempting to prove that this presumption was entirely disproved by their testimony. It is, of course, true that this presumption is a rebuttable presumption which either party, claiming to the contrary, may controvert and offer evidence to overcome. Van Camp v. Van Camp, 53 Cal. App. 17, 24, 199 P. 885; Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 394, 73 P. 172, 173; Estate of Warner, 167 Cal. 686, 688, 140 P. 583. It is also true, as appellants contend, that to disperse this presumption it was not necessary for them to produce conclusive evidence to the contrary, but only such evidence as under all the circumstances of the case would ordinarily produce conviction in an unprejudiced mind that the property was the separate property of one of the spouses. They rely particularly upon Freese v. Hibernia Sav. & Loan Soc., supra, in support of this position. We are in accord with the rule as stated in Freese v. Hibernia Sav. & Loan Soc., supra, which is therein stated as follows: "While the presumption attending the possession of property by either husband or wife is that it is community property, such presumption is a disputable one, and may be controverted by other evidence. * * * Certainly it is not required that the proof to destroy this presumption should be any more than sufficient to satisfy the mind of court or jury that its weight is enough to cause a reasonable person, under all the circumstances, to believe in its sufficiency, in order to counterbalance the naked presumption that the property was acquired with the funds of the community. * * * Clearly, it was never intended by this court to lay down a rule requiring demonstration in such matters; that is, such a degree of proof as excluding possibility of error, produces absolute certainty. * * * Such proof is never required. Generally, moral certainty only is required, or that decree of proof which produces conviction in an unprejudiced mind; and evidence which ordinarily produces such conviction is satisfactory. * * * We are of the opinion that it is incumbent on the party seeking to overcome the presumption of community property to do no more than to produce such legal evidence, as, under all the circumstances of the particular case, would ordinarily produce conviction in an unprejudiced mind, and that in the face of such evidence the naked presumption, unsupported by any testimony, must fall." While the rule thus enunciated supports the contention of appellants that conclusive proof is not necessary to overcome the presumption of community property, the case itself does not go to the full extent desired by appellants. It merely holds that, if there is evidence contrary to the presumption which would support a verdict of the jury in conformance with such evidence, the granting of a motion for a nonsuit is not proper. The case falls far short of holding that, if judgment had been rendered in conformance with the presumption, it would have been reversed upon appeal. In the case of Eaton v. Locey, 22 Cal. App. 762, 136 P. 534, cited by appellants, the court was convinced by the testimony of the plaintiff, and rendered judgment in his favor contrary to the presumption. Likewise, in Estate of Warner, 167 Cal. 686, 140 P. 583, the evidence therein, contrary to the presumption, compelled the conclusion by the lower court that the property in controversy was the separate property of the wife, and that conclusion was sustained by this court on appeal. We fail, however, to see how appellants can take much comfort in the above decisions. From the fact that judgment in the instant case was entered in favor of the plaintiff, it is obvious that the evidence offered on behalf of the appellants failed to produce conviction in the mind of the trial court.

In other words, the testimony of the appellants failed to convince the trial court that the property was in fact the separate property of the wife, and therefore failed to overcome the presumption that it was community property. The cases cited by appellants in which the testimony did convince the trial court have, therefore, no application here. Moreover, it has been held to be the rule of this court that the determination of the trial court upon conflicting evidence as to whether or not the evidence offered to overcome the presumption of community property is clear and convincing is not open to review on appeal. Estate of Nickson, 187 Cal. 603, 203 P. 106.

It is quite evident, therefore, that the trial court could have based its finding that the property was community property solely upon this disputable presumption. The particular phrasing of the conclusion of law, above referred to, "that at all of the time herein and more particularly on and after April 7, 1908" (the date of the "McEnerney" decree), "the defendant Otto Kalinowsky was the owner of the property referred to in said complaint holding the same as the community property of himself and his wife, Bertha Kalinowsky," might indicate, however, that the judgment was further predicated upon the "McEnerney decree."

Before discussing this act, however, it should be here noted that the "McEnerney decree" was brought into the case by the introduction of the judgment roll in evidence, and that no mention whatever was made of the "McEnerney decree" in the pleadings by either the plaintiff or the defendants. The amended complaint of the plaintiff presented an ordinary case for specific performance against Otto Kalinowsky, and alleged that "the defendant Bertha Kalinowsky and the fictitious defendants claim to have some interest in the land hereinabove described, but the interest they have, was acquired subsequent to the recordation of the said contract and with full knowledge of the same." The answer of the defendants denies that the defendant Otto Kalinowsky was at any of the times mentioned in the complaint, the owner of the land described, and further alleges that the interest of the defendant Bertha Kalinowsky is prior and superior to any claim of the plaintiff in said property.

[4] The so-called "McEnerney Act" is in chapter 59 of the extra session of 1906, approved June 16, 1906. St. 1907, Ex. Sess. 1906, p. 78. The purpose and history of this enactment is too well known to require repetition here. The act is entitled, "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." Section 1 of the act provides that a party under the conditions referred to therein "may bring and maintain an action in rem against all the world, in the superior court for the county in which such real property is situate, to establish his title to such property and to determine all adverse claims thereto." The act also provides for the posting and publishing of summons and the filing of an affidavit by the plaintiff in said suit wherein the following facts must be fully and explicitly set forth: "(1) the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed and from whom obtained; (2) whether or not he has ever made any conveyance of the property, or any part thereof, or any interest therein, and if so when and to whom; also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; (3) that he does not know and has never been informed of any other person who claims or who may claim, any interest in, or lien upon, the property or any part thereof, adversely to him, or, if he does know or has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show, fully and explicitly, the reasons for such inability. Such affidavit shall constitute a part of the judgment roll." Section 11 of the act provides that: "The judgment shall ascertain and determine all estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consist of mortgages or liens of any description and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action.

In view of the plain language of the statute that "the judgment shall ascertain and determine *all* estates, rights, titles, interests and claims in and to said property * * * whether the same be legal or *equitable*" and shall be binding "upon *every* person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof," we do not believe it can be correctly concluded that the rights of Bertha Kalinowsky were not adjudicated by said decree. The language of this particular section of the act is, in our opinion, so clear as to leave no room for interpretation or construction. Moreover, a consideration of the entire act leads to the conclusion that a suit brought under this act is in the nature of a suit to quiet title. Title, etc., Restoration Company v. Kerrigan, 150 Cal. 289, 309, 88 P. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199. In fact, the title of the act expressly declares it to be "an act to provide for the * * * quieting of title to real property. * * *" This being so, a judgment obtained under this act is effective and binding upon the whole world in the same way that a judgment in a simple action to quiet title is binding upon a specific defendant. In Title, etc., Restoration Co. v. Kerrigan, supra, in which case this act was for the first time before this court, an elaborate review of the act itself, the legal principles involved and the authorities was given. It was therein stated that the proceeding authorized by this statute was one quasi in rem, and declared that a decree under it was binding upon persons whose names were unknown, where the requirements of the statute had been fully complied with, notwithstanding the rule that ordinarily such judgment is only binding upon the parties and their privies. If the defendant Otto Kalinowsky had brought suit to quiet title against the defendant Bertha Kalinowsky, the decree obtained therein would have been binding upon her as to every claim, legal or equitable, which might have been litigated in that action. The "McEnerney Act" (St. 1906, Ex. Sess. p. 78) itself provides that all titles legal and equitable shall be "ascertained and determined," and that such determination shall be "binding and conclusive upon every person claiming any interest whatsoever." It follows, therefore, that the "McEnerney decree" not only establishes the legal title, but also determines upon what trusts, if any, the plaintiff in said action holds title, and that such determination is binding, not only upon those claiming under the legal title, but also upon any one claiming to own an equitable interest.

[5] The confidential relationship existing between husband and wife does not preclude a determination that the rights of the wife were ascertained and determined by said decree. An adverse claim is not necessarily one which is the basis of a present controversy. It is sufficient if it will form the basis of a future controversy. The act provides that the plaintiff in the suit in his affidavit shall explicitly set forth "that he does not know and has never been informed of any other person who claims *or who may claim* (italics ours) any interest in, or lien upon, the property or any part thereof, adversely to him. * * *" The fact that the personal relations of a husband and wife may be amicable, and that the wife is willing that her husband shall hold the legal title to her separate property, offers no certainty that at some future time the question of whether or not the husband is holding the property in trust for his wife may not be the subject of a legal controversy. In Title Insurance & Trust Company v. Ingersoll, 158 Cal. 474, 111 P. 360, judgment was given in favor of the plaintiff in an action originally instituted by a wife against her husband to impress a trust upon certain property purchased with her separate money after marriage. It is apparent, therefore, that the interest of a wife in property, title to which is held by her husband, bought with her separate money after marriage, is an interest adverse to him.

[6] No analogy can be drawn between this interest of the wife in the property as her separate property held in trust for her by her husband and her interest in community property. As already stated, she is entitled at any time to institute an action against her husband to have him declared trustee of property held in trust by him. Title Insurance & Trust Company v. Ingersoll, supra. On the other hand, the wife is not entitled during the life of her husband to have her interest in the community property ascertained and declared. Stewart v. Stewart, 199 Cal. 318, 249 P. 197.

We do not wish to be understood as holding that a confiding wife would be absolutely remediless if a "McEnerney" decree be obtained by her husband without her knowledge or without her interest having been set out in the affidavit which he is required by the act to file. In Bradley Company v. Bradley, 165 Cal. 237, 131 P. 750, this court held that a judgment obtained by a trustee under the so-called "McEnerney Act," which on its face purported to establish and quiet the trustee's title to the trust property, did not divest the trustor of his interest therein where such judgment was permitted to be obtained as the result of a mutual mistake of law entertained by both parties as to the legal effect of such judgment. It is to be noted that this was a direct attack by an independent action to establish a trust where a decree had been obtained under the "McEnerney Act."

It is unnecessary for us to decide whether or not the wife would have been entitled to interpose as an equitable defense to the present action the falsity of the affidavit by which she was prevented from presenting her defense in the "McEnerney" suit. It is sufficient to say that she did not do so. We have already seen that she set up no such defense in her pleadings. As to the evidence, she offered no proof whatever that her name was omitted from the affidavit made by her husband in the "McEnerney" action through fraud or mistake or for any other cause. The husband was also a witness in the case, and he in no way explained, or attempted to explain, the reason for the omission of her name from said affidavit. In his said affidavit he stated, as the act required, that he knew of no person "who claims or who may claim" any interest in the property, or lien thereon adverse to him. There is no evidence in the record of the falsity of this statement. It therefore clearly appears that in her proof Mrs. Kalinowsky did not attack the validity of the "McEnerney" decree, but, upon the supposition that the decree was not binding upon her, completely ignored it, and relied solely upon the testimony that the property was purchased with her separate funds.

In the absence of some proof of the invalidity of the decree in the "McEnerney" suit, it is binding and conclusive upon the appellants herein.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.

SHENK and SEAWELL, JJ. We concur in the judgment and in the conclusions expressed in the prevailing opinion wherein it is held that the decree under the "McEnerney Act" is binding on the defendant wife.

PRESTON, J. I dissent. I think the judgment should be reversed, and base this conclusion upon the following course of reasoning:

Plaintiff sued defendants as husband and wife for specific performance of a contract signed by the husband alone, which, paraphrased, reads as follows: "San Francisco, Calif., May 3, 1924. Received from David Ososke the sum of $25.00 being deposit on account of $500.00 * * * the purchase price of the property this day sold to David Ososke *and subject to the owners' approval*, situated in the City and County of San Francisco * * * (description). Title to be perfect, McEnerney Decree required. Sixty days' time required to search title. (Signed) Otto Kalinowsky. David Ososke."

The complaint alleged title in fee-simple absolute and ability in defendant husband to transfer title at the time of execution of said contract. It further alleged that, subsequent to execution of said contract, which had been theretofore duly recorded, defendant husband attempted to convey said property by deed to defendant wife. Appropriate allegations are also found to the effect that the wife took with knowledge of and subject to said contract. Defendant wife, however, by answer denied the claim of plaintiff as to the ownership of and title to said property in her husband, alleging that said property was at the time of said contract and at all times mentioned owned by her as her separate property. She further alleged that her interest therein was prior to and superior to any claim of plaintiff thereto.

The court made findings of fact to the effect that defendant husband was the owner of the property at the time of execution of the contract, and that he held it as community property. It specifically found that on April 7, 1908, defendant husband, under a proceeding taken under the so-called McEnerney Act (St. 1906, Extra Session, p. 78, Deering's Gen. Laws, Act 1026, p. 372), had procured a decree and judgment wherein it was declared that he (the said husband) was the owner of said property, and no other person had any right, title, claim, or interest therein adverse to him.

It is the contention of defendant wife that the testimony shows without contradiction that the property in question was purchased on December 14, 1907, with her separate funds, acquired by her prior to her marriage with her codefendant. The record fully sustains this contention, with no evidence to the contrary, except this decree and the presumption of law arising from the fact that title stood in the husband's name, which latter presumption is entirely removed by uncontradicted, credible testimony. In other words, it is clear that the court based its conclusion solely upon the said so-called McEnerney decree. The real question in the case, therefore, is: Does said decree foreclose defendant wife from setting up a parol trust in said property arising from the confidential relationship between herself and husband and the purchase of the property with her separate funds?

At the outset we take it as a self-evident proposition that, if the husband in this action were suing the wife to quiet title to the property in suit, he could not prevail over her contention, this because of said confidential relationship and the trust upon which he held the legal title. In Bradley Co. v. Bradley, 165 Cal. 237, 240, 131 P. 750, 751, involving a McEnerney decree, the court sets forth this principle in the following language:

"It is a matter of indifference under this pleading whether it be said that plaintiff is seeking to enforce a voluntary trust which has been repudiated by the trustee, or whether it is seeking to enforce an involuntary trust arising in law from that repudiation. In its creation the trust was voluntary, and, however at variance it may be thought to be with the mandate of the statute as to the creation of trusts in land, it is of such character that equity will not permit the trustee to take advantage of the confidential relations existing in which the trust itself originated and by repudiating the trust obtain an unconscionable advantage over the confiding trustor and beneficiary. So numerous are cases upon this subject that it must suffice to refer to Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Jones v. Jones, 140 Cal. 587, 74 P. 143; Kimball v. Tripp, 136 Cal. 631, 69 P. 428." See, also, Jasinski v. Stankowski, 145 Md. 58, 125 A. 684, 35 A. L. R. 275, and note, page 303; Webb v. Vercoe, 201 Cal. 754, 759, 258 P. 1099, 54 A. L. R. 1200.

Nor is it necessary to show fraud in the procurement of the decree. That a fraudulent use is about to be made thereof is sufficient upon which a court of equity may base its action. The court in Bradley Co. v. Bradley, supra, at pages 241, 242 of 165 Cal., 131 P. 752, said: "And finally upon this subject it may be added * * * that relief is not here sought against a judgment fraudulently obtained. The relief is sought against the fraudulent use of a judgment obtained under a thorough understanding between the parties and in furtherance of a trust relationship which existed between them. That such relief may be secured against the fraudulent use of a judgment not fraudulently obtained is well recognized in equity. Thompson v. Laughlin, 91 Cal. 313, 27 P. 752."

If the husband by virtue of the McEnerney decree could not successfully defend against the wife's equitable title to said property, neither can plaintiff in this action do so, for the plain reason that he is not under the showing here made in any better position for he is not an innocent purchaser for value. This statement finds abundant support in our authorities. Eversdon v. Mayhew, 65 Cal. 163, 167, 3 P. 641, 644, lays down the fundamental doctrine as follows: "To entitle a party to protection, as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, *prior to and down to the time of its payment;* for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser." The case of Davis v. Ward, 109 Cal. 186, 41 P. 1010, 50 Am. St. Rep. 39, is an amplification of the same doctrine. See, also, Henry v. Phillips, 163 Cal. 135, at page 140, 124 P. 837, Ann. Cas. 1914A, 39, and Glenn v. Rice, 174 Cal. 269, 275, 162 P. 1020.

Of course, in the event of a decree in favor of the wife, plaintiff must be protected as to the item of $25 paid on account of the purchase price of said property. Davis v. Ward, supra; Henry v. Phillips, supra. See, also, a case similar in fact to the case at bar, Lindley v. Blumberg, 7 Cal. App. 140, 146, 93 P. 894.

It is also a fact that, even if the defendant husband had made a deed to plaintiff of the property and the purchase price remained unpaid, the wife could, in a separate suit, sue to establish her interest in said property, and, so long as the purchase price remained unpaid at the time of the institution of such suit by her, plaintiff would be without the protection afforded an innocent purchaser for value and the wife's claim would prevail. Henry v. Phillips, supra.

We then conclude that plaintiff is in no better position with respect to the transaction in question than the husband would be were he claiming the property as against the right of the wife.

Lastly, however, it is asserted that the pleadings are not in a form to permit the wife to set up her claim to the property, this because in her answer she at no time put in issue thereby, by allegations of fraud or mistake, the efficacy of said McEnerney decree. It will, however, be noted that the allegations of the complaint were general as to ownership in the husband, and betrayed no intention of relying upon said decree as a portion of the chain of title. This being true, defendant wife could not foreknow that plaintiff would so rely thereon. Under this state of facts, plaintiff having resorted to general allegations, defendant replied in kind with a general denial and with an allegation of title in herself and she should be allowed to meet any specific document offered in evidence by plaintiff in support of his claim with any legitimate defense known to the law. That this may be done has been in effect held several times in this state.

For example, in the case of Sparrow v. Rhoades, 76 Cal. 208, 18 P. 245, 9 Am. St. Rep. 197, an action of ejectment in which plaintiff claimed title under a deed from defendant, under a general denial and without a plea of confession and avoidance, evidence on behalf of defendant was held admissible to show that the consideration therefor was illegal and the deed therefore void.

In Holmes v. Salamanca, etc., Co., 5 Cal. App. 659, 91 P. 160, an action of ejectment for unpatented lode mining claims, the complaint, in the usual form, alleged plaintiffs' ownership, possession, and right of possession to said claims and their ouster therefrom by defendants. The answer was a denial of ownership and right of possession in plaintiffs, and of the ouster. Under said pleadings the court held that defendants were entitled to make any proof which would defeat plaintiffs' title, and might, without pleading it, introduce testimony assailing plaintiffs' deraignment of title, and show a forfeiture by failure of plaintiffs to do assessment work; also, without specially pleading it, a valid location and holding by one of the defendants as a qualified locator.

See, also, Chrast v. O'Connor, 41 Wash. 360, 83 P. 238, where, in a suit to recover land, defendants alleged title generally, without deraigning it, and it was held plaintiffs might, under a reply pleading the general issue, attack a deed in defendants' chain of title as a forgery.

The above cases cite as authority Mather v. Hutchinson, 25 Wis. 27, wherein it is said: "The evidence upon this subject was objected to, upon the ground that these facts were not alleged in the answer. But the action was for the recovery of real estate. The complaint was in the ordinary form, and did not disclose the origin of the plaintiff's title. And we have held that in such an action, under such a complaint, the defendant, under the general denial, must be allowed to prove anything which would defeat the title offered by the plaintiff. Any other rule would place him at a great disadvantage. The plaintiff, not being bound to disclose the title relied on in his complaint may, at the trial, offer any evidence of title which he pleases. With such a rule as to the plaintiff, it would be manifestly unjust to exclude the defendant from proving that the title offered by the plaintiff was void for fraud or any other reason, because he had not specifically set forth the facts in his answer. It would require him to foreknow and avoid, by specific allegations, a title which the plaintiff was not bound to disclose at all." See, also, Pomeroy's Code Remedies (5th Ed.) p. 908, § 555.

This conclusion is but a natural one under our system of pleading, and is an extension of the doctrine, and to an extent the converse of it, promulgated by section 462 of the Code of Civil Procedure to the effect that the statement of any new matter in the answer in avoidance or constituting a defense or counterclaim must on the trial be deemed controverted by the opposite party. Moore v. Copp, 119 Cal. 429, 432, 51 P. 630; Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 616, 130 P. 15; Wolf v. Gall, 176 Cal. 787, 789, 169 P. 1017.

This disposes of every question involved in this appeal. By this pronouncement a decree under the McEnerney Act is in nowise impaired, for in every judgment in rem or quasi in rem, such as a decree of distribution, it may always be shown, if it is a fact, that the decree was obtained by fraud, and that the party obtaining it holds it in trust for the defrauded party, unless by so holding the rights of innocent third parties are affected. As was said in Estate of Walker, 160 Cal. 547, 549, 117 P. 510, 511, 36 L. R. A. (N. S.) 89: "The sanctity and immunity of a decree of distribution which has become final attaches to the decree itself, and not to those who under it may have derived an unconscionable advantage through fraud, accident, or mistake." See, to the same effect, Mulcahey v. Dow, 131 Cal. 74, 63 P. 158; Sohler v. Sohler, 135 Cal. 323, 330, 67 P. 282, 87 Am. St. Rep. 98; Parsons v. Weis, 144 Cal. 410, 419, 77 P. 1007; Wingerter v. Wingerter, 71 Cal. 105, 110, 11 P. 853; also, the recent case of Apablasa v. de Sepulveda, 91 Cal. App. 232, 267 P. 105.

208 Cal. 604

HOWDEN v. STATE BAR OF CALIFORNIA.

(L. A. 12019.)

Supreme Court of California. Dec. 30, 1929.

1. Attorney and client 🔑1—Statute permitting one declaring intention to become citizen to be admitted held not modified by later statute (Code Civ. Proc. §§ 275, 276; State Bar Act, § 24, as amended by St. 1929, pp. 1965, 1966).

State Bar Act (St. 1927, p. 41) § 24, as amended by St. 1929, pp. 1965, 1966, concerning admission to practice law, does not restrict Code Civ. Proc. §§ 275, 276, under which one who has declared intention to become citizen is entitled to be admitted.

2. Attorney and client 🔑4—Applicant who has declared intention to become citizen may properly take oath of office.

Applicant for admission to practice law, who has declared his bona fide intention to become a citizen of the United States and is a resident of the state, may properly take statutory oath of office.

In Bank.

Original proceeding by Norman C. Howden for admission to practice law, opposed by the State Bar of California. Petition granted.

John R. Girling, of Los Angeles, for petitioner.

Delger Trowbridge, of San Francisco, for respondent.

PRESTON, J. Special counsel appearing for petitioner moves this court for his admission to practice as an attorney and counselor at law in the courts of this state. In support of his motion he presents the following facts:

Petitioner, over the age of 21 years, of good moral character, a resident of the state, has diligently and in good faith studied law for at least three years upon such subjects and under such conditions as the law and the rules of this court prescribe, and, lastly, has made a bona fide declaration of his intention to become a citizen of the United States in the manner required by law.

The sole opposition to this motion is based upon a contention that under the law, as now written, full citizenship is a prerequisite to admission to the bar. The issue is presented here because of the desire of the incorporated State Bar and Committee of Bar Examiners thereunder, to get from this court the measure of their power and duty respecting a new contingency.

The thought is that since the amendment to section 24 of the State Bar Act, enacted in 1929 (St. 1929, chap. 884, pp. 1965, 1966), sections 275 and 276 of the Code of Civil Procedure have been thereby repealed, in view of which situation, the court, having in mind the provisions of said amendment and the preservation of our institutions, should hold that citizenship must be possessed by the applicant before he may receive a license to practice law. In so far as here involved, said amendment reads as follows: "With the approval of the supreme court, and subject to the provisions of this act, the board shall have power to constitute and appoint a committee of not more than seven members with power to examine applicants and recommend to the supreme court for admission to practice law those who fulfill the requirements. Any person over the age of twenty-one years may apply to the board for admission to practice law upon presentation of satisfactory testimonials of his good moral character, together with satisfactory proof that for at least three years he has diligently and in good faith studied law. * * *"

[1, 2] It requires but the contemplation of the above provisions of said section 24, as amended, to show that we cannot by any stretch of the imagination hold it to restrict the meaning of sections 275 and 276 of the Code of Civil Procedure. If it is to be given any interpretation out of harmony with said sections, it would be an interpretation which would enlarge upon and not restrict their provisions. Whether it does so enlarge upon said provisions of said sections is not here in-

volved and need not here be considered. An applicant for admission who has declared his bona fide intention to become a citizen of the United States and is a resident of this state may with perfect propriety take the oath of office prescribed by the statute. Consequently, the motion of petitioner must prevail.

It is therefore ordered that petitioner, Norman C. Howden, be and he is hereby admitted to practice as an attorney and counselor at law, authorized to practice in all the courts of this state, and the clerk will deliver him a certificate of such authority upon his taking the prescribed oath and signing the roll of attorneys.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.

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208 Cal. 793

John L. TELEGDI, Petitioner, v. STATE BAR OF CALIFORNIA, Respondent.
(L. A. 12020.)

Supreme Court of California. Dec. 30, 1929.

In Bank.

John R. Girling, of Los Angeles, for petitioner.

Delger Trowbridge, of San Francisco, for respondent.

PRESTON, J. Special counsel appearing for petitioner moves his admission to practice as an attorney and counselor at law in the courts of this state.

The identical state of facts found in the case of Norman C. Howden v. State Bar of California (Cal. Sup.) 283 P. 820, this day decided, are made a part of his petition. Therefore, upon authority of said last-mentioned case, it is hereby ordered that petitioner, John L. Telegdi, be and he is hereby admitted to practice in all the courts of this state, and the clerk will deliver him a certificate of such authority upon his taking the prescribed oath and signing the roll of attorneys.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.

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102 Cal. App. 705

PEOPLE v. PHILLIPS. (Cr. 1883.)

District Court of Appeal, Second District, Division 2, California. Dec. 20, 1929.

1. Criminal law ⚷49—Excluding evidence tending to show that accused, although not insane, was so subnormal that he did not intend to defraud, held proper.

In prosecution for forgery, excluding evidence offered for purpose of showing that, although accused was in a state of mind which was not legally insane, he was in such a subnormal state of mind that he did not intend to defraud, *held* proper, since the law does not recognize partial insanity.

2. Criminal law ⚷354—Excluding evidence tending to show accused's state of mind at trial held proper, where offense was committed about five years previously.

In forgery prosecution, where trial was had on July 25, 1929, excluding evidence offered to show accused's present state of mind *held* proper, where offense was committed on December 11, 1923.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

J. P. Phillips was convicted of forgery, and he appeals. Affirmed.

Frederic H. Vercoe, Public Defender, Franklin Padan, Chief Deputy Public Defender, and Richard F. Bird, Deputy Public Defender, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J. By an information filed on December 21, 1923, by the district attorney of Los Angeles county the defendant was charged with the crime of forgery, alleged to have been committed on December 11, 1923. The defendant interposed a plea of "not guilty" and also one of "not guilty by reason of insanity." His trial was set for February 11, 1924, but he absconded and was not reapprehended until April 29, 1929. His trial upon the first plea came on for hearing on July 25, 1929, and on the second plea on the day following. The jury returned a verdict of guilty, and also found the defendant sane. The court denied his motion for a new trial, and he is here upon an appeal from the judgment and from the order refusing to vacate the verdict.

[1] The appellant raises but one question. During the first trial he offered testimony to show that his mental condition was subnormal; it being the contention of his counsel that there is "between the state where a person is normal mentally and the state where he is legally insane, a fixed twilight zone where he is neither insane nor normal mentally." This proof was tendered "for the purpose of showing that he was in such a state of mind he did not entertain an intent to defraud, which is the gist of the crime on which" the appellant was being tried. The quotations are taken from the offer of proof of counsel during the trial, and clearly and succinctly set forth the theory he had in mind. And perhaps the question here will be made more clear if we also set down an excerpt from appellant's brief which concisely states the proposition, as follows: "The trial court erred in refusing to allow appellant to introduce evidence at his trial on his plea of

not guilty regarding his subnormal condition, not amounting to insanity as affecting the question of the intent or lack of intent with which the alleged criminal act was committed."

Counsel for appellant, while recognizing the force of the opinion in People v. Troche (Cal. Sup.) 273 P. 767, 769, attempt to distinguish the instant cause therefrom. Their argument is plausible and earnest, but without substance, as a few references to the language of that decision will demonstrate. It is there said: "The arguments touching the validity of these provisions have been advanced from three points of view: First * * * Second, that, when properly construed, the statute eliminates from the consideration of the jury during the trial of the general issue the question of the 'legal insanity' of the defendant—the only kind of insanity which excuses one from punishment for a crime committed—but does not prevent the introduction of evidence tending to establish the mental condition of the accused at the time the offense was committed, *for the purpose of showing a lack of criminal intent*, malice, or premeditation, such evidence to be also considered by the jury, in the exercise of its discretion in a trial for murder, in fixing the degree of the crime and the punishment at life imprisonment or the extreme penalty, if it finds the offense to have been murder in the first degree. * * *" (Italics ours.) In our opinion the words of the Supreme Court constitute a restatement of the proposition advanced by the appellant. We can scarcely imagine two arguments more nearly the same when relating to a subject as new to the profession. How does the court answer? In these words:

"The trial court committed no error in strictly following the letter of the statute (Pen. Code, §§ 1020 and 1026) and excluding, on the trial of the general issue of not guilty, all evidence tending to show the mental condition of the defendant at the time of the commission of the offense. The doctrine of 'partial insanity,' announced by some authorities, particularly Wharton in his work on Criminal Law, has never been recognized as the law in this jurisdiction. In this state, in order that 'insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity—as, for instance, suffering from some insane delusion or hallucination—still if he understands the nature and character of his action and its consequences, if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts.' People v. Willard, 150 Cal. 543, 554, 89 P. 124, 129; People v. Kerrigan, 73 Cal. 222, 225, 14 P. 849. See, also, People v. Hurtado, 63 Cal. 288. In this state 'so far as accountability to the law is concerned, there is no middle ground.' People v. Perry, 195 Cal. 623, 639, 234 P. 890, 896. Such is the law in many jurisdictions. Warner v. State, 114 Ind. 137, 16 N. E. 189; United States v. Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293; Commonwealth v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625; Dean v. State, 105 Ala. 21, 17 So. 28; Wartena v. State, 105 Ind. 445, 5 N. E. 20; Kirby v. State, 68 Tex. Cr. R. 63, 150 S. W. 455. 'Protection is always afforded in courts of law to persons of unsound mind. Distinction is made between sanity and insanity in people, but not as respects their grade of intelligence. The law does not attempt to measure degrees of intellect nor to make distinction with respect thereto, where the power of thought and reason exists.' State v. Schlaps, 78 Mont. 560, 578, 254 P. 858, 863. In 14 R. C. L. page 599, § 54, it is said: 'It is the general rule that insanity, when interposed as a defense in a criminal prosecution, is either a complete defense or none at all, and it has been held that there is no degree of insanity sufficient to acquit of murder but not of manslaughter.' A valuable note on this subject is found in the case of Knights v. State, 76 Am. St. Rep. 83 (58 Neb. 225, 78 N. W. 508).

"It follows, therefore, that any evidence tending to establish the insanity of the defendant under his plea of not guilty by reason of insanity at the time of the commission of the homicide, other than evidence of the immediate circumstances of the offense, would have been irrelevant and immaterial on the trial of the general issue as to the guilt or innocence of the defendant raised by the general plea of not guilty. As the statute accorded the defendant his full right, and ample opportunity to submit to a jury his plea of insanity at the time of the commission of the offense, in excuse of his act and as a reason why no penalty of the law should be visited upon him, it follows that the trial court correctly excluded the evidence on the trial of the general issue.

"Furthermore, the only evidence admissible for the purpose of enabling the jury to determine whether the death penalty or life imprisonment should be imposed in the event the defendant should be found guilty of murder in the first degree was the evidence which the court did admit, and which concerned 'the circumstances connected with the offense.' People v. Golsh, 63 Cal. App. 609, 613, et seq., 219 P. 456. See, also, People v.

Witt, 170 Cal. 104, 110, 148 P. 928. The insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all he is entitled to an acquittal in both degrees. State v. Maioni, 78 N. J. L. 339, 74 A. 526, 528, 20 Ann. Cas. 204." An analogous argument was also advanced in People v. Lazarus (Cal. Sup.) 279 P. 145, 148, and its soundness denied.

[2] This apt language precludes the necessity of further discussion of the subject. However there is another fatal defect. Counsel, when asked by the court if he intended to show that appellant was in a subnormal state of mind at the time of the commission of the crime, responded: "Yes. Of course the only evidence I can produce though, tending to show that he was in that state of mind at the time of the commission of the crime is the evidence as to his present mental state, together with the testimony of a number of doctors to the effect that his mental condition is such that if it exists now it probably existed five years ago, five and a half years ago." It will, of course, be borne in mind that the trial was had on July 25, 1929, while the offense was committed December 11, 1923. In People v. Lazarus, supra, it was urged by the defendant that he was entitled under the general plea to offer evidence as to his mental condition prior to the commission of the offense charged as bearing upon his intent at the time it was committed. The court said: "The record discloses, however, that the evidence which said defendant thus desired to offer upon his plea of 'not guilty' did not in any way involve the facts and circumstances immediately attending the commission of his crime, but related wholly to mental states and their causes existing and affecting the defendant during a period long preceding the date of his crime. As to this evidence the record discloses that he was allowed the fullest opportunity to present the same upon his trial upon the plea of 'not guilty by reason of insanity,' and his case in that respect is thus brought directly within and is fully disposed of under the recent decisions of this court in the cases of People v. Troche, 273 P. 767; People v. Fook, 273 P. 779; and People v. Coen, 271 P. 1074. We therefore find no prejudicial error on the part of the trial court in confining said defendant with relation to such evidence to his proofs under his plea of 'not guilty by reason of insanity.'"

The situations are sufficiently comparable as to warrant us in saying that the case is squarely in point.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; BURNELL, J. pro tem.

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102 Cal. App. 656

WRIGHT v. SOUTHERN COUNTIES GAS CO. et al. (Civ. 3966.)

District Court of Appeal, Third District, California. Dec. 19, 1929.

1. Negligence 🔑48—Owner of premises is liable for injuries to others by dangerous instrumentality or condition, of which he knew or might reasonably have known.

Liability of the owner of premises for injuries sustained by persons who have entered thereon depends on owner's knowledge of the dangerous instrumentality or condition not known to the person injured, but such owner will be held to have known that which he reasonably should have known.

2. Negligence 🔑61(1)—That act of another concurred with defendant's negligence does not make latter not proximate cause of injury.

The fact that another party's act may concur in the negligence of defendant does not make the latter's negligence not the proximate cause of the injury.

3. Negligence 🔑59—Negligent act is proximate cause of injury, if it might reasonably have been foreseen that some injury would result, it not being essential that particular injury should or could reasonably have been foreseen.

Where an act or omission is negligent, it is not necessary, to render it the proximate cause, that the negligent person could or might have foreseen the particular consequences or precise form of injury, or particular manner in which it would occur, if by exercise of reasonable care it might have been foreseen or anticipated that some injury would result.

4. Negligence 🔑121(2)—Where cause of injury is under management of defendant, and accident is such as does not ordinarily happen, if management exercises reasonable care, doctrine of res ipsa loquitur applies.

Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such that in ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence under the doctrine of res ipsa loquitur, in the absence of explanation by defendant, that the accident arose from a want of care.

5. Gas 🔑20(2)—Res ipsa loquitur doctrine held applicable to explosion of gas in apartment owned and controlled by defendant.

Evidence in action for injuries from explosion of gas in apartment under exclusive management and control of defendant owner *held* to render proper application of doctrine of res ipsa loquitur.

6. Gas 🔑16—Owner's want of knowledge of escaping gas in apartment was immaterial to liability for injuries to another.

In action for injuries by explosion of gas in apartment owned and controlled by defendant, defendant's actual knowledge or want of knowledge as to escaping gas was immaterial, if circumstances were such that he should have known of such escaping gas.

7. Gas 🔑19—Plaintiff, striking match to light cigar, was not contributorily negligent, precluding recovery from owner of apartment in which escaping gas exploded.

Plaintiff was not contributorily negligent by reason of lighting match or cigar while visiting apartment owned and controlled by defendant owner, as result of which gas explosion ensued and injury resulted.

8. Gas 🔑20(2)—Evidence held to sustain recovery for injuries by explosion of escaping gas in apartment.

Evidence *held* to sustain judgment for plaintiff for injuries by explosion of escaping gas in apartment owned and controlled by defendant.

9. Trial 🔑260(1)—Error cannot be predicated on refusal of instruction covered by instructions given.

There is no error in refusing instructions completely covered by other instructions.

10. Appeal and error 🔑839(1)—Defendant, appealing only from judgment for damages for plaintiff against him, cannot predicate error on instruction to find for codefendant on cross-complaint filed by defendant.

Defendant, appealing only from judgment for plaintiff for damages against him, cannot predicate error on an instruction to find in favor of codefendant on cross-complaint filed by appellant.

11. Damages 🔑132(1)—$8,000 as compensation for injuries in explosion of escaping gas held not excessive, $2,000 thereof representing special expenses and losses incurred by plaintiff.

Award of damages in the sum of $8,000 to plaintiff, seriously injured in explosion of escaping gas, *held* not shown by evidence to be excessive, or to be affected by improper motive of jury, particularly when $2,000 represented special expenses and loss incurred by plaintiff by reason of injuries.

12. New trial 🔑28—Denial of new trial in personal injury action on ground of plaintiff's collapse on witness stand held not abuse of discretion.

Denial of new trial on motion based on collapse of plaintiff during course of his examination on witness stand in personal injury case *held* not abuse of discretion; trial court, in addition to the affidavits presenting it, having observed the occurrence, which took place in his presence.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Paul S. Wright against the Southern Counties Gas Company and Juan Jiminez. Judgment for plaintiff against defendant Jiminez, and he appeals. Affirmed.

H. S. Clewett, of Los Angeles, for appellant.

A. W. Sorenson, Henry Brown, and Joe Crider, Jr., all of Los Angeles, for respondents.

PLUMMER, J. This action was prosecuted to recover damages for and on account of injuries suffered by the plaintiff by reason of an explosion of gas in a certain apartment house owned by the defendant Juan Jiminez. The gas was furnished by the defendant Southern Counties Gas Company; the jury returned a verdict against the defendant Juan Jiminez in the sum of $8,000, and from the judgment entered thereon the defendant Jiminez appeals.

The evidence upon which the verdict rests is substantially as follows: The transcript shows that on the 19th day of May, 1926, and prior thereto, the defendant Juan Jiminez was the owner and in exclusive control of a certain four-flat building located in San Pedro. It was in one of the flats of this building that the explosion occurred. The flat in question had been occupied until about March 18, 1926, and up to that date had been rented to and occupied by one Mrs. Rose Bartlett. On March 18, 1926, Mrs. Bartlett moved out of the flat, and it remained unoccupied until the date of the explosion on May 19, 1926. It appears from the testimony that, when Mrs. Bartlett left the flat, she ordered the gas company to turn off the gas. This order was executed by the gas company. In turning off the gas, the company not only turned off the stopcock controlling the passageway for gas into the meter, but sealed and locked the same; the seal used for this purpose consisted of two pieces of iron, which fitted over the valve, protecting it from interference and making it inaccessible, so long as the seal remained with its catch unbroken. This catch, however, does not appear to have been made of very substantial material, and a slight blow from a hammer or other like instrument would readily break the catch. With the catch destroyed, the seal would require a new catch in order to render it again effective. An inspection of the meter was made by the gas company on April 19, 1926. On that date the lock was in place and the meter closed, and an inspection of the dial showed that no gas had passed through the meter since the reading on March 18th. It also appeared that the lock was in the position in which it was placed and left by the gas company on the date that the meter was sealed. The testimony further shows that in the living room of the flat in which the explosion occurred there was a gascock used for turning on and turning off gas when the gas heater in the living room was being used. After the explosion, which occurred on the 19th day of May, 1926, an inspection of the premises revealed that this gascock was open, and that the gas heater in the room in which the explosion occurred was situated a few feet from the gascock just referred to, but was not connected therewith.

As we have said, the testimony shows that the flat in question was under the exclusive control of the defendant Jiminez. No other person had a key thereto. After Mrs. Bartlett left the premises, and preceding the date of the explosion, the defendant Jiminez visited the premises several times. At a date approximately two weeks before the explosion, the defendant Jiminez moved certain furniture into the flat in question, including a small gas heater, which he placed in the living room a short distance from the gascock referred to, this being the gas heater which we have heretofore mentioned. After the explosion a reading of the gas meter showed that 97,100 cubic feet of gas had passed through the meter from the time it was read on April 19, 1926, to May 19, 1926. The lock and seal on the meter were found broken and the gas turned on. Testimony was introduced by witnesses familiar with the flow of gas, who testified that it would take from 12 to 14 days for 97,100 cubic feet of gas to pass through the aperture the size of the one in the living room where the gascock was found open. The transcript contains evidence to the effect that the defendant Jiminez demonstrated the kitchen stove for the plaintiff on the day of the explosion, just prior thereto. The testimony in this particular is to the effect that on the day in question the plaintiff and the defendant Jiminez went to the flat for the purpose of making an inspection of the same. The plaintiff's visit was to determine whether he would rent the flat. The plaintiff's testimony is to the effect that he and the defendant Juan Jiminez went into the kitchen, where the defendant Jiminez lighted a match, turned on the gas in the kitchen stove at the various burners, and that in so doing the pilot light was first used, and then that said defendant turned on the gas of the respective burners, lighting the same. This testimony was contradicted by the defendant Jiminez. From the kitchen the plaintiff and the defendant Jiminez passed through other rooms and into the living room containing the open gascock. Neither of the parties detected the odor of gas. While there the plaintiff struck a match for the purpose of lighting a cigar. An explosion immediately occurred, severely injuring the plaintiff, as well as the defendant. The transcript also contains testimony to the effect that the range of explosibility of natural gas is from 5 per cent. to 12 per cent.; that a different proportion might burn, if once ignited, but that it would not detonate.

[1] It is also admitted upon this appeal that no one other than the Southern Counties Gas Company had the right to interfere with the lock and seal upon the meter which we have mentioned. That it had been interfered with, however, by some one, is likewise unquestioned. While the testimony shows that the defendant Jiminez had exclusive control of the apartment in which the explosion occurred; had visited the same several times after it had been vacated by the previous tenant; was in the apartment about two weeks preceding the explosion, and placed therein certain furniture, including a gas heater near where the open gascock was found; that it would take about two weeks for 97,100 cubic feet of gas to pass through the open gascock; that the defendant Jiminez knew that the gas was flowing through the meter, by reason of his having lighted the gas flowing through the kitchen stove, which would be fed by the same meter; it is contended that this testimony is not sufficient to support the verdict.

In this particular our attention is called to a number of cases supporting the text found in 20 Ruling Case Law, on page 56, to the effect that "the mere ownership of land or buildings does not render one liable for injuries sustained by persons who have entered thereon or therein. * * * Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owners or occupants, and not known to the persons injured, that a recovery is admitted." This statement of the rule is unobjectionable so far as it goes, but it stops short of stating the full rule as to liability of an owner of the premises involved. If the circumstances are such as to show that the owner, with reasonable diligence, might have become aware of the peril, or should have known the same, liability attaches. The text further quoted by the appellant is in the negative form, and is: "On the other hand, an injury is not actionable if it could not have been foreseen or reasonably anticipated." (This is found on page 13 of the same volume.)

The authorities are numerous to the effect that a defendant is not bound to keep his premises absolutely safe, but it is universally held that an owner of premises must use ordinary care to keep the premises in a safe and suitable condition, so that they will not unnecessarily or unreasonably expose any one to danger who may lawfully be thereon. It is also well settled that, in actions based upon negligence, what an owner of premises reasonably should have known, he will be held to have known. Again, in applying the law relative to the duty of an owner of premises, all the inferences which a jury may properly draw from the testimony introduced must be kept in mind. Thus, the testimony in this case shows that the meter was locked and sealed. It likewise shows that some one tampered with the lock and seal and turned the stopcock, so that the gas would again flow through the meter. It also shows that it would require about two weeks for the quantity of gas to flow through an aperture the size of the open gascock in the living room, registered by the meter. It likewise shows that the defendant had control of the flat in question; that he was in the flat about two weeks before the explosion, had taken furniture there preparatory to renting the same, and had placed in the living room, near where the open gascock was found, a gas heating stove; and that on the day of the explosion he tested the gas in the cook stove in the kitchen. If, upon this testimony, the jury was warranted in drawing the inference that the defendant had tampered with the lock and seal on the gas meter, and had opened the gascock in the living room and subsequently failed to close the same, then and in that case the verdict is amply supported.

Again, if the jury was warranted in drawing the inference that the one who tampered with the lock and seal on the gas meter, and turned the gas therein, also opened the gascock in the living room to ascertain if the gas was flowing through the same, then and in that case the natural inference would be that the defendant negligently failed to close the gascock in the living room. There is no direct testimony to the effect that the defendant opened the gascock in the living room, or that he tampered with the gas meter, but there is plenty of testimony to the effect that the defendant was upon the premises at about the time when the tampering must have taken place, and that the gascock was opened by some one and left open near where the defendant had placed a gas heater. The transcript contains no testimony of any person having broken into or trespassed upon the premises in question, and during all the time the defendant Jiminez had possession of the key to the premises, and the premises were inaccessible to any person other than the defendant Jiminez. This is shown by reason of the exclusive control of the premises by the defendant Jiminez, and the absence of any testimony whatever that any other person had trespassed upon the flat. If, upon this testimony, and all that we have set forth, the jury had a right to infer that the defendant was the one who opened and left opened the gascock in the living room, then and in that case the verdict should be upheld.

[2] Again, it is further argued by the appellant that it is not shown that the negligence of the defendant Jiminez was the sole cause of the injury, or rather, as stated by the appellant, that the negligence of the defendant Jiminez was not the proximate cause of the injury; the assumption being that the proximate cause of the injury was the tampering with the lock and seal on the gas meter. However, we do not need to go into this question further than to state that, if the gascock had not been left open in the living room, the tampering with the meter would have occasioned no injury. The fact that another party's act may concur in the negligence does not furnish any defense. The law with reference to concurrent negligence is thus stated in 45 C. J. p. 920: "As a general rule it may be said that negligence, to render a person liable, need not be the sole cause of the injury. It is sufficient that his negligence, concurring with one or more efficient causes other than plaintiff's fault, is the proximate cause of the injury, so that where several causes combined to produce injuries, a person is not relieved of liability because he is responsible for only one of them, it being sufficient that his negligence is an efficient cause without which the injury would not have resulted." The text cited further shows that all that is necessary to be shown is that the person sought to be charged was responsible for one of the causes which united in producing the injury.

[3] Again, as shown by the text in the same volume on page 918, "Where an act or omission is negligent it is not necessary, to render it the proximate cause, that the person committing it could or might have foreseen the particular consequences or precise form of the injury, or the particular manner in which it would occur, if, by the exercise of reasonable care, it might have been foreseen or anticipated that some injury would result." Common understanding is all that is necessary to anticipate, not only a possible, but a probable, explosion as resulting from escaping gas.

It would serve no useful purpose to review all the authorities cited by the appellant, but we will give some attention to the principal case upon which the appellant relies, to wit, the case of Leonard v. Enterprise Realty Co., 187 Ky. 578, 219 S. W. 1066, and reported with annotations in 10 A. L. R. 238. The syllabus in that case is in the following words: "A property owner is not liable for injury to one whom he permits to inspect the premises with a view to leasing them, by explosion of gas escaping from a pipe which an outgoing tenant had disconnected without shutting off the flow of gas, without the knowledge of the property owner or reasonable opportunity on his part to discover the fact."

A recital of the facts set forth in the opinion in that case demonstrates the inapplicability of anything there said to the case at bar. The facts are that the plaintiff, desiring to rent an apartment, passed in front of an apartment belonging to the realty company, between the hours of 4 and 5 o'clock in the afternoon, and as he passed by he noticed a moving van taking furniture from the apartment, and thereupon he obtained a key to a back door of the apartment, from one of the men moving the furniture. The defendant went immediately to the office of an agent of the realty company, reaching there about 5 p. m., reported he had a key, and asked permission to look at the apartment, which was granted. After supper appellant and his wife went to the apartment, arriving there about 6:30 p. m. Appellant told his wife to remain on the sidewalk, while he went around to the rear of the building and unlocked the rear door, so that he could come through and let her in the front way. Appellant unlocked the back door, which leads to a kitchenette. From here the appellant walked into the front hall. It being dark, he struck a match to find his way, and as he did so an explosion took place, severely injuring the appellant. Following the explosion, investigation disclosed an open gas pipe in the kitchenette, from which the gas stove had been disconnected; the theory of the appellant being that the man who disconnected the stove failed to shut off the gas, etc. It was held that the plaintiff could not recover, the facts showing conclusively that the owner of the premises had had no opportunity to examine the same between the time when the former tenant had removed therefrom and the entering of the plaintiff. No knowledge of the condition of the premises, as left by the out-going tenant, could be imputed to the owner by reason of the lack of opportunity. The plaintiff by his own act and conduct, and by his own testimony, showed such lack of knowledge and lack of opportunity to acquire knowledge on the part of the owner. A recital of the facts disclosed in the Leoenard Case furnishes a complete answer to the appellant's extended argument based thereon.

[4, 5] In addition to the inferences which may be drawn by the jury from the facts which we have culled from the record, the respondent urges the doctrine known as res ipsa loquitur. Many definitions of this rule have been given, but the quotation used by this court, found in the case of Phœnix Assurance Co. v. Texas Holding Co., 81 Cal. App. 61, 252 P. 1082, 1084, taken from the case of Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, will answer as well as any: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." What this court said in the case of Phœnix Assurance Co. v. Texas Holding Co., applying the doctrine of res ipsa loquitur to the circumstances there involved, we think applicable to the circumstances disclosed in this case.

This court again, in the case of Brown v. Davis, 84 Cal. App. 180, 257 P. 877, had occasion to apply the same doctrine, and what was there said is applicable here. In Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105, 148 P. 951, 952, the doctrine was applied, and in answer to the appellant's contention that it could not apply by reason of the possibility of some other person being liable, the court used the following language: "But the appellant contends that, because the third possibility exists, the doctrine of res ipsa loquitur cannot be given application. In support of this contention, counsel for the appellant argues that the mere fact that persons other than the defendant or its employees were working in and about the building, and had access to the particular floor where this steam pipe was located, would be sufficient to prevent the application of the rule, because some one or other of these might possibly have so struck or tampered with this pipe as to have caused the loosening of its cap to such an extent that it would be liable to blow off at any moment under pressure. We think this argument, unsustained, as it is by any semblance of evidence or proof tending to show such interference with this pipe or cap, carries the possibilities in cases of this kind entirely too far." That was a case in which the plaintiff was injured by the blowing off of a cap placed insecurely upon a steam pipe. The court further in its opinion goes on to say that, if such possibilities are allowed to prevent the application of the doctrine of res ipsa loquitur, it would in effect entirely eliminate the doctrine.

A good case illustrating where the doctrine of res ipsa loquitur does not apply is that of Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 66 P. 787, 55 L. R. A. 608, where the question presented was whether the operators of a street railway car or the driver of a brewery wagon were negligent in causing the collision of the wagon with the street car. Thus, where the negligence of one is sufficient to occasion injury without the negligence of the other party, no inference of negligence as against both can be drawn. On the other hand, if the collision could not have occurred without the concurrent negligence of both parties, then and in that case the doctrine would have applied. In the case at bar the doctrine applies as against the owner of the premises because, irrespective of whether the gas company was negligent, or whether some unknown person broke the seal and the lock, no injury would have followed if the gascock in the living room had not been left open. The one who left the gascock open, or who, by reasonable inferences from the testimony, may be concluded to have left the gascock open, stands alone in his negligence, irrespective of what others may have done. If both defendants in this case were negligent, both would be liable. Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. An explosion of gas was involved in that case. The court said, quoting from the syllabus: "Where an explosion of gas causing damage to a patron of a restaurant results from the joint negligence of the gas company in not discovering and repairing a leak in its pipes, and of the restaurateur in bringing a light in contact with the gas, whereby it explodes, the person damaged may recover from either or both at his election."

The case of Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474, relied upon by the appellant, showing that the doctrine of res ipsa loquitur could not apply, is based upon circumstances showing that an attempt was being made to hold the defendant liable for the acts of an independent contractor. Nothing of the kind is involved in this action.

[6-8] That the defendant Jiminez did not know or realize that gas had been escaping into the living room when he entered, accompanied by the plaintiff, is not material. If the circumstances disclosed are sufficient to show that he should have known that gas was escaping, and that gas would escape therein if the gascock heretofore mentioned were left open, and the circumstances are sufficient to warrant the jury in concluding that the defendant Jiminez was the person who left the stopcock open, then the defendant's actual knowledge is immaterial. As said in Gobrecht v. Beckwith, 82 N. H. 415, 135 A. 20, 52 A. L. R. 858: "One under duty to use care for which knowledge is necessary cannot escape liability for negligence because of voluntary ignorance." In addition to what we have said relative to the defendant Jiminez having lighted the gas in the kitchen stove, we may state that the transcript discloses testimony strongly corroborative of the plaintiff's version of this occurrence. The fact that the plaintiff was the one who struck a match for the purpose of lighting a cigar, with the resultant explosion, does not suffice to charge him with negligence. It has been held that, even where the injured invitee or licensee smells the gas and lights a match the question of his contributory negligence is for the jury. Dowler v. Citizens' Gas & Oil Co., 71 W. Va. 417, 76 S. E. 845, Ann. Cas. 1914C, 341. The record to which we have referred and the authorities cited we think sufficient to take the case to the jury and also to support its verdict.

[9] It is next contended that the court erred in its instructions to the jury, and especially in refusing to give an instruction to the jury requested by the defendant, which reads as follows: "You are instructed that, unless you believe from the evidence that the defendant Juan Jiminez ought reasonably to have foreseen that injury to the plaintiff might probably happen as a result of entering said premises, then your verdict must be in favor of the defendant Juan Jiminez." An examination of the record shows that this instruction is completely covered by a subsequent instruction given by the court at the request of the defendant, and modified by the court to make it an accurate statement of the law. This instruction reads: "You are instructed that one is not liable for negligence, where no injurious consequences could have reasonably been contemplated or foreseen as the result of the act or omission complained of, and if you believe from the evidence that no injurious consequences could reasonably have been contemplated or foreseen by defendant Juan Jiminez as the result of inviting plaintiff to enter said premises, then your verdict must be for the defendant Juan Jiminez." The modification consisted in the insertion of the words "or foreseen."

It would unduly extend this opinion to set forth and analyze the voluminous instructions given by the court, which covered every possible phase of the questions presented to the jury. We content ourselves with the statement that a careful reading of the instructions leads inevitably to the conclusion that the court in no wise erred to the prejudice of the appellant. The instruction covering the doctrine of res ipsa loquitur, and the effect given thereto, is amply supported by the reasoning and the authorities cited by this court in the case of Brown v. Davis, supra.

[10, 11] As to the instruction advising the court to find in favor of the defendant Southern Counties Gas Company, on the cross-complaint filed by the defendant Juan Jiminez, it is sufficient to say that this appeal is taken only from the judgment in favor of Paul S. Wright against the defendant Juan Jiminez, awarding the plaintiff the damages heretofore mentioned in this opinion. In this particular it is urged that the damages awarded the plaintiff were excessive. This assignment of error is not followed by anything which would indicate anything of merit. All that is stated is that the total special expenses and loss incurred by the plaintiff by reason of his injuries amounted to the sum of $2,000, leaving $6,000 as compensation for pain, suffering, etc. As the assignment is only in general language, and nothing cited to support the assignment, it is sufficient generally to state that an examination of the testimony relative to the plaintiff's injuries shows that the jury did not act improperly, or award damages from any improper or illegal motive.

[12] It is finally urged that the court erred in denying appellant's motion for a new trial. This motion was based upon the collapse of the plaintiff during the course of his examination upon the witness stand. Affidavits were submitted to the court, pro and con, on the question as to whether such collapse was actual or simulated. The occurrence took place in the presence of the trial court, which gave the trial court a basis for its ruling, which is lacking here. However, placing our decision wholly upon the affidavits presented, we are unable to say that the court abused its discretion in denying the appellant's motion.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

SWAN v. SMITH. (Civ. 3963.)★

District Court of Appeal, Third District, California. Dec. 14, 1929.

Rehearing Denied Jan. 13, 1930. Hearing Denied by Supreme Court Feb. 10, 1930.

1. Payment 🔑16(1), 21—Giving note or check in amount of debt does not constitute payment, without express or implied agreement to that effect.

The giving of a note or check of a debtor or third party for the amount of a debt does not constitute payment, unless there is agreement between the parties that it shall be so accepted, and agreement may be either express or implied from circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Payment.]

2. Appeal and error 🔑1008(1)—Payment 🔑76(4)—Whether note for amount of debt is accepted as payment is question of fact, and decision of trier of facts thereon is conclusive.

Question whether note given for amount of debt is accepted for payment is question for trier of facts in each case, and on appeal verdict of jury or finding of trial court is conclusive as to that issue.

3. Payment 🔑76(4)—Whether note in amount of debt was accepted by defendant as payment, defeating counterclaim in action to recover moneys collected by defendant, held question of fact.

In action to recover sum of money collected by defendant for plaintiff, in which defendant counterclaimed for debt due him from plaintiff, question whether note received by defendant from plaintiff was accepted as payment in amount of its face value for stock sold plaintiff by defendant *held* question of fact for trial court.

4. Principal and agent 🔑66—Duty of agent to account for principal's money is similar to duty of trustee to beneficiary.

The relation of principal and agent is fiduciary in character, and the duty of an agent to account for money in his hands belonging to his principal is similar to that of a trustee in possession of money belonging to the beneficiary.

5. Partnership 🔑125—Each partner has authority in partnership affairs to act as agent for other partners.

Partnership is a branch of the law of agency, and each partner has authority in partnership affairs to act as agent for other partners.

6. Limitation of actions 🔑39(9)—Limitation statute applicable to action for accounting between partners held to apply to principal's action against agent to recover moneys collected (Code Civ. Proc. § 343).

Code Civ. Proc. § 343, providing four-year limitation for action for accounting between partners, where one of partners in possession of partnership property refuses to account, *held* applicable to principal's action against agent to recover for moneys collected by agent, which agent failed to remit.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Joseph B. Swan against John Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

Law & Overholt, of Los Angeles, for appellant.

Mayo Thomas and Leonard E. Thomas, both of Los Angeles, for respondent.

FINCH, P. J. The plaintiff commenced this action December 10, 1925, to recover the sum of $7,249.23 collected for him by the defendant. In his answer the defendant "admits that between the 25th day of March, 1922, and June 24, 1922, he collected the sum of $7,249.23 belonging to plaintiff, but denies that he collected same on any agreement or understanding that same was to be applied other than on indebtedness in the sum of $91,586.33 then due and owing defendant from the plaintiff." The answer alleges that the plaintiff's alleged cause of action is barred by the statute of limitations. By way of counterclaim it is alleged:

"That on or about the 15th day of May, 1919, in the Dominion of Canada, plaintiff became indebted to this defendant in the sum of $91,586.33, for and on account of the sale of one-half of the issued capital stock of the Ajax Coal & Mining Company, a Canadian corporation, which said stock was then and there delivered to said plaintiff, who then and there agreed with the defendant to pay said defendant the sum of $91,586.33, no part of which has been paid, excepting the sum of $73,835.56, and interest to December 7, 1921; that there is now due and unpaid from said plaintiff to this defendant the sum of $17,750.77, with interest from December 7, 1921."

Paragraph 4 of the court's findings reads as follows:

"That in respect to the said defendant's counterclaim, this court finds that on or about the 15th day of May, 1919, plaintiff became indebted to the defendant in the sum of $91,586.33; that in partial payment of this said sum, and on or about the said 15th day of May, 1919, the said plaintiff delivered to this defendant his promissory note in the sum of $66,586.33, which said promissory note with interest thereon was duly paid in full to this defendant by the said plaintiff on or before December 28th, 1920; that in completing the payment of said sum of $91,586.33, as aforesaid, this said plaintiff assigned, indorsed and delivered to this defendant, on or about the 15th day of May, 1919, a certain secured promissory note, drawn by M. A. Brown and H. H. Brown and in the sum of $25,000, which said promissory note was given, indorsed and delivered by the said plaintiff and received and accepted by the said defendant as full and complete payment of the obligation of $91,586.33, as aforesaid; that the said plaintiff is

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★Rehearing denied. Hearing denied by Supreme Court.

not now, nor has he been subsequent to the 28th day of December, 1920, indebted to this defendant in any sum or at all."

Judgment was entered in favor of the plaintiff for the amount prayed for in the complaint and interest thereon, and the defendant has appealed.

In respondent's brief it is urged that he is not liable as an indorser on the Brown note, referred to in paragraph 4 of the findings, on the ground, among others, that the note was not presented for payment at the time it became due, but there was no such issue before the court. As said in appellant's reply brief, the cause of action stated in the counterclaim "is not an action against the indorser of the note but an action upon the original indebtedness." The issues made by the pleadings were whether the Brown note was received by the defendant as payment, in the amount of its face value, for the shares of stock sold to the plaintiff, and whether plaintiff's cause of action was barred by the statute of limitations.

Relative to the purchase of the shares of stock, the plaintiff testified in part as follows: "We had a conversation * * * in which he said, 'Joe, I want to sell out to you and go back to Los Angeles.' * * * I told him that I couldn't pay him out; I didn't have the money. * * * He worked on my sympathies, and I said to him, 'Mr. Smith, the only way that I would consider about buying you out at this time would be if you will take the Brown note as part payment of the $25,000;' and he said he would be glad to do that, and made comments on his opinion of Mr. M. A. Brown's ability to pay, even though that business didn't pay out; under those conditions I agreed. * * * He brought the note over from the safe, turned it upside down, and he says, 'Now, as I am taking this as mine, I want you to indorse it to me, so that I can handle it without bothering you.'" In a part of plaintiff's deposition, read by counsel for the defendant in cross-examination of the plaintiff, he testified, referring to the note: "I told him that he must take this, if I agreed to allow him to withdraw, as his property, and he agreed to it. * * * He said he felt secure in the note, for the reason that M. A. Brown was a thrifty kind of fellow, and, even if the store wouldn't pay it, he would get into something that would pay."

[1-3] "The giving of a note or check of a debtor or a third party for the amount of a debt does not constitute payment, unless there is an agreement between the parties that it shall be so accepted. * * * The general rule above stated does not require that, in order to constitute the giving of a note or check a payment, there shall be express words or writing agreeing that the instrument shall be absolute payment. The circumstances and the conduct of the parties, taken together, may show an understanding that the paper is taken in satisfaction of the debt. * * * It is a question for the trier of facts in every case whether a note given for the amount of a debt was accepted as payment, and upon appeal the verdict of the jury or the finding of the trial court is conclusive as to the issue." 20 Cal. Jur. 920-928.

[4-6] The defendant was the agent of the plaintiff for the collection of the money for the recovery of which the action was brought. "The relation of principal and agent is fiduciary in character." 1 Cal. Jur. 788. "The acts of the agent are judged with almost, if not quite, the same strictness as those of a trustee." Williams v. Lockwood, 175 Cal. 598, 601, 166 P. 587, 588. The duty of an agent to account for money in his hands belonging to his principal is similar to that of a trustee in possession of money belonging to the beneficiary of a trust. "Partnership is a branch of the law of agency, each partner having authority in partnership affairs to act * * * as agent for the other partners." 2 C. J. 425. The statute of limitations applicable to an action for an accounting between partners, where one of the partners in possession of partnership property refuses to account therefor, is section 343 of the Code of Civil Procedure, which provides for a limitation of four years. Freeman v. Donohoe, 65 Cal. App. 65, 81, 94, 223 P. 431. The same section must be held applicable in this case, and it follows that no part of the plaintiff's cause of action was barred at the time the action was commenced.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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102 Cal. App. 787

PEOPLE v. TIBBETTS. (Cr. 1548.)★

District Court of Appeal, First District, Division 2, California. Dec. 30, 1929.

Rehearing Denied Jan. 14, 1930. Hearing Denied by Supreme Court Jan. 27, 1930.

1. Criminal law ⟹562—Improbability or falsity of some testimony was immaterial, where evidence supported allegations of information.

Where evidence introduced by prosecution supported every allegation contained in information, it was immaterial that certain witnesses may have sworn falsely or that some of sworn statements of state's witnesses were inherently improbable.

2. Witnesses ⟹40(1)—Court did not err in permitting 8 year old prosecutrix to testify following careful examination as to her mental development (Code Civ. Proc. § 1880, subd. 2).

Trial court did not err, under Code Civ. Proc. § 1880, subd. 2, in permitting 8 year old prosecu-

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★Rehearing denied. Hearing denied by Supreme Court.

trix to testify after careful examination of her as to her mental development.

3. Jury 🔑131(15)—Objection was properly sustained to query of defendant's attorney in selecting jury whether they would follow instruction that defendant need only establish evidence raising reasonable doubt (Pen. Code, § 1096).

Objection was properly sustained to statement of defendant's attorney in selection of jury inquiring of jury whether they would follow instruction that defendant need only establish evidence sufficient to raise reasonable doubt, since such instruction would not conform to statutory provision relative to acquittal in case of reasonable doubt (Pen. Code, § 1096).

4. Jury 🔑72(½)—Though some of talesmen present were examined during morning, it was not error to allow names of others to be put in box in afternoon and to deny new panel.

Where some of talesmen were examined during morning session, and at afternoon session others who were on panel came forward, it was not error to permit their names to be put in box and to deny motion of defendant's attorney that new panel be drawn, because defense was using ten peremptory challenges without the full panel.

5. Criminal law 🔑778(5)—Instruction that defendant need only establish evidence sufficient to raise reasonable doubt of guilt held properly rejected (Pen. Code, § 1096).

Instruction in criminal prosecution that it was only necessary for the defendant to establish evidence sufficient to raise a reasonable doubt as to the truth of the charge in the information *held* properly rejected because not complying with Pen. Code, § 1096, relative to presumption of innocence and acquittal in case of reasonable doubt.

6. Criminal law 🔑814(3)—Refusal of instruction that law applicable to photographs followed that applicable to finger prints was not error, where there was no evidence as to finger prints.

In criminal prosecution, refusal of instruction that law applicable to photographs was the same as that applicable to finger prints *held* not error, where there was no evidence introduced on the subject of finger prints, and the law applicable thereto had not been stated in any instruction.

7. Criminal law 🔑823(10)—Instruction relative to testimony offered held not erroneous, in view of entire charge, as authorizing jury to consider testimony not admitted.

Use of expression "testimony offered" in instruction as to powers of jury in weighing evidence and drawing conclusions *held* not erroneous, in view of entire charge as authorizing jury to consider testimony offered but not admitted.

8. Criminal law 🔑1172(2)—Where case did not rest on circumstantial evidence, error, if any, in instruction on that subject, was harmless.

Error in instruction on circumstantial evidence, if any, was not prejudicial, where case did not rest on circumstantial evidence.

9. Criminal law 🔑429(2)—Where there was other evidence showing identity, variation in spelling of defendant's name did not prevent admission of judgment of conviction.

Variation of spelling of defendant's name in certified copy of judgment of conviction did not prevent trial court from admitting the certified copy in evidence, where there was other evidence introduced which showed identity of person.

10. Criminal law 🔑730(15)—Defendant held not prejudiced by district attorney's calling defendant's attorney liar, where court reprimanded district attorney and instructed jury to disregard statement.

District attorney's misconduct in calling defendant's attorney a liar in open court *held* not to amount to prejudicial error, where court reprimanded district attorney and instructed jury to disregard the statement.

11. Criminal law 🔑977(3)—Where trial on insanity was postponed, judgment need not be entered within five days after verdict on trial of not guilty plea (Pen. Code, § 1191).

Where defendant entered plea of not guilty, and another plea of not guilty because of insanity, and trial on issue of sanity was postponed, it was not error to delay entry of judgment beyond five days after verdict, on not guilty plea, within which time judgment must ordinarily be entered under Pen. Code, § 1191.

12. Criminal law 🔑1130(5)—Reviewing court need not consider points raised, where defendant's brief fails to designate clearly rulings complained of or show why erroneous or cite authorities.

Where defendant's brief fails to point out clearly or concisely rulings complained of and reasons why they were erroneous or to refer to authorities, court is not called on to consider the points raised on appeal.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

George W. Tibbetts was convicted of an offense, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted of violating section 288 of the Penal Code. He made a motion for a new trial, his motion was denied, and from the judgment of conviction and the order denying a new trial he has appealed.

[1] 1. The defendant contends that the evidence was insufficient to support the verdict. In making this contention he claims that the witnesses swore falsely as to some matters, and that some of the sworn statements were inherently improbable. For the purpose of this decision it may be conceded that both assertions are well founded. However, as to other matters it is equally clear that the

prosecution introduced evidence which abundantly supported every allegation contained in the information.

[2] 2. It is claimed that the prosecutrix, a little girl eight years of age, should not have been allowed to testify. Code Civ. Proc., § 1880, subd. 2. The record discloses that the trial court carefully examined her as to her mental development, and the record does not show that the trial court erred in its determination that she was entitled to be sworn. The point is without merit. People v. Reyes, 194 Cal. 650, 651, 229 P. 947.

[3] 3. When the jury was being selected, the defendant's attorney asked each of several jurors this question: "Would you follow this instruction if the court should so instruct you, that it would only be necessary *for the defendant to establish evidence sufficient* to raise a reasonable doubt in your mind as to the truth of the charge in the information, upon which it would be your duty to return a verdict of not guilty?" (Italics ours.) The prosecution interposed an objection, the objection was sustained, and the defendant claims that the ruling was error. It was not. Pen. Code, § 1096.

[4] 4. The selecting of a jury commenced in the morning. Some of the talesmen present were examined during the morning session. At the afternoon session some other talesmen who were on the panel came forward, and their names were put in the box, and thereupon the attorney for the defendant inquired if those persons were members of the panel. He was advised that they were and the reason why their names were not in the box during the morning. Thereupon the attorney for the defendant requested that a new panel be drawn because the defense was using ten peremptory challenges without a full panel. The motion was denied. The attorney then made an objection to the names going into the box. The objection was overruled. He then asked the court to discharge the panel. The motion was denied. We see no error in any one of the rulings. The defendant cites no authorities and presents no argument showing that there was any error committed.

[5] 5. The defendant offered a proposed instruction worded the same as the question mentioned above in division 3. It was refused, and he claims the refusal was error. As we have pointed out above, it was not sound law. The court did not err in refusing to give it. A correct instruction on the same subject was given.

The defendant proposed an instruction on the subject of the effect of a variation between the spelling of the defendant's name, Tibbetts, and the spelling of the name in a judgment of a prior conviction, Tibbits. It was complex, argumentative, and did not correctly state the law. Moreover, it omitted material facts, and was not pertinent to the evidence introduced. The prosecution did not rely on any presumption, but called a witness who testified that this defendant is the same individual who was on trial in the former action in which the judgment of prior conviction was rendered.

[6] The defendant tendered an instruction to the effect that the law applicable to photographs was the same as that applicable to finger prints. There had been no evidence on the subject of finger prints, and the law applicable to finger prints had not been stated in any instruction. If the requested instruction had been given, it would not have helped the jury.

[7] The trial court gave an instruction as to the powers of the jury in weighing evidence and drawing conclusions. In the instruction it used the expression "testimony offered." The defendant asserts that the jury was told that it could consider testimony offered but not admitted. Nothing on the face of the instruction warrants that interpretation, and, when all of the instructions are read together, it is clear no error was committed.

[8] The trial court gave an instruction on circumstantial evidence. The defendant claims that the trial court used the word "should" when the proper word was "must." As the case did not rest on circumstantial evidence, it is clear that the error, if any, was not prejudicial.

[9] 6. It is claimed that the trial court erred in admitting in evidence a certified copy of the judgment of conviction of George Tibbits. As this defendant spells his name Tibbetts, it is claimed that the prior judgment was not against this defendant. However, as shown above, there was other evidence which showed identity of persons.

[10] 7. It is contended that the district attorney was guilty of misconduct. In this connection the defendant specifies that in open court the district attorney called the defendant's attorney a liar. The record shows that, when that statement was made, the court reprimanded the district attorney and instructed the jury to disregard the statement and "pay no attention to it whatever." Bearing this fact in mind, it does not appear that the rights of the defendant were prejudiced.

[11] 8. The defendant contends that the trial court erred in denying his motion for a new trial because judgment had not been pronounced in time. Pen. Code, § 1191. When the case went to trial, the defendant had of record three pleas: (1) Not guilty of the offense charged; (2) not guilty of the offense charged because he was insane at the time he is alleged to have committed the unlawful act; and (3) a denial that he had suffered said prior conviction. The trial was had on the first and third pleas. The verdict was returned May 2, 1929. After the jury was dismissed, the court ordered the cause set for trial, as to the issue of sanity, on May 13, 1929. On the latter date the defendant withdrew the plea of insanity. Thereupon he was arraigned for judgment. The defendant in-

terposed a motion for a new trial. One of the grounds of the motion was that judgment was not pronounced against him within five days after the verdict. Under the facts stated the trial court did not err in denying the motion. People v. Leong Fook (Cal. Sup.) 273 P. 779.

[12] 9. The defendant's brief specifies forty errors, and the defendant claims that there are many more. We have treated every point that was properly presented, and have treated some that were not properly presented. Some of the assignments contain from two to fifteen alleged errors. All of the assignments not treated were improperly presented. The defendant did not point out clearly or concisely the rulings complained of as erroneous and the reasons why they were erroneous, nor refer to authorities supporting him. Under these circumstances the court is not called upon to consider the points. People v. Morales, 77 Cal. App. 483, 486, 487, 247 P. 221.

We find no error in the record. The judgment and order are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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102 Cal. App. 723

MOORE v. STEEN et al. (Civ. 39.)

District Court of Appeal, Fourth District, California. Dec. 23, 1929.

1. Trial ⚷163—Motion for nonsuit, not pointing out precise grounds on which made, is insufficient.

Motion for nonsuit must point attention of court and counsel to precise grounds upon which made, and general statement that there is no evidence justifying court granting any relief to plaintiff, or that plaintiff has failed to prove sufficient case, is insufficient.

2. Trial ⚷163—It is error to grant nonsuit on motion merely stating that there is no evidence justifying relief to plaintiff.

It is error to grant motion for nonsuit on general ground that there is no evidence justifying any relief to plaintiff.

3. Physicians and surgeons ⚷18(6)—Res ipsa loquitur rule held applicable to injury by X-ray burns which could possibly be caused only by negligence of defendant or latent defects not subject to operator's control.

In an action for injuries from X-ray burns, where the evidence showed the only possible causes for the burns could be negligent and dangerous excess of electric current permitted to go through machine or latent defects in apparatus or dispersion of secondary ray not subject to operator's control, the apparatus having long been in possession and use of defendant, the doctrine of res ipsa loquitur was properly applicable.

4. Negligence ⚷121(2)—"Res ipsa loquitur rule" is that, when thing causing injury which ordinarily would not occur, under proper management, is under defendant's exclusive control, injury is evidence of negligence.

The rule of "res ipsa loquitur" is that, when a thing which causes injury without fault of injured person is shown to be under the exclusive control of defendant, and injury is such as in ordinary course of things does not occur, if proper management is exercised, it affords reasonable evidence, in absence of explanation that injury arose from defendant's want of care.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Res Ipsa Loquitur.]

5. Physicians and surgeons ⚷18(9)—Judgment of nonsuit in action for X-ray burns held erroneous, in view of res ipsa loquitur doctrine and evidence negativing latent defect in apparatus.

In action for injuries by X-ray burns, evidence that injuries to plaintiff could not be attributed to latent and undiscovered defects in apparatus, but was caused by negligence of defendant, together with application of doctrine of res ipsa loquitur, *held* to render judgment of nonsuit erroneous.

6. Appeal and error ⚷927(3)—In reviewing judgment of nonsuit at close of plaintiff's testimony, every reasonable inference must be resolved in favor of plaintiff.

On reviewing judgment of nonsuit at close of plaintiff's evidence, testimony must be construed as strongly as possible in favor of plaintiff, and every reasonable inference resolved for him.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Joe Moore against Claude E. Steen and others. Judgment for defendants, and plaintiff appeals. Reversed.

Harvey & Harvey and W. F. Menton, all of Santa Ana, for appellant.

Head, Rutan & Scovel, of Santa Ana, for respondents.

SLOANE, P. J. This appeal was taken to the Supreme Court from a judgment of nonsuit and afterwards transferred to the Fourth District Court of Appeal for decision.

The action is for damages sustained by plaintiff through an injury to his body alleged to have been inflicted upon him by the defendants, their agents and employees, in negligently, carelessly, and unskillfully exposing him to the X-ray for the purposes of diagnosis, and while the relation of physician and patient existed between plaintiff and defendants. The cause was tried before a jury, and, at the conclusion of plaintiff's evidence, defendants moved for a nonsuit, which motion was granted, and from which judgment of nonsuit the plaintiff has taken this appeal.

The motion for nonsuit, as appears in the

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

record, is as follows: "If the court please at this time the defendants and each of the defendants move the court for a judgment of nonsuit under the provisions of subdivision 5 of section 581 of the Code of Civil Procedure, on the ground that the plaintiff has failed to prove a sufficient case for the jury; and on the further ground that the plaintiff has failed to prove a sufficient case for the jury as to *any* of the defendants; on the further ground that plaintiff has failed to prove the material allegations of his complaint as to all or any of the defendants; and on the further ground that the plaintiff has failed to prove a sufficient case to sustain any verdict in his favor by the jury against these defendants or against any one of the defendants."

Appellant first attacks the ruling and judgment of the court on motion for nonsuit, on the ground that the motion does not specify the precise grounds upon which it is made.

[1, 2] It is the settled law in this state that a motion for nonsuit must point the attention of the court and counsel to the precise grounds upon which it is made, and it is not sufficient to state generally that there is no evidence before the court justifying it granting any relief to the plaintiff or that plaintiff has failed to prove a sufficient case. The motion should show wherein the plaintiff failed to prove its case. 9 Cal. Jur. p. 48, § 33, and authorities cited. It will be observed that the allegations of insufficiency of the proof, although repeated in various terms, amount simply to the general allegation of an insufficiency of the evidence to support a judgment, and fail to point out as to what particular issue in the case the evidence is insufficient.

It is error to grant a motion for a nonsuit where the grounds therefor are not stated. The reason for this rule is stated in Christensen Lumber Co. v. Buckley, 17 Cal. App. 37, 43, 118 P. 466, 468, as follows: "The reason for the rule requiring the grounds of a motion for a nonsuit to be stated is to afford the plaintiff an opportunity to correct any defects of pleading or proof which admit of correction."

If there was any failure of proof in the present case to sustain a judgment for the plaintiff, it was as to the matter of establishing that the injury sustained by plaintiff was due to negligence on the part of defendants. If this particular ground of omission had been pointed out, particularly as to the respect in which the evidence was insufficient, the plaintiff might have been able to supplement his evidence in a manner to meet the alleged insufficiency.

Passing this point for the present, and considering the motion on its merits, the question arises whether there was such an absence of proof of negligence in administering the X-ray test as to justify withholding the case from the jury and granting a judgment of nonsuit.

There is no question, under the proof submitted, but that the defendants, as physicians and surgeons, were in the employment of plaintiff to diagnose his case and ascertain what was ailing him, that in doing so, they resorted to these X-ray tests, and that, by reason of exposure to the X-ray, the plaintiff suffered a third degree burn, which developed into an ulcerated sore, causing plaintiff intense suffering and incapacitating him for a long period of time to follow his regular employment. The only element of proof necessary to recovery by the plaintiff, which is subject to a question as to its sufficiency, is evidence that the injury sustained was owing to negligence on the part of defendants.

Unless the doctrine of res ipsa loquitur applies to this case, it must be admitted that the evidence of negligence is extremely meager, and depends upon a process of elimination.

There were three possible causes for the injurious effects of the X-ray upon the plaintiff developed by the testimony of the medical experts who testified. First, negligent and dangerous excess of electric current permitted to go through the X-ray machine. Second, hypersensitiveness of the patient to such electric exposure, unknown to the defendants. Third, latent defects in the X-ray machine and apparatus, or dispersion of secondary rays in the operation, which latter, it seems, is not subject to the control of the operator. It was shown in evidence that the patient was not hypersensitive, which leaves the two alternatives, either that the X-ray was negligently operated, or the burns were caused by some conditions in the operation due to latent and undiscovered defects in the machinery, or to a dispersion in an unusual manner of the electric current, from causes unknown to, and beyond the control of, the defendants.

[3] One of the defendants testified that this X-ray machine was one which had been in their use and possession for a considerable time, and it seems extremely improbable that the injuries to the plaintiff resulting from its use were occasioned by defects in the apparatus or in its dispersing the electric current in a manner which had not previously been manifested in the operation of this X-ray appliance. If we could deal in probabilities, they would preponderate largely towards the conclusion that the injury to plaintiff was caused by an excessive and unusual application of the electric current, either as to time or quantity, through the fault of the operation.

Arguing on this point, counsel for respondent says: "Assuming that the question of hypersensitivity is removed in the case at bar, the other possible causes of the burn testified to by plaintiff's experts, namely, hidden defects in the X-ray machine or in the milliampmeter or the secondary rays, were not removed by any testimony or evidence whatsoever. The reasoning of the decisions referred to by appellant, and admitted by him to be good reasoning on page 14 of his opening brief, still remains, namely, that where the evidence shows the burn could have resulted from two or more possible causes, then the result alone does not prove what was the cause of the burn."

We doubt if the burden of eliminating this last possible explanation of plaintiff's injuries to relieve defendants from liability can, under the circumstances of this case, be thrown on the plaintiff. Here is an apparatus which had been long in the possession and use of the defendants, and which, if it possessed latent defects, its power for evil would naturally have developed before the treatment of plaintiff, an apparatus of which the plaintiff could have no possible previous knowledge or means of determining its secret and undisclosed possibilities. It would seem no more than reasonable that the doctrine of res ipsa loquitur should apply at least to throwing the burden of proof on the defendants to show the existence of some condition of this X-ray apparatus that was beyond their knowledge or control, as relieving them from the implication of negligence in its operation.

As stated in the opinion of Mr. Justice Chipman, P. J., in Koskela v. Albion Lumber Co., 25 Cal. App. 12, 26, 142 P. 851, 856, where a workman was injured by the giving way of an appliance known as a "Traveller," by which the plaintiff was being transferred in the customary manner from the shore to the vessel on which he was employed: "It is difficult to conceive of appliances that had during the day carried safely many loads of two or three tons weight suddenly, without fault of the operators or of the appliances themselves, breaking down under a load of 300 pounds. If the accident was susceptible of an explanation consistent with the assumption that the appliances were adequate and their operation by defendants without fault, the burden was upon defendants so to show to the satisfaction of the jury."

The defendants claim they had no knowledge of any defects in the appliances which it is alleged had been carefully inspected prior to their use, and that the "accident was a casualty which no act of the defendants could have foreseen or prevented, and was caused through the breaking of a metal device of the loading apparatus, through a latent, unknown and undiscoverable defect in the metal thereof." There would seem to be the same reason here for throwing the burden upon the defendants to establish any defense of a latent and unknown defect in the structure or operation of the appliances used for this X-ray operation.

As to the general application of the doctrine of res ipsa loquitur to the use of the X-ray, it seems to be a matter of agreement between both parties that the weight of authority in recent decisions in other jurisdictions is against it, and it is conceded that ordinarily this doctrine cannot be applied in cases of alleged malpractice of physicians and surgeons in the treatment of disease.

The doctrine as laid down by Judge Taft in Ewing v. Goode (C. C.) 78 F. 442, 443, in the following language, is undisputed: "Before the plaintiff can recover, she must show by affirmative evidence—first, that defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. * * * A physician is not a warrantor of cures. If the maxim, 'Res ipsa loquitur,' were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.' "

It may be noted, however, that this is not a case claiming damages for malpractice in the treatment of disease, but for negligence in the process of a diagnosis to ascertain the cause of plaintiff's ill health. This distinction in the application of the rule under consideration seems to be recognized in the decisions.

There is a reason in the interests of the service of the public, as pointed out in the quotation from Judge Taft's opinion, why a distinction might be made between the diagnosis of a case and the treatment of the disease for curative purposes.

[4] The accepted rule of res ipsa loquitur is stated as follows: "When a thing which caused the injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur, if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care. (Koskela v. Albion Lumber Co., 25 Cal. App. 12, 142 P. 851; San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680; Hill v. Pacific Gas & Electric Co., 22 Cal. App. 788, 136 P. 492.)"

The conditions of the instant case come well within the terms of this rule, unless excluded by the doctrine exempting physicians in the treatment of disease.

The only California decision cited by either party bearing on the situation here is one cited by appellant in the oral argument on this appeal, in which case the opinion was rendered in March, 1929, long after the judgment of nonsuit in this case.

This decision, Ragin v. Zimmerman (Cal. Sup.) 276 P. 107, 108, is an X-ray damage case, and has many points in common with the instant case, and, while the court holds the evidence of negligence sufficiently proved by plaintiff, it declares that the doctrine of res ipsa loquitur might properly be applied.

The plaintiff was subjected to an X-ray process in a dentist's office for the purpose of ascertaining the condition of the patient's chin and jaw, and the "aveolar process and other related parts of the dentigerous anatomy." The operation resulted in electric burns, shock, and physical and mental pain, inflicted upon the patient by the alleged negligent and careless operation of the X-ray. The trial of the case resulted in a judgment for the plaintiff. The evidence disclosed that the plaintiff was badly burned in the operation, at several places about her face, limbs, and body. The immediate cause of the burning was attributed under the evidence to bringing the apparatus so close to the patient's knees that she received a severe shock, which caused her to involuntarily change her position so as to occasion the several burns which resulted in her serious injury. The question to be determined was whether or not the shock causing her involuntary movement was the result of negligence on the part of the operator. In the course of the opinion the court says:

"Appellant has devoted a great part of his argument to combating the application of the doctrine of res ipsa loquitur to malpractice cases. There is nothing in the record to indicate that the court decided the case by the application of the doctrine of res ipsa loquitur or was influenced by that doctrine in rendering its decision. The trial court simply held, and there was evidence in the record to sustain its finding, that the operator of the X-ray machine so 'carelessly, negligently and unskillfully conducted herself in performing the operation of taking the said X-ray picture that she caused the plaintiff to become violently electrified, shocked. * * *' Appellant, upon examining respondent's teeth, placed her in charge of the young lady who operated the X-ray machine, with directions that a radiograph be taken. She was then conducted by the operator to the X-ray machine room and placed in a recumbent position for the taking of the radiograph. The operator's version of what followed is that she instructed respondent to remain very quiet and forewarned her against becoming alarmed at the slight clicking noise which she would hear as soon as the X-ray mechanism was set in motion, and as she pulled the second switch respondent raised her knee so that it either came in contact with or was brought into very close proximity to the X-ray tube, which carries a high voltage of electric current, and that she next observed an electric spark flash from the lower part of the tube toward respondent's knee. Respondent then leaned forward and in an attempt to extricate herself from her peril wrapped herself around the tube, which extended at slight elevation over the body from the extremities to her face. It is admitted that when bodies are brought within certain given distances of said tubes electric sparks are arced, or jump from said tubes and produce burns and cause damage to bodies into which they are inducted. The operator admitted that she placed said highly charged electric tube not more than ten inches above the knees of respondent as she arranged her in the chair for the purpose of taking the picture.

"Respondent, who had no technical knowledge as to the operation or mechanism of an X-ray machine, denied that the operator cautioned her against raising her knees or forewarned her as to the slight clicking noise that would be produced upon turning the switch, and positively denied that she raised her knee or otherwise changed her position before she was shocked and burned by the electric flashes. A piece of her dress, which would rest normally upon her knee, was burned. Besides, she received burns on the left side of her face, chest, certain fingers of both hands and on the thigh. The primary cause of the burns and shock is more consistently explicable on the theory that the electric sparks were arced from the tube to the face or upper portion of the body, thereby causing the respondent, either in pain or in fright, to move her lower limbs in an attempt to throw the tube a safe distance from her body or to carry herself from the zone of danger, than on the theory that the slight clicking sound, against which appellant claims respondent had been cautioned, so terrified her that she voluntarily elevated her knee to the extent of ten inches, thus bringing it in contact or near contact with the high voltage electric appliance. The claim of appellant that the first electric current to enter respondent's body was caused by her raising her knees approximately ten inches upon becoming startled at the slight clicking sound which followed the turning of the switch is not, in the light of the situation, consistent with human conduct and the trial court, no doubt, rejected appellant's version and gave credence to the respondent's account of her conduct up to the time that she received the first electric shock. If it be conceded, in the absence of any evidence sustaining such a concession, that the knee burn was the first received by respondent, that circumstance would not be sufficient to exculpate appellant of negligence. There is ground sufficient for holding that the tube was brought by the operator even closer to respondent's knee than she admitted bringing it. * * * It therefore follows that the electric burns which respondent received were the result of defendant's negligence.

"Appellant has cited a number of cases to the effect that the doctrine of res ipsa loquitur is not applicable to malpractice cases brought against physicians, surgeons and dentists for errors of judgment committed in the treatment of disease. Such cases have no application whatsoever to the facts of the instant case. Appellant here was not engaged in employing an X-ray as a treatment for disease. * * * His contention now is that the res ipsa loquitur doctrine, as applied to physicians, should be extended to include X-ray operators. We are satisfied that the negligence of appellant, as found by the trial court, is supported by the case as presented, and recourse to the doctrine of res ipsa loquitur is not necessary. If it were necessary, however, to invoke it, we would not hestitate to apply it to the facts described by the evidence in the instant case. See discussion of application of rule to electrical devices, 10 Cal. Jur. 199, 200. It may well be said here, as was said in Phœnix Assur. Co. v. Texas Holding Co., 81 Cal. App. 61, 252 P. 1082, in applying the doctrine of res ipsa loquitur to the facts of a case not so typically illustrative of the reason of the rule as the instant case:

"'We think this doctrine may be urged with more than plausibility. Everything in the present case which in any way contributed to the accident was under the management of the defendant; * * * and that in the ordinary course of things the accident would not have happened if those having the management had used proper care.' * * *

"In Evans v. Clapp (Mo. App.) 231 S. W. 79, the doctrine was applied in an action to recover for the negligent use of X-ray machines in taking radiographs, in the following language:

"'It is manifest * * * that it cannot be said the jury could not reasonably find that plaintiff received an X-ray burn at the hands of the defendants, and that it was negligently administered. It is a dangerous agency, exceedingly capable of producing serious injury unless administered with care and caution. State v. Lester, 127 Minn. 282, 149 N. W. 297, L. R. A. 1915D, 201. As hereinbefore stated, the X-ray was not applied in this case for purposes of treatment, but merely to ascertain the cause of plaintiff's headaches, and this was disclosed at the first examination. There is no room, therefore, for the application of any theory of mere honest mistake in the careful application of a treatment intended to be applied in the accomplishment of a result similar to the one produced but not to the extent thereof.

"'On the contrary, the X-ray was to be used only to discover a condition which was at once shown, and the many other exposures were not made in the interest of the patient but for other purposes. Examinations, when carefully and properly made, do not produce burns; hence when a burn is produced, this fact is of itself some evidence from which the jury may find that the degree of care and skill ordinarily exercised by persons of like profession and using such agencies was not exercised in that particular case. (Citing authorities.) Of course the rules governing the duty and liability of physicians and surgeons in the performance of professional services are applicable to them in the use and manipulation of an X-ray machine. 21 R. C. L. 386.' Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073, Ann. Cas. 1918E, 256, and cases therein cited, hold to the same effect."

[5] Following the conclusions of the Supreme Court in the foregoing case, we are of the opinion that there was some affirmative evidence on the trial of the instant case tending to support a finding that the injuries to plaintiff could not be attributed to latent and undiscovered defects in the X-ray apparatus, but was caused by the negligence of defendants, and that, in any event, this case is one for the application of the doctrine of res ipsa loquitur.

[6] This being a judgment of nonsuit, on defendants' motion at the close of plaintiff's evidence, without any rebutting evidence being introduced by the defendants, the testimony must be construed as strongly as possible, and every reasonable inference therefrom resolved in favor of the plaintiff.

The judgment of the trial court is reversed.

We concur: BARNARD, J.; MARKS, J.

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102 Cal. App. 697

INGLEDUE v. DAVIDSON et al. (Civ. 3921.)★

District Court of Appeal, Third District, California. Dec. 20, 1929.

Rehearing Denied Jan. 18, 1930. Hearing Denied by Supreme Court Feb. 17, 1930.

1. Negligence 🔑32(1)—Owner or occupant of building must exercise ordinary care to render premises reasonably safe to persons invited thereon.

The owner or occupant of a building must exercise ordinary care to render premises reasonably safe to persons whom he induces to come thereon by invitation, express or implied,

2. Innkeepers 🔑10—Evidence held to make restaurant proprietor's liability for injuries to patron from explosion of escaping gas question for jury.

Evidence that restaurant proprietor knew before gas explosion that something was wrong with gas and had meter changed, but did not have gas pipe examined to ascertain from what source smell came, *held* to make question of his negligence, resulting in injury to restaurant patron, question for jury.

3. Negligence 🔑121(2)—Doctrine of res ipsa loquitur does not apply, where plaintiff alleges specific acts of negligence.

Where plaintiff in his complaint gives explanation of cause of action, and, instead of relying on general allegations of negligence, sets out specifically negligent acts or omissions complained of, doctrine of res ipsa loquitur does not apply.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by L. F. Ingledue against L. Davidson and others. From a judgment for defendant Davidson on a directed verdict, plaintiff appeals. Reversed.

★Rehearing denied. Hearing denied by Supreme Court.

H. T. Morrow and Hyams & Himrod, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

JAMISON, Justice pro tem. Appellant brought this action to recover damages for injuries sustained by him from an explosion of gas. From a judgment rendered in favor of respondent upon a directed verdict he has appealed.

It appears from the evidence that on the 6th day of May, 1922, appellant went to respondent's restaurant about noon for a lunch. He had made his order and was sitting on a stool at the lunch counter, facing a large mirror that was attached to and rested against the wall some 6 feet in front of and to the west of him. This mirror was from 25 to 30 feet long and about 6 feet wide, and rested upon a shelf, the bottom of the mirror being about 6 inches higher than the lunch counter; the space between the shelf and the lunch counter being used by the waiters in passing back and forth while waiting upon the lunch counter customers. Immediately south of the south edge of said mirror, and 12 or 14 inches therefrom, was a coffee urn, which was heated by a small gas jet. Shortly after appellant had taken his seat at the lunch counter, and while waiting for his order to be filled, a small flame, several inches wide and a few inches high, shot up from the south edge of the mirror, which increased in size until it was 6 or 8 inches high. A passing waiter struck at it with a cloth or with his hand, and, this having no effect upon it, he started to get some water to pour on it. Just then an explosion took place, that forced the mirror from its place, and it fell forward on the lunch counter. Appellant was thrown from his seat on the stool to the floor, and suffered injuries that sent him to the hospital, and that confined him to his bed for several weeks, and compelled him to expend sums for physician's, nurse's, hospital, and other bills created by said injuries.

It appears that immediately behind the mirror, and concealed from observation by it, was a gas pipe, one-half inch in diameter, that was not being used for any of the purposes of the restaurant at the time of the explosion. This pipe was 8 or 10 feet long, and had an ell at the upper end that extended toward the back of the mirror. The lower end connected with the main in the basement, that furnished gas to the restaurant, and it had no cut-off that would prevent the flow of gas into it when gas was turned on for the use of the restaurant. The upper end of this unused gas pipe extended from 4 to 6 inches above the level of the shelf upon which the mirror rested, and this pipe was between the mirror and a brick wall, but not imbedded in the wall.

Respondent knew of the existence of this pipe, at least to the extent of knowing that it connected with the main house pipe in the basement, although it is not shown that he knew that it extended up to the point behind the mirror. Immediately after the explosion, a flame several inches high was seen coming from this unused pipe, and this flame continued to burn until the gas was cut off from the restaurant.

It appears from the evidence that the gas which caused the explosion came from this unused pipe, which was either not plugged, or so insecurely plugged that it permitted gas to escape from it. There was a brick wall behind the mirror, and behind this pipe, which had pockets in it, were places where brick had been left out, or from which they had been removed, and these pockets apparently had become filled, or partly filled, with this leaking gas, and some of this gas found its way along and outside of the edge of the mirror and became ignited, and this ignition was communicated to the gas in the pockets, and thereupon the explosion ensued.

Respondent had occupied the premises in which he was conducting the restaurant since December 20, 1920, and at the time of the explosion was occupying said premises as lessee under a lease which provided that he should keep the leased premises in good order and condition at his own expense. The unused pipe had been placed in said leased premises before the occupancy thereof by appellant, and prior to the explosion had not been used by him.

Respondent testified that his weekly gas bills from the first of the year until the week ending March 20th of that year ran from $36.20 to $39.92; that for the week ending on March 20th the bill was $42.12, and thereafter his weekly gas bills increased until on May 1st it was $45.90. He also testified that the defendant the Los Angeles Gas & Electric Corporation was furnishing the gas for his restaurant; that during the latter part of March he complained to the gas company regarding the increase in his gas bills, and was requested to file a complaint; that in April, 1922, he called at the office of the gas company and stated to its employee he found there that he was having the highest gas bills he ever paid; that he didn't see any reason why this should be the case; that he did not know what was the matter; that said employee suggested that there might be water in the meter; that the next day an employee of the gas company came to the restaurant and changed the meter.

The gas bill, after the meter was changed, was still more, that on Tuesday or Wednesday before the following Saturday, the day upon which the explosion took place, respondent again called at the office of the gas company, and said to the employee in charge of the office, "I know there is something wrong there somewhere, and I wish you would send some one down and find out what it is." On Thursday preceding the explosion, two employees of the gas company came to the restaurant and started to take the meter out. Respondent told them to wait until he called up the office of the gas company. He then stated to the employee who answered on the telephone that he did not want another meter, but wanted some one to come down and investigate the matter. The employee asked him if he did not want the meter, and, when respondent informed him that he did not want it, the employee said something that sounded to respondent like an invitation to betake himself into the realms of Pluto.

Appellant produced as a witness Harry J. Griffin, captain of the fire department of Los Angeles, who testified that he went to the place of the explosion, that when he arrived there he saw the mirror lying on the lunch counter, and a flame coming from the gas pipe that stood behind where the mirror had been; that he immediately had the gas that supplied the restaurant shut off; that he saw respondent there, and asked him what he thought caused the explosion; and that respondent replied that he had been smelling gas around there for four or five days, and had been trying to get it fixed.

[1] Appellant was an invitee on the premises of respondent at the time of the explosion. The owner or occupier of a building must exercise ordinary care to render the premises reasonably safe to persons whom he induces to come thereon by invitation, express or implied. Thompson on the Law of Negligence, p. 146. And, as such invitee, respondent owed appellant the duty of maintaining the property in a safe condition and of exercising reasonable care in protecting him from injury. Madigan v. O. H. Hale & Co., 90 Cal. App. 151, 265 P. 574; Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Giannini v. Campodoni Co., 176 Cal. 548, 169 P. 80; Oles v. Kahn Bros., 81 Cal. App. 76, 253 P. 158.

[2] There was evidence on the part of plaintiff that for some time before the explosion respondent knew that something was wrong with the gas that was being furnished to his restaurant; that for some unaccountable reason his gas bills were increasing. He had the meter changed, and still the increase continued. As a cause for the explosion he stated to the captain of the fire department that he had smelled gas for four or five days prior to its occurrence. He did not have his gas pipes examined, to ascertain from what source the smell of gas came, though he must have known that this continuing odor of gas indicated a leakage, but continued to have the gas turned on, though he must have realized that a continual leakage of gas would likely result in an explosion.

In the case of Perera v. Panama-Pacific Int. Exp., 179 Cal. 63, 175 P. 454, 455, the court said: "It is now settled that the right of a court to direct a verdict is, with regard to the condition of the evidence, absolutely the same as the right of a court to grant a nonsuit, and also that a court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff." See, also, Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649; McCarthy v. Pac. Elec. Ry. Co., 82 Cal. App. 503, 255 P. 868.

And in this last-named case, the court said that the rule as to directed verdicts is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial, for a court may grant a new trial, even when there is substantial evidence to sustain the verdict, if it believes the evidence preponderates against the verdict, but applies only where the evidence is wholly insufficient to support the verdict, and where upon the whole evidence the court, of its own motion, would be compelled to set the verdict aside as unsupported by the evidence. From the foregoing facts the jury could have been warranted in the belief and inference that, prior to the explosion, the respondent was put upon notice that there was a leakage in his gas pipe or pipes, and that his failure to cause an examination of his gas pipes, and the stoppage of such leak, and the continued use of the gas in his restaurant while such condition existed, were the proximate causes of the explosion. We are of the opinion that the evidence tending to prove that the explosion was caused by the negligence of the respondent was sufficiently substantial to require the submission of the case to the jury.

[3] Appellant claims that the doctrine of res ipsa loquitur applies to the facts of this case. In his complaint he does not plead negligence in general terms, but sets out the specific acts of respondent upon which he bases his allegations of negligence. By so doing, he has barred himself from relying upon this principle of the law. The general rule is that where the plaintiff in his complaint gives the explanation of the cause of the action, that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply. Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; Marovich v. Central Cal. Traction Co., 191 Cal. 295, 216 P. 595.

The judgment is reversed.

We concur: FINCH, P. J; R. L. THOMPSON, J.

102 Cal. App. 783

INGLEDUE v. DAVIDSON et al. (Civ. 3925.)

District Court of Appeal, Third District, California. Dec. 20, 1929.

1. Gas ⇨16—Action for explosion of escaping gas cannot be maintained against gas company, in absence of notice or information to company of leakage.

Action for injuries to plaintiff by reason of explosion of escaping gas cannot be maintained against company furnishing supply of gas, in absence of notice or information sufficient to put it on notice that leakage existed.

2. Gas ⇨20(2)—In action against gas company for explosion of escaping gas on premises not under defendant's control, res ipsa loquitur doctrine does not apply.

In action against gas company for injuries from explosion of escaping gas on premises not under defendant's control, doctrine of res ipsa loquitur does not apply.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by L. F. Ingledue against L. Davidson and others. From a judgment of nonsuit as to defendant Los Angeles Gas & Electric Corporation, plaintiff appeals. Affirmed.

H. T. Morrow and Hyams & Himrod, all of Los Angeles, for appellant.

Paul Overton, S. W. Guthrie, Samuel Poorman, Jr., and Douglas Van Dyke, all of Los Angeles, for respondent.

JAMISON, Justice pro tem. Respondent is one of the defendants in the case of L. F. Ingledue, Plaintiff and Appellant, v. L. Davidson, Doing Business under the Fictitious Name and Style of Pulman Lunch, Defendant and Respondent, D. W. Edelman et al., Defendants, in which a decision was this day rendered. 93 Cal. App. —, 283 P. 837. At the close of plaintiff's evidence in that case, the trial court granted a motion for nonsuit in respondent's favor. From this action of the court, plaintiff has appealed.

[1] The facts applying to this case are set forth in the aforesaid decision. It appears from these facts that at no time prior to the explosion had this respondent received any notice that there was any leakage of gas from any of the gas pipes on the premises of defendant Davidson, nor information sufficient to put respondent upon notice that such leakage existed.

[2] Nor can the doctrine of res ipsa loquitur be invoked against this respondent, for the reason set forth in said decision, and for the additional reason that the pipe, the leaking from which caused the explosion, was a part of the house piping of the said Davidson restaurant, and not under the actual control of this respondent.

The trial court did not err in granting the motion for nonsuit.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

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102 Cal. App. 783

MOORE v. ROGERS et al. (Civ. 6829.)★

District Court of Appeal, First District, Division 1, California. Dec. 28, 1929.

Rehearing Denied Jan. 27, 1930. Hearing Denied by Supreme Court Feb. 24, 1930.

1. Appeal and error ⇨1071(6)—Failure to make finding on material issue constitutes prejudicial error, only where it appears evidence was sufficient to sustain finding in favor of complaining party.

Failure to make finding on material issue presented by pleadings constitutes prejudicial error, entitling complaining suitor to reversal, only where it appears from record that there was evidence introduced sufficient to sustain finding in favor of such party.

2. Appeal and error ⇨901—Appellant complaining of failure to make finding on material issue has burden to show finding was required by evidence.

Appellant complaining of trial court's failure to make finding on material issue presented by pleadings has burden to cause record to show that such finding was required by evidence, since error is not presumed.

3. Appeal and error ⇨704(2)—Where appellant did not bring up evidence, failure to make finding on issue raised held not error.

Where plaintiff appealing from judgment in action for conversion of automobile did not bring up evidence rendering it impossible for appellate court to say whether any evidence was introduced on issue on which court failed to make finding, or whether evidence would have been legally sufficient to support finding, if made, failure to make finding on such issue *held* not error.

4. Appeal and error ⇨907(2)—Presumption exists on appeal that evidence was legally sufficient to sustain finding, where evidence was not brought up in record.

Where plaintiff appealing from judgment in action for conversion of automobile did not bring up evidence, presumption exists that testimony adduced was legally sufficient to sustain finding that plaintiff's right of action was barred by laches.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by R. G. Moore against John Rogers and others. Judgment for defendants, and plaintiff appeals. Affirmed.

L. L. Steele, of Oakland, for appellant.

Joseph J. Bullock, of Redwood City, for respondents.

KNIGHT, J. This is an appeal by plaintiff from a judgment in favor of defendants

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★Rehearing denied. For opinion of Supreme Court denying hearing, see 284 P. 916.

in an action for the alleged conversion of plaintiff's automobile, the ground of appeal being that the trial court failed to find on a material issue raised by the pleadings.

The complaint alleged that the defendant Roach was the constable of the third judicial township of San Mateo county; that on February 15, 1926, pursuant to a writ of attachment duly issued out of the justice's court in an action brought against plaintiff by the defendant Carli, Roach seized said automobile and retained possession thereof "until on or about the 20th day of September, 1926, when he converted said automobile to the use and benefit of himself and of said defendants John Rogers and Frank Carli, who ever since said time and still continue to hold and retain said automobile as their own." The complaint further alleged that plaintiff demanded the return of said automobile, but that such demand was refused, and that by reason of the alleged conversion he has suffered damage in the sum of $700.

The answer consisted of a general denial, verification being waived. The action was tried by the court sitting without a jury, and the judgment in favor of defendants was based upon the following findings: That prior to February 13, 1926, while plaintiff was the owner of said automobile, the defendants Rogers and Carli performed work thereon and furnished materials therefor; that on said date Carli sued plaintiff in the justice's court of the third township "for the work, labor, and material rendered and performed in the repair of said automobile, and on or about the 13th day of February, 1926, the defendant Roach placed said automobile in the garage of Rice and Hinton for storage with the full knowledge of plaintiff"; that the automobile remained there until August 30, 1926, at which time Rice and Hinton caused it to be sold pursuant to section 3051 and 3052 of the Civil Code for the storage due thereon. It was further found that plaintiff had full knowledge of all of the foregoing proceedings, but took no action in the matter until January, 1927, when he demanded the return of the automobile, and that thereafter and in April, 1927, he commenced this action for conversion. And in connection with such delay the court also found that plaintiff's right to said automobile, if any he had, was lost by his laches.

As will be noted, the trial court made no finding upon the allegations of the complaint relating to the seizure of said automobile by Roach, as constable, under attachment proceedings, and the specific point plaintiff makes in support of this appeal is that the omission to so find constituted reversible error, it being contended in this regard that if, as alleged, said automobile was attached, and while under attachment was sold for storage, the constable was liable for conversion under the law as stated in the case of Aigeltinger v. Whelan et al., 133 Cal. 110, 65 P. 125.

[1-3] Aside from the question of the application herein of the legal principle declared in that case, however, it has been repeatedly held that the failure to make a finding on a material issue presented by the pleadings results in prejudicial error entitling the complaining suitor to a reversal only where it appears from the record that there was evidence introduced as to such issue, and the evidence in that regard was sufficient to sustain a finding in favor of such party. And as error is not presumed, it is incumbent upon the appellant to cause the record to show that such finding was required by the evidence (see 2 Cal. Jur., pp. 1032, 1035, and cases therein cited). Here plaintiff did not bring up the evidence, the appeal having been taken upon the judgment roll alone; consequently, in the state of the record before us it is impossible to say whether any evidence was introduced at all to prove that the automobile was ever attached, or, if it was, whether the attachment was in force at the time of the sale for storage. And, furthermore, if any such evidence was introduced it cannot be determined from this record whether the same would have been legally sufficient to sustain a finding in plaintiff's favor. Manifestly, therefore, no error in the findings has been shown.

[4] It will be observed also that the court found that plaintiff's right of action herein was barred by laches. In any event, therefore, the judgment would not be subject to reversal, because, in the absence of evidence showing to the contrary, it must be presumed on appeal that the testimony adduced at the trial was legally sufficient to sustain the foregoing finding.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

102 Cal. App. 775

PROVOST v. PROVOST et al. (Civ. 6244.)

District Court of Appeal, Second District, Division 2, California. Dec. 27, 1929.

1. Husband and wife 🔑299(1)—Judgment granting wife maintenance held erroneous in directing spouses each receive half income of community real estate, without ordering division of property or proceeds (Civ. Code, §§ 137, 146, 147).

Court, in the granting wife support and maintenance, erred in decreeing that each of spouses receive one-half of income derived from community real estate, without ordering equal division between spouses of property or proceeds under requirements of Civ. Code §§ 146, 147, relative to actions for divorce, which are adopted by section 137 and applied to actions for maintenance.

2. Husband and wife 🔑258—Community funds do not merge in husband's separate property improved with community funds without wife's consent.

Where husband has without wife's consent improved his own separate property with funds belonging to the community, community funds do not merge in his separate property.

3. Husband and wife 🔑258—Wife seeking maintenance had right to compensation measured by improvement in husband's separate property through application of community funds without wife's consent.

Where husband improved his separate property with community funds without wife's consent, wife in suit for maintenance had right to compensation in the amount of her share in the community measured by the improvement that such community property had effected in separate property of husband.

4. Husband and wife 🔑258—Wife's right to compensation for community funds applied in improving husband's separate property held not defeated by husband's conveyance to daughter without money consideration.

Right of wife suing for maintenance to compensation for husband's use of community funds without her consent in improving husband's separate property *held* not defeated by fact that husband had deeded his separate property so improved to his daughter, where such transaction was for fraudulent purpose of depriving wife of her right to separate maintenance and daughter parted with nothing of value.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Suit by Maria Provost against Anthony Provost and another for maintenance and support and other relief. From the judgment, defendants appeal. Reversed and remanded.

James H. Mitchell, of Los Angeles, for appellants.

Albert Sidney Brown, of Los Angeles, for respondent.

CRAIG, Acting P. J. Appellant Anthony Provost and the respondent Maria Provost intermarried on October 20, 1904, and lived together until January 8, 1925, when they separated. Prior to this marriage said appellant acquired a small parcel of real property of the value of about $300, described as lot 33, block 2, of subdivision No. 1 of Dolgeville, in the city of Alhambra, known and designated for the purposes of this case as the "Alhambra property." Thereafter the spouses improved the same with community funds, and enhanced its value to about $12,000. Following their marriage said parties acquired by their united efforts a parcel of real property which both alleged to be of the value of about $5,000, described as follows: The southwest quarter, section 21, the northeast quarter of the northwest quarter, the north half of the northeast quarter, and the southeast quarter of the northeast quarter, section 28, township 5 north, range 12 west, San Bernardino base and meridian, in the county of Los Angeles. On August 26, 1924, Anthony Provost conveyed to appellant Edna L. Gomes, his daughter by a former marriage, all of his right, title, and interest in and to the Alhambra property together with the improvements thereon.

On April 1, 1925, the respondent commenced an action for maintenance and support, wherein she alleged that the conveyance from Provost to his daughter had been made without consideration, without the plaintiff's knowledge or consent, and for the purpose of defrauding and depriving her of maintenance and support from its income; that she was advanced in years, and had no income, funds, employment, or vocation, and was compelled to live for the greater part upon the charity of friends and relatives. Appellant Edna L. Gomes was made a party defendant, and the plaintiff prayed for possession of all furniture and furnishings of the Alhambra property as a home pending litigation, a division of the community property, and a lien thereon to the extent of one-half the value of all improvements, or, as an alternative, that she be awarded all of the community property. By supplemental complaint, desertion and willful neglect by defendant Provost to furnish the common necessaries of life were alleged, and a dissolution of the bonds of matrimony demanded. The defendants answered jointly, admitting that the realty last herein mentioned, described as the "ranch property," was community, that it was of the value of $5,000, and that there were furniture, furnishings, and farm implements of a value of about $250. They alleged that the Alhambra property was at the time of conveyance wholly the separate property of Anthony Provost, and joined issue upon the other material allegations of the complaint. Defendant Provost by cross-complaint alleged cruelty and desertion upon the part of his wife, and also prayed that a decree of divorce be granted.

After a trial before the court without a jury, it was found that all of the allegations of grounds for divorce were untrue, and it was adjudged that neither the plaintiff nor the defendant Anthony Provost be granted a divorce. The findings of fact further recite that the Alhambra property was conveyed by Provost to his daughter for valuable consideration and without the plaintiff's knowledge; that it was the separate property of the husband and that he had a legal right to convey the same, but that Mrs. Gomes had given nothing of value therefor; that both of the spouses were entitled to their support from its income, and that they had no other means of support, but that said conveyance had been made for the purpose of depriving the plaintiff of her interest therein, and that Mrs. Gomes had collected all income therefrom since the date of conveyance. The trial court directed that each of the spouses receive one-half the income, if any, derived from the ranch property, or that, in the event of sale, the proceeds be equally divided between them; that Mrs. Gomes retain title to the Alhambra property, but that Anthony Provost receive the income therefrom and pay to the plaintiff $40 per month, the balance, if any, to be devoted to his own use; that, if said income be insufficient for the support and maintenance of both spouses, this property be sold under execution, and the proceeds applied in a manner best suited to their necessities. Liens in favor of the plaintiff and her husband were created and imposed thereon to secure the payment of said amounts.

The defendants appealed, and here contend that the Alhambra property was at all times separate, that Anthony Provost had a legal right to convey it, and conveyed the same for a valuable consideration, and that the trial court erred in imposing a lien thereon or directing that it be sold, as heretofore mentioned.

[1] Section 137 of the Civil Code provides that, in granting the husband or wife permanent support and maintenance, the court "shall make the same disposition of the community property * * * as would have been made if the marriage had been dissolved." Sections 146 and 147 of the same Code require, if a divorce be granted upon any ground other than of adultery or extreme cruelty, the community property shall be equally divided between the parties and that whenever necessary for that purpose the court may order a partition or sale, and a division or other disposition of the proceeds. Hence it clearly results that as to the ranch property the findings and judgment were erroneous, since no division thereof was directed to be made through partition or sale. D'Arcy v. D'Arcy, 89 Cal. App. 86, 264 P. 497. In the case last cited it was held not error to award all of the community property to a wife who alleged extreme cruelty, and was given custody of a minor child, even though her pleadings did not allege the necessity for such award nor pray that it be granted. In the instant case it was conceded by the parties, and was found by the court, that this parcel was community property, and that the sole means of support of either spouse in the absence of its sale must be derived from the income produced by the Alhambra property, which the findings and judgment imply may become insufficient.

[2] A more serious problem is presented as to the legal status and propriety of the trial court's ruling as to the Alhambra realty and improvements placed upon a parcel of the husband's land by community endeavors.

That improvements made during the marriage on separate property of either husband or wife with community funds will as a general rule belong to the spouse owning the property is stated in 21 Cyc. 1648, and the language is quoted with approval in Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195. However, it is significant that in this and every other California case, except in Estate of Barreiro, 86 Cal. App. 764, 261 P. 509, where the principle has been applied, it has been a fact that the property improved by the expenditure of community money was realty belonging to the wife. In each such instance the husband exercising his legal authority has used funds of the community to annex valuable structures to the wife's separate property. In Shaw v. Bernal, 163 Cal. 262, 124 P. 1012, 1014, it is stated: "* * * But it is clearly the rule that where a husband deliberately constructs from community funds a building upon the separate property of his wife, in the absence of any sufficient agreement or undertaking to the contrary, as between him and her, the title to the building follows the title to the land and is separate property of the wife, and neither he nor the marital partnership has any title to any portion of the property, either land or building." Upon that phase of the decision the court concludes: "In view of what we have said as to the rule applicable where a husband voluntarily constructs with community funds buildings upon the separate property of the wife, there is nothing in the foregoing testimony to compel a conclusion that any part of the property here involved, land or improvements, was community property at the date of death of Mrs. Shaw."

In Smith v. Smith, 47 Cal. App. 650, 191 P. 60, 62, it is said: "The expenditure by a husband of either his separate funds or the community funds of himself and wife in improving his wife's separate property does not operate to change the title. As between them, in the absence of any specific agreement to the contrary, the title to the improvements follows the land." And from Carlson v. Carlson, 10 Cal. App. 300, 101 P. 923, 925, we quote: "In the absence of any specific agreement, no lien would be created on account of money expended by a husband upon the separate property of the wife. Peck v. Brummagim, 31 Cal. 450, 89 Am. Dec. 195. The law will not infer from such expenditures alone an agreement either to change the character of the property or an intent to charge the same with a lien. It must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's estate, and that it was intended to accrue to her interest. Flournoy v. Flournoy, 86 Cal. 294, 21 Am. St. Rep. 39, 24 P. 1012."

It is apparent that the reason back of each of these decisions stressed in the opinion on the subject, except in Estate of Barreiro, supra, which will be considered separately, is that a husband had authority to control the disposition of the community funds, and that he voluntarily annexed them to the separate property of the wife, who exercised no such power. From these facts the intention of the husband is presumed to have been that the improvements made with the community money should become a part of the separate property of the wife. To merely state a case where the facts are reversed and the husband has spent community funds in improving his own separate estate is to make manifest the palpable impropriety of applying these decided cases as precedents for holding that, simply because community property is annexed to the separate property of one of the spouses, the whole is thereby for all purposes the separate property of that spouse. Since the facts are reversed, logic compels the conclusion that the community funds do not merge in the separate property where the husband has, without consent of the wife, improved his own separate property with that belonging to the community. To hold otherwise would be to permit the authority of the husband in controlling the community property, given him in the interest of greater freedom in its use and for its transfer for the benefit of both himself and his wife, to become a weapon to be used by him to rob her of every vestige of interest in the community property with which the law has expressly invested her. Such a conclusion would violate every sense of justice, and outrage every principle of fair dealing, known to the law. The provisions of our Code do not require us to so hold, nor do the prior decisions of this jurisdiction compel or warrant a ruling which would thus uphold the marital marauding of the wife's estate. If it be true that, in order for the community property to remain such, there must be an agreement to that effect, where, under the direction of the husband, it is annexed to the separate property of the wife, then, where as in the instant case the husband has used his legal authority in the handling of the community funds to enhance the value of his own separate lands in order that it should become a part thereof, and be changed in its character to separate property, an agreement to that effect should be shown. Such consent cannot be presumed from the wife's mere silence, for the law has given her no right to say "No." It would be a novelty to hold that one who has no right to speak is presumed to have waived property rights by silence alone.

There is authority in other jurisdictions upholding the demands of justice in cases of this character and protecting the rights of the wife in community funds. In Sims v. Billington, 50 La. Ann. 968, 24 So. 637, it was held that, although buildings and improvements placed upon separate property of the husband during marriage and paid for with community funds belonged to the husband, the community has an interest therein which will be sustained, and the separate estate will be charged with the amount that such improvements have enhanced the value of the property. In Legg v. Legg, 34 Wash. 132, 75 P. 130, 132, it was said: "In equity and fairness to Malena Legg, as the survivor of the community, she should be reimbursed for betterments placed on the land by the community." A lien was there impressed upon the property for the amount allowed, but only to secure its payment to the widow after sale, which had been ordered by the trial court. And in Furrh v. Winston, 66 Tex. 521, 1 S. W. 527, 529, it is said: "It is well settled that separate estate of one member of the community must reimburse the community for any proper improvements made in good faith upon the separate estate with community funds." Our Supreme Court long since recognized the universal application of these principles, and announced upon the authority of New York, Louisiana, and Texas decisions that the beneficent purposes of the statute cannot be frustrated by voluntary transfer by a husband for the purpose of defeating any rights which the wife may have. Smith v. Smith, 12 Cal. 216, 73 Am. Dec. 533; Estate of Barreiro, supra. Text-writers also have perceived that the common law and civil law authorities are in accord that, while no lien is imposed, yet compensation may be claimed, in the event of improvement of separate property by community investment. McKay on Community Property (2d Ed.) p. 659, § 1013; Freeman on Cotenancy and Partition (2d Ed.) § 138.

In Estate of Barreiro, supra, the opinion asserts: "We therefore have but one question to settle: Were the improvements presumptively community property?" This follows the statement: "We do not mean to say that a fund might not be traced through this medium to its destination, and the character of the property finally acquired be determined according to the facts, because such is not the case before us, but only that in the instant case no character is given to the property by proof other than that the land was separate property." And so it is evident that this authority makes no pretense of holding that, where it is an established fact that valuable improvements paid for with community funds have been placed upon the husband's separate property, the entire estate is to be held as his without compensation or redress of any character to the wife. Later in the same case it is said: "The authorities hold that the most that the marital partnership may acquire under such circumstances, if anything, is a right to reimbursement to the extent of the value added to the property by the improvements."

[3, 4] We conclude that, while the Alhambra property must be regarded as being the separate estate of the defendant Provost, the plaintiff through proper proceedings and pleadings has a right to compensation in the amount of her share in the community, measured by the improvement that such property has effected in his separate property. This situation is not affected by the fact that defendant Provost deeded the entire estate at Alhambra to his daughter, for it was expressly found that this transaction was for the fraudulent purpose of depriving the wife of her right to separate maintenance from her husband, and that the daughter gave nothing of value for the property transferred to her.

Other arguments are advanced and discussed in the briefs which we do not regard necessary to consider in this decision. The judgment is reversed and the cause remanded for a new trial in accordance with the views herein expressed. Of course, the trial court may in the ends of justice even permit an amendment to the pleadings before another trial is had, but the rights of the parties can and should be determined in this action.

Judgment reversed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

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102 Cal. App. 798

Maria PROVOST, Plaintiff and Respondent, v. Anthony PROVOST and Edna L. Gomes, Defendants and Appellants. (Civ. 6244.)

District Court of Appeal, Second District, Division 2, California. Dec. 27, 1929.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

James H. Mitchell, of Los Angeles, for appellants.

Albert Sidney Brown, of Los Angeles, for respondent.

CRAIG, Acting P. J. Upon the authority of our decision in the next preceding case, Provost v. Provost et al. (Cal. App.) 283 P. 842, the judgment herein is reversed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

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102 Cal. App. 669

GIBBONS v. NARITOKA. (Civ. 3968.)

District Court of Appeal, Third District, California. Dec. 19, 1929.

1. Appeal and error 🔑1039(4)—Failure of pedestrian to allege party having control of automobile was agent of owner held harmless, where case was tried on agency theory.

In pedestrian's action against owner of automobile for injuries received when struck by automobile under supervision of a servant, failure to allege that servant was agent of owner *held* harmless, where case was tried on theory of agency, and evidence thereon was adduced without objection on part of automobile owner.

2. Appeal and error 🔑1042(5)—Order striking automobile owner's defense that employee had no authority to allow stranger to operate automobile, if made, held harmless, where case was disposed of on employee's negligence.

In pedestrian's action for injuries received when struck by automobile under control of agent, order striking out owner's affirmative defense to effect that employee had not authority to procure aid of a stranger to operate automobile, if made, *held* harmless, where case was disposed of on theory of employee's negligence.

3. Automobiles 🔑244(6)—Evidence that employee allowed stranger to drive truck, and that driver turned into street at intersection without slackening speed, held to support finding of negligence (Civ. Code, § 1714).

In pedestrian's action for injuries received when struck by motortruck while crossing street in pedestrians' pathway, evidence that employee allowed stranger to drive truck at 25 miles an hour amid heavy traffic, and that driver suddenly turned into street at intersection without slackening speed, striking pedestrian, *held* to support finding of negligence, since employee made no protest against reckless manner of driving truck, and during emergency sat beside driver without stopping machine, for under Civ. Code, § 1714, liability for injuries may attach, not only for result of one's deliberate negligent acts, but also for failure to exercise due care.

4. Automobiles 🔑244(50)—Evidence held to show pedestrian struck by motortruck while crossing street, was free from contributory negligence.

Evidence that pedestrian, after looking to her right and left and seeing no danger, attempted to cross street in pedestrians' pathway, and, reaching car track in center of street, again looked both ways, continuing across street, and was struck by motortruck turning onto street at intersection, *held* to show that pedestrian was free from contributory negligence.

5. Master and servant ⚷301(2)—Master is not liable for negligence of stranger assisting employee, when stranger's services are performed independently of employee.

Master is not liable to third person for negligent acts of unauthorized stranger procured by employee to assist him, when services of stranger are performed out of presence and independent of employee, or when services are not within scope of servant's employment, or when assistance is secured contrary to direct instructions of master.

6. Automobiles ⚷193(4)—Employer held liable to pedestrian, injured when struck by motortruck being negligently driven by stranger under supervision of employee.

Where employee driving motortruck procured assistance of stranger, and permitted stranger to drive truck while employee sat beside him, employer *held* liable for injuries sustained by pedestrian, struck while crossing street in pedestrian's pathway by motortruck turning onto street at 25 miles per hour in heavy traffic, since a master is liable to third person for result of negligent acts of stranger, whose services are procured without master's authority by servant to assist him within scope of his employment, under his supervision and in his presence.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Katherine Gibbons against D. Naritoka. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Fred E. Peterson, of Los Angeles, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment for damages for injuries sustained by a pedestrian through the negligence of the driver of an automobile while the plaintiff was crossing a street. The chief problem is whether the owner of the machine may be held liable for the negligent operation of the automobile while it is being driven by a stranger without the owner's authority, but in the presence of the employee who is hired for that purpose.

The defendant, who lived in Los Angeles, was the owner of the automobile. Frank Takao was employed to drive the truck in conveying produce to market. He was not authorized to procure an assistant to operate the machine. While the agent was engaged in hauling celery to market in Los Angeles, trouble occurred with the engine. A negro, who was an entire stranger to him, but who chanced to be near by, voluntarily assisted in starting the engine. Takao then invited the negro to drive the truck, which he proceeded to do. The agent sat by his side on the front seat, smoking a cigarette. They drove up San Pablo street to Twelfth street. At this point the traffic was heavy. The machine was traveling 25 miles an hour. The brake was defective. The plaintiff was 42 years of age and reasonably intelligent and alert. After looking to her right and left, and seeing no danger, she attempted to cross Twelfth street in the pedestrians' pathway. Reaching the car track in the center of the street, she again looked both ways for vehicles and then continued on her way. Without warning and without slackening its speed, the truck suddenly turned from San Pedro street into Twelfth street and struck the plaintiff from behind, dragging her 35 or 40 feet before the machine was brought to a stop. The plaintiff was seriously injured. Upon trial, the plaintiff was awarded a judgment of $2,428, from which this appeal was perfected.

A reversal of the judgment is sought on the ground that (1) the employee was not authorized to procure an assistant to operate the machine, and that the doctrine of respondeat superior therefore does not apply; (2) the complaint failed to state a cause of action, for the reason that it omitted to allege the agency of the servant, or that the accident occurred in the due course of his employment; (3) the court erred in striking from the answer an affirmative defense to the effect that the accident occurred through the negligence of a stranger, who was then operating the machine without the knowledge or authority of the defendant; and (4) the findings and judgment are not supported by the evidence.

It was stipulated that the defendant owned the machine; that Takao was employed by him to drive the truck; that the negro was procured to drive the automobile without the knowledge of the owner, and was engaged in operating it at the time of the accident; that the employee, Takao, sat by the driver's side on the front seat at that time; and that they were then occupied in the regular course of Takao's employment in returning the truck to the owner's place of business.

[1] The court adopted specific findings in accordance with the foregoing facts, upon all of these issues. The complaint failed to allege the employment or agency of Takao, the driver of the truck. This omission was due to the fact that at the time of the accident he gave his name as Naritoka, and it was assumed he was the owner of the machine. This omission was harmless, for the reason that the case was tried on the theory of the existence of this agency. This relationship was stipulated, and evidence of the fact was adduced without objection on the part of the defendant. The findings of the court also assumed that these were valid

issues in the case. The defendant had the full benefit of this issue.

[2] The record on appeal does not show that the court struck out the affirmative defense to the effect that Takao, the employee, had no authority to procure the aid of the negro to operate the machine. Even though such an order was made, it is also harmless, in view of our disposition of the appeal on the theory that the negligence of the employee, Takao, proximately caused the accident, since the machine was, in effect, actually operated under the personal supervision and direction of the agent himself, and he failed to remonstrate against the negro's reckless driving of the machine, and did not attempt to regulate its speed.

[3, 4] There is ample evidence of negligence in the operation of the machine, and of plaintiff's freedom from contributory negligence. At the time of the accident the truck was traveling 25 miles an hour amid heavy traffic. The brake was defective. Without warning, it suddenly turned from San Pedro street into Twelfth street. Without slackening its speed, it struck the plaintiff from behind and dragged her 35 or 40 feet before it was brought to a stop. During this emergency the employee sat by the side of the negro driver, within reach of the wheel, the brake, and the apparatus by means of which he could have readily shut off the gas and stopped the machine. He made no protest against the reckless manner of operating the truck, and he made no effort to regulate its speed. He may be presumed to have known the brake was defective. Under such circumstances, the employee was himself guilty of negligence which may be imputed to the owner of the machine. This will render him liable for the injuries sustained by the plaintiff, on the doctrine of respondeat superior.

Liability for injuries sustained may attach, not only for the result of one's deliberate negligent acts, but also for his failure to exercise due care in the performance of his duty or in the management of his property. Negligence may consist of affirmative acts or careless omissions. Section 1714, Civ. Code. Mr. Justice Henshaw says in the case of Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 518, 111 P. 530, 532, Ann. Cas. 1912A, 642: "Negligence may be active or passive in character. It may consist in heedlessly doing an improper thing, or in heedlessly refraining from doing the proper thing. Whether the circumstances call for activity or passivity, one who does not do what he should is equally chargeable with negligence with him who does what he should not."

[5] The authorities are not in strict harmony as to the master's liability to third persons for the negligent acts of an unauthorized stranger procured by the employee to assist him within the scope of his employment. 45 L. R. A. (N. S.) 382, note; 13 L. R. A. (N. S.) 572, note; Decennial Digests, Master and Servant, ⟹ 301 (2). Clearly the master is not liable when the services of a stranger are performed out of the presence and independent of the employee, or when the services are not within the scope of the servant's employment, or when the assistance is secured contrary to the direct instructions of the master. Emison v. Wylam Ice Cream Co., 215 Ala. 504, 111 So. 216; Butler v. Mec. Iron Foundry Co., 259 Mass. 560, 156 N. E. 720, 54 A. L. R. 849. Some cases go so far as to hold that the master is liable for such negligence only when there is either express or implied authority for the agent to procure assistance. 18 R. C. L. 785, § 245; 39 C. J. 1271, §§ 1458b–1459.

[6] The liability of the master has sometimes been denied upon the specific ground that the servant was not present at the time of the performance of the tortious acts complained of. Blumenfeld v. Meyer-Schmid Grocer Co., 206 Mo. App. 509, 230 S. W. 132. These cases, however, do not involve the principle of the co-operating negligence of an employee who is personally present with knowledge of the tortious acts of his assistant and possessing the ability to restrain or regulate such acts. By the weight of authority and in accordance with good reason, a master is liable to a third person for the results of the negligent acts of a stranger whose services are procured without the master's authority by the servant to assist him within the scope of his employment, under his supervision and in his presence. Gates v. Daley, 54 Cal. App. 654, 202 P. 467; Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611, 45 L. R. A. (N. S.) 382; Appel v. Eaton & Prince Co., 97 Mo. App. 428, 71 S. W. 741; Wellman v. Miner, 19 Misc. Rep. 644, 44 N. Y. S. 417; Grant v. Knepper, 245 N. Y. 158, 156 N. E. 650, 54 A. L. R. 845; Hollidge v. Duncan, 199 Mass. 121, 85 N. E. 186, 17 L. R. A. (N. S.) 982; Slothower v. Clark, 191 Mo. App. 105, 179 S. W. 55; Ellefson v. Singer, 132 App. Div. 89, 116 N. Y. S. 453; Dillon v. Mundet (Sup.) 145 N. Y. S. 975; City of Indianapolis v. Lee, 76 Ind. App. 506, 132 N. E. 605; Semper v. Am. Press, 217 Mo. App. 55, 273 S. W. 186; Hendler Creamery Co. v. Miller, 153 Md. 264, 138 A. 1.

The appellant relies upon the case of Vorbeck v. Patten-Davies Lumber Co., 67 Cal. App. 475, 227 P. 929, as authority exempting him in the present case from liability for the negligent operation of his truck. That case, however, is clearly distinguishable from the present case, upon the very principle heretofore announced. In that case, Baldwin was employed by the defendant lumber company to load trucks in the lumber yard. He had no authority to operate the trucks. The driving of the trucks was specifically delegated to a yard foreman. A loaded truck stood in the yard. The foreman was not present. Baldwin asked a baker boy, who chanced to be present, to drive the truck out. He did so. An accident occurred. Baldwin was not even present on the truck, or within sight, at the time of the accident. Quite properly the court held, under such circumstances, that the lumber company was not liable for the negligence of the driver of the truck. That decision is not in conflict with the foregoing rule of law, which is announced with relation to the facts of this case.

We are of the opinion that the defendant is liable in the present case for the consequences of the negligent omission on the part of the employee, Takao, to reasonably regulate the operation of the truck.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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103 Cal. App. 66

PEOPLE v. LAMEY. (Cr. 1857.) ★

District Court of Appeal, Second District, Division 1, California. Jan. 2, 1930.

Hearing Denied by Supreme Court Jan. 30, 1930.

1. Criminal law 🔑393(1)—Defendant's immunity from self-incrimination continued on trial of issue of insanity after trial and conviction on plea of not guilty (Const. art. 1, § 13; Pen. Code, § 1026).

Defendant's immunity under Const. art. 1, § 13, providing no person shall be compelled, in any criminal case, to be a witness against himself, *held* to continue on trial of plea of not guilty by reason of insanity, where a separate trial was had on that plea, under Pen. Code, § 1026, after defendant's trial and conviction on plea of not guilty, and it was therefore error to compel defendant to testify in the insanity trial, since law providing for separate trials is procedural merely and does not affect substantial rights.

2. Criminal law 🔑623—Defendant's constitutional rights and immunities are not impaired by provision for separate trials on pleas of not guilty and insanity (Pen. Code, § 1026).

Provision of Pen. Code, § 1026, for separate trials on issue of guilt and on plea of not guilty by reason of insanity, merely changes procedure, and does not affect substantial right or take away any of defendant's constitutional rights or immunities.

3. Burglary 🔑3—Defendant's entry into room to take personal property for temporary use, without intending to deprive owner thereof permanently, is not burglary.

Defendant entering room to take owner's personal property merely for temporary use cannot be convicted of burglary, but entry must have been with intent permanently to deprive the owner of the property.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Harold Lamey was convicted of burglary and other offenses, and he appeals. Reversed and remanded, with directions.

Frederic H. Vercoe, Public Defender, and Franklin Padan, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, P. J. The judgments followed upon convictions of the several crimes charged in counts I, IV, and V of the information. Count II was dismissed, and a new trial was granted of the charges contained in count III. On arraignment, the defendant had pleaded, on each count, "not guilty" and "not guilty by reason of insanity." With respect to the pleas of "not guilty," the evidence is amply sufficient to sustain the verdicts.

[1, 2] Appellant contends that the court erred in compelling him to become a witness during his trial on the plea of not guilty by reason of insanity. Over objections duly made, he was required to give testimony relating to the issues presented by that plea. This trial was before the same jury which had rendered verdicts on the principal issues. Section 1026 of the Penal Code outlines the proceeding. "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, * * * then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. * * *"

It is declared in the Constitution of California, art. 1, § 13, that no person shall be compelled, in any criminal case, to be a witness against himself. In this case, under the plea of not guilty, the effect of the verdict in each instance was that the defendant had committed the acts which, if committed by a sane person, would make him guilty of the alleged crimes. For the purposes of that verdict he was presumed to be sane, but, under his plea of not guilty by reason of insanity, the question of his status and responsibility as a criminal remained open and undetermined. That he was a criminal and subject to punishment was not yet established. Un-

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★Hearing denied by Supreme Court.

der the second plea, that issue was to be tried separately, but it was all in the same case. The second verdict, equally with the first, was necessary before a judgment of conviction could be rendered. Under the former practice, when the defendant relied upon his right to introduce evidence of insanity as part of his defense, it was well understood that the state had no right to compel the defendant to give testimony as a witness, even upon that issue. We do not perceive that his rights in this respect are in any way different under the new practice. The change is only a change of procedure; it does not affect a substantial right, and it does not take away any constitutional right or immunity. In People v. Troche (Cal. Sup.) 273 P. 767, 772, the defendant was tried on his plea of not guilty, and then under his plea of not guilty by reason of insanity, as provided by the present law. Pen. Code, §§ 1016, 1020, 1026. The jury found against him on both pleas. On appeal from the judgment, defendant contended that the provision of the State Constitution guaranteeing a public and speedy trial to one accused of a crime "means *one* speedy and public trial, and no more." To this the Supreme Court responded: "The trial had by the defendant, under the present law, amounted to one trial and no more." The very reasoning which sustains the present procedure at the same time preserves to the defendant all of his rights of defense. Among these rights, saved to the defendant under the Constitution, is the right of immunity from being compelled in any criminal case, to be a witness against himself.

"According to one of the oldest maxims of the common law, 'Nemo tenetur seipsum accusare,' any person, whether a party or stranger to the litigation, either in a civil action or a criminal prosecution, may, if he sees fit, refuse to answer any question the answer to which, if true, will render him punishable for crime, or which, in any degree, may tend to establish a public offense with which he might be charged. Rapalje on Witnesses, § 261. This principle of the common law doubtless had its birth in the abhorrence with which confessions coerced by inquisitorial torture were regarded alike in England and America. 8 R. C. L. p. 78. Its soundness has seldom been questioned. And today it stands among the guaranties of personal liberty and security in all the Constitutions, both of England and America.

"The words 'criminal case,' as used in section 13 of article 1 of the Constitution, are broader than 'criminal prosecution.' To bring a person within the immunity of this provision, it is not necessary that the examination of the witness should be had in the course of a criminal prosecution against him, or that a criminal proceeding should have been commenced and be actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law, and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal, unless the law has absolutely secured him against any use in a criminal prosecution of the evidence he may give; and this can only be done by a statutory provision that, if he submits to the examination and answers the questions, he shall be exempt from criminal prosecution for any offense that may be disclosed as a consequence of his examination." In re Tahbel, 46 Cal. App. 755, 758, 189 P. 804, 806.

[3] It is further contended by appellant that the court erred in refusing to give the following instruction relating to the charge of burglary: "Before you can find the defendant guilty of burglary it will be necessary for you to find beyond a reasonable doubt that in entering the room and apartment of E. M. Dailey, he did so with the intent permanently to deprive the owner of his personal property. If you believe the intent was merely for a temporary use of the personal property, the defendant cannot be convicted of burglary."

We think that the instruction states the law correctly and should have been given. People v. Brown, 105 Cal. 66, 38 P. 518, 519. The phase of the case covered by this instruction was not, in our opinion, sufficiently contained in the other instructions given. The evidence showed that the defendant unlawfully entered the apartment of Dailey and carried away to a nearby apartment certain personal property of the said Dailey without Dailey's knowledge or consent. But the circumstances connected with this act were such that the jury might have found that the defendant did not intend to permanently deprive the owner of his property. If this be so, then, as stated in People v. Brown, supra, "If he did not intend so to do, there is no felonious intent, and his acts constitute but a trespass."

The judgment of conviction of the crime of burglary as charged in count I of the information is reversed, and the cause is remanded for a new trial of all issues raised by both pleas to that count of the information. The judgments of conviction on counts IV and V are reversed solely on the ground of error as herein declared, relating to the trial on the pleas of "not guilty by reason of insanity." It is directed that the verdicts of guilty, as found on trial on the several pleas of "not guilty" of the charges contained in said counts IV and V, stand and remain in force without further trial thereof. It is further directed that the verdict on the pleas of "not guilty by reason of insanity" in relation to said counts IV and V be set aside, and that there be a new trial of the issues presented by said pleas of "not guilty by reason of insanity" as to said counts IV and V before another jury. After verdict shall have been duly returned upon trial of the issues now reopened, as hereinabove provided, the trial court will make such further orders or render such judgments as are in such cases provided by law.

We concur: HOUSER, J.; YORK, J.

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102 Cal. App. 744

ROBBINS v. SOUTHERN PAC. CO. et al.★

(Civ. 6265.)

District Court of Appeal, Second District, Division 2, California. Dec. 24, 1929.

Rehearing Denied Jan. 23, 1930. Hearing Denied by Supreme Court Feb. 20, 1930.

1. Appeal and error 🔑927(3)—Evidence need not be reviewed on appeal from judgment of nonsuit except as tending to establish facts favorable to appellant.

Appellate court on appeal from a judgment of nonsuit need not review evidence, except in so far as it tends to establish facts favorable to appellant.

2. Railroads 🔑327(1)—Every reasonable opportunity to look and listen must be taken before attempting to cross railroad tracks.

Tracks of a steam railroad are in and of themselves a warning of danger, and it is duty of one approaching them to take every reasonable opportunity to look and listen before attempting to cross.

3. Railroads 🔑328(2, 3)—Person about to cross railroad tracks has duty of coming to full stop and alighting from vehicle, if necessary.

Where view of railroad tracks is obstructed, a greater quantum of caution is demanded, and, in case obstruction is such as to prevent a view up and down the tracks without coming to a full stop and, if necessary, alighting from vehicle, then it is duty of one about to cross tracks to do those things.

4. Railroads 🔑330(2, 3)—Failure of those in charge of train to give signal or absence of flagman does not absolve one attempting to cross tracks from duty of using ordinary care.

Failure of those in charge of a train to give customary or law-demanded signal, as by blowing whistle or sounding locomotive bell, does not absolve person attempting to cross railroad tracks from duty of using ordinary care for his own protection, and the same is true as to absence of flagman at a point where one is usually stationed.

5. Railroads 🔑330(2)—Adoption of safety devices by railroad or maintenance of flagmen does not release individual from obligation of exercising ordinary care.

Adoption by railroad company of safety devices or maintenance of flagmen for protection of public never releases individual from obligation of exercising ordinary care for his own protection, although quantum of care which will be reasonable may be less where safeguards are maintained.

6. Railroads 🔑327(1)—Obligation to stop, look, and listen before crossing tracks is not absolute.

Duty to stop, look, and listen before attempting to cross railroad tracks is not an absolute one, but rather one the exercise of which is dependent on particular conditions obtaining at the time.

7. Railroads 🔑328(1)—Test of negligence in attempting to cross railroad track, with view obstructed, is whether reasonably prudent person would have been justified in acting on appearances.

Test of negligence on the part of one about to cross a railroad track, the view of which is obstructed, is as to whether a reasonably prudent person situated as individual under consideration is situated would have been justified in acting on appearances as it may be assumed he did, and, where reasonably prudent men might disagree as to whether ordinary care was exercised, question is for jury.

8. Trial 🔑165—Every favorable inference and every favorable presumption from evidence must be considered, on motion for nonsuit, as proved in favor of plaintiff.

On a motion for nonsuit, every favorable inference fairly deducible, and every favorable presumption fairly arising, from evidence adduced, must be considered as facts proved in favor of plaintiff.

9. Railroads 🔑350(28)—Person placing trust in instrumentalities provided by railroad for protection of public and failing to give warning is not contributorily negligent as matter of law.

Person placing his trust in instrumentalities provided by railroad company for protection of public is not guilty of contributory negligence as a matter of law, in case they fail to give warning of impending danger or death.

10. Death 🔑58(1)—Defendants under affirmative plea of contributory negligence had burden of proving negligence of deceased contributed to death.

Defendants, in action to recover damages by reason of death of plaintiff's husband, had duty of proving that deceased was guilty of negligence contributing to his death under their affirmative plea of contributory negligence.

11. Death 🔑58(1)—One dying as result of accident will be presumed, without evidence to contrary, to have exercised ordinary care for his own safety.

Where death has resulted from an accident, and lips of injured party are thus sealed, it will be presumed, in absence of evidence to contrary, that he exercised ordinary care for his own safety.

12. Negligence 🔑136(9)—Contributory negligence is question of law when only one conclusion can reasonably be drawn from evidence.

Question of contributory negligence becomes one of law for court to determine, where only one conclusion can be reasonably drawn from evidence, and, even in absence of conflict in evidence, contributory negligence is a mixed ques-

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★Rehearing denied. Hearing denied by Supreme Court.

tion of law and fact which should be left to jury, if different conclusions on matter may rationally be reached from evidence.

13. Railroads ⚷350(22)—Contributory negligence of deceased in attempting to cross tracks when view was obstructed held for jury.

Contributory negligence of deceased in attempting to cross railroad tracks at time view was obstructed *held* to present a question for jury under evidence.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Katherine Robbins against the Southern Pacific Company and others. Judgment of nonsuit, and plaintiff appeals. Reversed.

Hewitt, Ford, McCormick & Crump, of Los Angeles (Frank J. Barry, of Los Angeles, of counsel), for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

BURNELL, Justice pro tem. [1] This being an appeal from a judgment of nonsuit, it is unnecessary to review the evidence except in so far as it tends to establish facts favorable to appellant's contention that the death of her husband was caused by respondents' negligence. With this thought in mind, and ignoring all contradictory evidence, we may thus state the situation as it was presented to the court below on respondents' motion for a nonsuit:

The accident which resulted in the unfortunate death of Joseph M. Robbins occurred at 6:05 p. m. of February 24, 1926, at Prestolite crossing, a public thoroughfare in the city of Los Angeles. At this point the Southern Pacific maintains four lines of railroad tracks running in an easterly and westerly direction which are crossed by an oiled rock road. On the night in question the deceased was driving a Dodge truck, towing a Chevrolet car, in a northerly direction along the abovementioned road when his truck was struck by a Southern Pacific locomotive running from west to east on the third track from the south and driven by respondent Baker, an engineer in the employ of respondent railroad company. View of the tracks was obstructed by box cars, of which there were 4 on the first or southerly track to the west of the road, the nearest being from 12 to 15 feet to the left of the deceased as he approached the crossing, while there were about 50 of such cars on the second track, so that it was impossible to see the third and fourth tracks at all. These facts were testified to by the witness Cunningham, who was riding on the truck with the deceased. The same witness also swore that he heard no whistle blown or bell sounded as the truck approached the crossing, that there "was not any headlight from the engine showing down the road," and that he was positive that the headlight was not lighted. No "wigwag" or automatic signal was maintained at the crossing at the time of the accident, but a watchman, the respondent O'Dell, was employed by the railroad company, whose duty it was "to stop traffic whenever a train would come—automobiles that crossed the Prestolite Crossing." At the time of the accident he had been so employed for the past seven months.

Robbins was familiar with the crossing, having frequently driven across the tracks over the same road which he traveled on the night in question. On this point Cunningham testified: "I had known the deceased the last several months; had ridden with him often; sometimes two or three times a week, and sometimes not so often; and had ridden over the same road with him often before, two or three times a week, for seven months, but not every week; sometimes I might go a couple of weeks and maybe I wouldn't see him for three weeks after that; had crossed with him there at this place sometimes in the evening several times." As the deceased and Cunningham approached the tracks at a speed of between four and six miles per hour—so slowly, indeed, that the watchman testified he thought the truck had stopped—the watchman was standing in the crossing, between the rails of the fourth or northerly track, facing the Dodge truck, "with the lanterns back of his legs." His instructions were to halt traffic on the approach of trains at night by swinging a red lantern held in his left hand with the arm in a horizontal position, while a white lantern, held at his right side, remained motionless, but on this occasion he gave no signal whatever of the approach of the engine. The deceased had driven the truck across the first and second tracks when Cunningham saw the engine bearing down upon them, and, with an exclamation of warning to his doomed companion, jumped from the truck an instant before the engine struck it. The speed at which the locomotive was being driven was such that after the impact "it kept on going for some 900 feet and at a speed of 35 or 40 miles per hour." Measurement of the skid marks on the rails showed them as extending 532 feet from the crossing. The truck was carried about 90 feet east of the crossing, and was "all smashed to pieces," and the driver so badly injured that he died the same night. Cunningham further testified that he was not watching the deceased at the time of the accident, but that as they were traveling toward the tracks he himself "looked up the track to see if any train was coming," but could not see up the track, and that he also looked when they reached the first track, and when they were between the first and second lines of track, and just as they were about to cross the third. The watchman's testimony was to the effect that

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

he was blinded by the lights on the truck—"couldn't see what it was doing"—and thought it had stopped.

From the statement made by the trial judge in ruling on the motion for nonsuit, which statement is incorporated in the supplement to appellant's opening brief, it is evident that the motion was granted on the theory that the evidence disclosed that the deceased was guilty of contributory negligence as a matter of law, and it is upon this theory that respondents urge an affirmance of the judgment. In support thereof they direct our attention to certain well-established principles of law to which we shall now advert.

[2-4] The tracks of a steam railroad are in and of themselves a warning of danger, and it is the duty of one approaching them to take every reasonable opportunity to look and listen before attempting to cross them. Hutson v. Southern Cal. Ry. Co., 150 Cal. 701, 89 P. 1093; Holmes v. South Pacific Coast Ry. Co., 97 Cal. 167, 31 P. 834; Green v. Los Angeles, etc., R. R. Co., 143 Cal. 37, 76 P. 719, 101 Am. St. Rep. 68; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651. If the view of the tracks is obstructed, a greater quantum of caution is demanded (Herbert v. Southern Pacific Co., supra; Griffin v. San Pedro, etc., R. R. Co., 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 P. 175); and, if the obstruction is such as to prevent a view up and down the tracks without coming to a full stop, and, *if necessary*, alighting from his vehicle, then it is the duty of one about to cross such tracks to do these things. Murray v. Southern Pacific Co., 177 Cal. 1, 169 P. 675. Nor does the failure of those in charge of a train to give the customary or law-demanded signal, as by blowing the whistle or sounding the locomotive bell, absolve him from his duty to use ordinary care for his own protection. (Stefanich v. Payne, 54 Cal. App. 210, 201 P. 940; Hutson v. Southern Cal. Ry. Co., supra); and the same is true as to the absence of a flagman at a point where one is usually stationed (Stefanich v. Payne, supra).

[5, 6] Indeed, it may be stated as a general rule that the adoption by a railroad company of safety devices or its maintenance of flagmen for the protection of the public never releases the individual from the obligation of exercising ordinary care for his own protection, although the quantum of care which will be reasonable may be less where the company maintains such safeguards than where it does not. Koch v. Southern Cal. Ry. Co., 148 Cal. 677, 84 P. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795. On the other hand, it is equally well settled that the duty to stop, look, and listen is not an absolute one, but rather one the exercise of which is dependent on the particular conditions obtaining at the time (Hoffman v. Southern Pacific Co. [Cal. App.] 279 P. 474; Whitney v. Northwestern Pacific R. R. Co., 39 Cal. App. 139, 178 P. 326), and that "if there is reasonable cause to believe there is no danger it is not negligence per se not to stop, look, or listen" (Wilkinson v. United Railroads, 195 Cal. 185, 232 P. 131, 135). In the case just cited, it is also held that one of the circumstances which will excuse a failure to look and listen is "where one has entered on the crossing under an express or implied invitation of the company's employees giving reasonable assurance of safety." Such assurance of safety may consist of raised traffic bars, of open gates where such devices are maintained at crossings, or of the absence of a watchman or flagman at a crossing where one is usually stationed when trains are approaching. Wyseur v. Davis, 58 Cal. App. 598, 209 P. 213; Gregg v. Western Pacific R. R. Co., 193 Cal. 212, 223 P. 553, 554; Pennsylvania Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 845, 10 Am. St. Rep. 136; Elias v. Lehigh Valley R. R. Co., 226 N. Y. 154, 123 N. E. 73, 74; Hooper v. Boston & Maine Ry. Co., 81 Me. 260, 17 A. 64, 65.

Pennsylvania Co. v. Stegemeier, supra, which is cited and relied on in Wyseur v. Davis, supra, was a case where a pedestrian attempted to cross a railroad track over a public street in the city of Ft. Wayne. The gates were open at the time, and the flagman was in his shed, but he gave no warning. It was held that under the circumstances it could not be said, as a matter of law, that the pedestrian was guilty of contributory negligence in attempting to cross without taking the precautions usually required to discover approaching trains, and the court said: "The case at bar is to be discriminated from those in which the injured person enters upon a track where there is no affirmative assurance of safety, for here the fact that the gates were up and no warning given by the flagman was an affirmative assurance of safety, upon which a citizen might act without being chargeable with negligence. This case is essentially unlike one where the only negligence is the mere failure to sound a whistle or ring a bell, for here the assurance was that there was no train near the crossing. This assurance constitutes the distinctive feature of this class of cases, for the reason that it is in the nature of an invitation to cross and of a declaration that there are no approaching trains."

[7-9] In the final analysis, the test of negligence as applied to one about to cross a railroad track, the view of which is obstructed, should be: Would a reasonably prudent person, situated as the individual under consideration was situated, and seeing what he then saw, have been justified in acting upon appearances as it may be assumed he did? If reasonably prudent men might disagree as to whether ordinary care was exercised in the premises, the question should be left for the jury to determine. Hoffman v. Southern Pacific Co., supra; Gregg v. Western Pacific R.

R. Co., supra. On a motion for nonsuit, "every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs" (Gregg v. Western Pacific R. R. Co., supra), and the fact that the deceased had frequently crossed over the tracks at Prestolite Crossing during the seven months preceding the accident, during all of which period of time the flagman had been stationed there to warn traffic of approaching trains, might fairly raise the inference that he knew that a flagman was kept there by the company whose duty it was to so warn the public. Seeing the flagman there as he approached and was about to cross the tracks, and noting that, instead of giving the customary signal as hereinabove described, the man stood motionless, facing the truck, and with his lanterns held back of his legs, had the deceased not a right to assume that the danger of which the swinging red lantern usually gave warning was absent? Did he not "enter on the crossing under an * * * implied invitation of the company's employees giving reasonable assurance of safety?"

To answer these questions in the negative is to hold that as a matter of law one who places his trust in the instrumentalities provided by a railroad company for the protection of the public is guilty of contributory negligence if they fail to give warning of impending danger or death. This is not the law. A case which well illustrates the true rule is that of Hooper v. Boston & Maine Ry. Co., supra. There the deceased and others were riding slowly at 10 o'clock at night toward a railroad crossing. They heard a whistle, but were uncertain whether it was from the road ahead of them or from another quite near. The gate at the crossing, though usually attended when trains were passing, was open, and no flagman was near. The view of the approaching train was obstructed, and the deceased drove on and was struck by it. It was held that judgment against the railroad company for the death of the deceased would not be reversed for contributory negligence, and the court said: "Clearly the gates must be tended, or they become false signals, and lead the traveler into the very danger against which they were intended to guard him. Open gates invite passing; closed gates forbid passing. And by these signals thousands of travelers are governed every day. And, as gatemen usually perform their duties with fidelity,—as much so as conductors, or engineers, or switchmen, —we think it would be a wrong to them, as well as to travelers, to hold that every one who trusts them is guilty of a want of ordinary care. It would not be true. Ordinarily, the great mass of the community do trust them. And, so far as we can discover, it has never been held by any court that to trust them is a want of ordinary care. The contrary has been held in many cases. A collision at a railroad crossing is prima facie evidence of negligence on the part of the traveler. But the inference of negligence may be repelled. And we think that an open gate and an obstructed view may be sufficient for this purpose. Certainly, they are sufficient to bring the question within the province of the jury to decide, and prevent a nonsuit, or the setting aside of the verdict, if the jury find in favor of the traveler."

In Elias v. Lehigh Valley R. R. Co., a case to which we have already adverted, the situation was similar in many ways to that in the instant case. There the driver of a sleigh was injured by collision with a train at a road crossing. There was evidence that a flagman stationed at the crossing was in his shanty at the time of the accident and gave no signal of warning to the driver as he approached the tracks. The court there said: "Where, although not required so to do, a railroad has stationed flagmen at a crossing, that fact, as to one who knows it and has come to rely upon it, may be considered by a jury in deciding whether under all the circumstances he has used reasonable care for his own protection. The absence of such a flagman may well affect the vigilance they would otherwise have required of an approaching traveler. As to the defendant's negligence, it is true that no flagman need have been stationed at this point. Having voluntarily placed one there, the defendant could later withdraw him. Its duty was done if it gave reasonable warning of the passing of its trains, and often the bell and whistle would as a matter of law be sufficient. Not always, however. Where the practice of guarding the crossing was not abandoned, where it was neglected by him whose duty it was to warn travelers, his unexplained failure might be found to be negligent towards those who knew of his habitual presence and had become accustomed to his warnings. The danger is obvious. It is like in kind to that caused by raised and untended gates. To some extent it is an assurance that the way is safe."

[10, 11] In the instant case respondents urge the lack of any positive evidence to prove that the deceased anticipated the presence of the flagman, or that he saw him, or that he relied on him to give warning of the approach of trains. The first of these objections has been covered by what we have said as to the inference to be drawn from the fact of deceased's familiarity with the crossing; the second may be disposed of by reference to the testimony of Cunningham that the flagman was on the crossing, facing the truck, and therefore in full view of Robbins as well as of the witness who was seated by his side, and by the fact that, if Robbins was guilty of negligence in not looking ahead, that was something the burden of proving which lay on the defendants under their affirmative plea of contributory negligence (Dawson v. San Diego Electric Ry. Co., 82 Cal. App. 141, 255 P. 215), and that there was no evidence that he was not keeping a lookout ahead. To this may be added the application of the principle that, where death has resulted from an accident, and the lips of the injured party are thus sealed, it will be presumed, in the absence of evidence to the contrary, that he exercised ordinary care for his own safety (Larrabee v. Western Pacific R. R. Co., 173 Cal. 743, 161 P. 750)—in this instance consisting at least of looking ahead of his vehicle as he approached the tracks—and the further presumption that a person of normal sight and hearing "must have seen and heard that which was within the range of his sight and hearing" (Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992, 995). Manifestly, as to the third objection, no testimony could have been adduced as to whether or not deceased relied upon the flagman to warn him of danger, as only Robbins could have told what was in his mind; but here again we think it may well be inferred, at least with respect to a motion for nonsuit, that, knowing a flagman was stationed at the crossing, and seeing him there as he was about to drive across the tracks, and observing that he gave no signal, Robbins relied on these facts as an indication of lack of danger. There is most certainly no evidence that he did not rely upon them.

[12] It is only when but one conclusion can be reasonably drawn from the evidence on the question of contributory negligence that the question becomes one of law for the court to determine. Even in the absence of conflict in the evidence, contributory negligence is a mixed question of law and fact which should be left to the jury, if different conclusions upon the matter may rationally be reached from the evidence adduced. Murray v. Southern Pacific Co., supra; Young v. Pacific Electric Ry. Co. (Cal. Sup.) 279 P. 438; House v. Meyer, 100 Cal. 592, 35 P. 308; Whitney v. Northwestern Pacific R. R. Co., 39 Cal. App. 139, 178 P. 326; Katz v. T. I. Butler Co., 81 Cal. App. 747, 254 P. 679; Dawson v. San Diego Electric Ry. Co., supra. The rule is thus stated in Peak v. Key System Transit Co., 88 Cal. App. 354, 263 P. 578, 582: "In order that this court could determine as a matter of law that respondent [appellant here] was guilty of contributory negligence, it must be clearly shown from the undisputed facts, judged in the light of common knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure. Nehrbas v. Central Pac. R. R. Co., 62 Cal. 320. The evidence against the plaintiff should be so clear as to leave no room for doubt, and the facts such that the inference is irresistible, to justify this court in determining as a matter of law plaintiff guilty of contributory negligence. Schneider v. Market St. R. R. Co., 134 Cal. 487, 66 P. 734; Schurman v. L. A. Creamery Co., 81 Cal. App. 758, 254 P. 681."

[13] Under the state of facts presented by the evidence adduced on behalf of the plaintiff in this case, we are of the opinion that the court below should have left it to the jury to determine whether, under all the circumstances disclosed by the proof, Robbins acted as an ordinarily prudent man might have been expected to act, knowing what he knew and seeing what he saw—in other words, whether or not he used reasonable care for his own protection.

The judgment is reversed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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102 Cal. App. 675.

PEOPLE v. JUSTICE'S COURT OF SAN BERNARDINO TP., SAN BERNARDINO COUNTY, et al. (Civ. 150.)

District Court of Appeal, Fourth District, California. Dec. 19, 1929.

Justices of the peace ⚿31—Justice's court, after finding that population of township exceeds 30,000, must take jurisdiction in accordance with law (Code Civ. Proc. § 112; Pen. Code, § 1425).

Justice's court, after finding that population of township is 30,000 or more, must take jurisdiction of all matters and causes coming within jurisdiction, in accordance with provisions of Code Civ. Proc. § 112, and Pen. Code, § 1425.

Original application by the People for a writ of mandate prayed to be directed to the Justice's Court of San Bernardino Township, County of San Bernardino, and George W. Holbrook, Justice of the Peace of such Township. Writ granted.

Geo. H. Johnson, Dist. Atty., and James L. King, Deputy Dist. Atty., both of San Bernardino, for petitioner.

Stanley Mussell and M. O. Hert, both of San Bernardino, for respondents.

MARKS, J. This proceeding was instituted in this court to compel the respondent justice's court and the duly elected and qualified justice of the peace of San Bernardino township, county of San Bernardino, state of California, to exercise original jurisdiction in certain cases under section 112 of the Code of Civil Procedure and section 1425 of the Penal Code, of which respondent would have jurisdiction, provided San Bernardino township has a population of 30,000 or more.

All the facts alleged in the petition are admitted in the answer, except that the township has a population of 30,000 or more, and both parties joined in a request to this court that it appoint a referee to determine the population of the township. Joseph Rich was appointed as such referee, and on December 17, 1929, submitted his report, in which he found that on December 1, 1929, the population of San Bernardino township was, and ever since has been, in excess of 40,000. The parties made no objection to the report and did not question the correctness of the findings of the referee. In accordance with such report and the findings of the referee, and upon the evidence submitted in support thereof, this court now finds as a fact that the township of San Bernardino, county of San Bernardino, state of California, on the 1st day of December, 1929, had, and now has, a population in excess of 30,000.

In the case of County of Los Angeles v. Justice's Court of Beverly Hills Township et al., 281 P. 611, the Supreme Court has held that the jurisdiction of a justice's court depends on the fact of the population of the township, and that, when it is found that its population is 30,000 or more, it must take jurisdiction of all matters and causes coming within the jurisdiction prescribed by the present law.

Therefore let a peremptory writ of mandate issue, directed to and commanding the respondent, the justice's court of San Bernardino township, county of San Bernardino, state of California, and George W. Holbrook, justice of the peace thereof, to forthwith accept and exercise the jurisdiction prescribed by section 112 of the Code of Civil Procedure of the state of California and section 1425 of the Penal Code of the state of California, for justice's courts in cities, cities and counties, towns, and judicial townships having a population of 30,000 or more.

We concur: SLOANE, P. J.; BARNARD, J.

103 Cal. App. 383

HOLLY SUGAR CORPORATION v. MORRISON, Justice of the Peace, et al. (Civ. 75.)

District Court of Appeal, Fourth District, California. Dec. 19, 1929.

As Modified on Rehearing Jan. 23, 1930.

Justices of the peace ⚷31—Justice's court must take jurisdiction when township in which court is located has been determined to have required population (Code Civ. Proc. § 112; Pen. Code, § 1425).

Where parties to cause of action stipulated that findings of the referee, that township had population in excess of that required for exercise of justice's court's jurisdiction, was correct, justice's court was required to take jurisdiction of all matters coming within its jurisdiction prescribed by Code Civ. Proc. § 112, and Pen. Code, § 1425, since jurisdiction of justice's court depends on fact of population of township.

Application by the Holly Sugar Corporation for a writ of mandate prayed to be directed to the Justice's Court of Santa Ana Township, County of Orange, Kenneth E. Morrison, Justice, to compel the justice to exercise original jurisdiction in a certain cause which he had refused to entertain. Writ granted.

Scarborough, Forgy & Reinhaus, of Santa Ana, for petitioner.

L. A. West and B. Z. McKinney, both of Santa Ana, for respondents.

MARKS, J. This proceeding was instituted in this court to compel respondent to receive and file a complaint in a civil action wherein petitioner here and plaintiff therein sought to recover judgment upon a promissory note. It was alleged in the complaint that there was the sum of $592.89 principal, $100 attorney's fees, and accrued interest due and unpaid thereon, in a total sum of less than $1,000. Petitioner further seeks to compel respondent to take jurisdiction of, to proceed with the hearing and disposition of said action on the ground that Santa Ana township had, and still has, a population in excess of 30,000. The answer of respondent admits all of the facts alleged in the petition except the population of the township.

Upon stipulation of the parties, W. F. Menton was appointed referee to take evidence and determine the population of the township. On December 17, 1929, he submitted his findings and report, in which he found that the population of Santa Ana township was, and now is, in excess of 30,000. On December 19, 1929, this court found that the population of Santa Ana township was in excess of thirty thousand and ordered a peremptory writ of mandate to issue requiring respondent to file the complaint of petitioner and take jurisdiction of the action. Petitioner filed a petition for rehearing, which was granted. Petitioner's complaint was offered for filing with respondent on October 26, 1929. The original report of the referee found the population of Santa Ana township to be in excess of thirty thousand on December 10, 1929. Between these dates the statute of limitations had run on petitioner's cause of action. The referee has now filed a report in which he found that the population of Santa Ana township was, on October 26, 1929, and still is in excess of thirty thousand. The parties have stipulated that the findings of the referee are correct and that they may be adopted as the findings of this court. Therefore, in accordance with such report and the findings of the referee and upon the evidence submitted by him in support thereof, this court now finds as a fact that the township of Santa Ana, county of Orange, state of California, on October 26, 1929, had and still has a population in excess of 30,000.

Under authority of the case of County of Los Angeles v. Justice's Court of Beverly Hills Township et al. (Cal. Sup.) 281 P. 611, we must hold that the jurisdiction of a justice's court depends upon the fact of the population of the township, and when it is found and determined that it has a population of 30,000 or more, it must take jurisdiction of all matters coming within the jurisdiction prescribed by the present law. While this proceeding only involves the filing of a complaint in a civil action, the determination of the population of Santa Ana township herein at more than 30,000 should require the respondent to accept and exercise the jurisdiction prescribed by section 112 of the Code of Civil Procedure of the state of California and section 1425 of the Penal Code of the state of California.

Therefore, let a peremptory writ of mandate issue, directed to, and commanding the respondent the justice's court of Santa Ana township, county of Orange, state of California, and Kenneth E. Morrison, justice of the peace thereof, to forthwith accept and file the complaint of petitioner herein upon payment of the legal filing fee therefor, the said filing of such complaint to be as of the date of October 26, 1929, and further commanding respondent to exercise jurisdiction over said cause and proceed to the hearing and determination thereof as required by law.

We concur: SLOANE, P. J.; BARNARD, J.

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102 Cal. App. 710

INDIAN REFINING CO., Inc., v. ROYAL OIL CO., Inc., et al. (Civ. 21.)

District Court of Appeal, Fourth District, California. Dec. 21, 1929.

1. Corporations 🔑45½, 514(1), 672(2)—The word "Inc." when used following name of corporation or in pleading is equivalent to the phrase "a corporation."

The word "Inc." is an abbreviation meaning incorporated, and, when used following a corporate name or in a pleading, is the equivalent of the phrase "a corporation."

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Inc.]

2. Corporations 🔑673—Finding that plaintiff is Maine corporation and that many of its records are kept under its corporate name, followed by the letters "Inc.," held sustained by evidence (Civ. Code, § 357).

Under Civ. Code, § 357, providing that misnomer of corporation does not invalidate written instrument, finding that I. R. Co. is Maine corporation and is also referred to as I. R. Co., Inc., and that many of its records are kept under the latter name, *held* sustained by evidence, in action on contract, resisted on the ground that plaintiff had no authority to do business within state.

3. Corporations 🔑642(7)—Suit by foreign corporation is not itself "doing business" within state within meaning of statute (St. 1923, p. 1037, § 7).

The bringing of an action by a foreign corporation does not constitute "doing business" within meaning of St. 1923, p. 1037, § 7; the right of a foreign corporation to sue and collect purchase price of merchandise sold in interstate commerce being unquestioned.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Doing Business.]

4. Corporations 🔑673—Defendant has burden to show that plaintiff foreign corporation is not entitled to maintain action because of bar of statute, as to doing of business within state.

In an action by a foreign corporation on contract, resisted on the ground that plaintiff cannot recover because a foreign corporation doing business within the state without compliance with state law, defendant has burden to show that plaintiff is within bar of statute.

5. Corporations 🔑673—Finding that foreign corporation had withdrawn from intrastate business within state since making of contract, and was entitled to maintain suit on contract, held supported by evidence.

Evidence *held* to sustain finding that plaintiff corporation had right to do business within state of California, when contract was made, but thereafter withdrew and has not since maintained office within state for purpose of transacting or doing intrastate business, and therefore was entitled to sue on contract.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by the Indian Refining Company, Inc., against the Royal Oil Company, Inc., and others. Judgment for plaintiff, and defendants appeal. Affirmed.

David W. Richards, of San Bernardino, for appellants.

N. C. Peters, of San Bernardino, for respondent.

BARNARD, J. This is an appeal by defendants from a judgment in favor of the plaintiff in an action for the purchase price of certain merchandise sold by the plaintiff to the defendant Royal Oil Company, Inc., the payment for which was guaranteed in writing by the other defendants. The complaint was filed May 18, 1926. The sole ground of this appeal is the contention that the plaintiff is a foreign corporation, that it was illegally doing business in California at the time this action was begun, and for that reason it is unable to maintain the action. Appellants attack the following findings of fact made by the trial court as unsupported by the evidence:

"I. The plaintiff Indian Refining Company is a Maine corporation and is also referred to as Indian Refining Co., Inc., and many of its records are kept under the name of 'Indian Refining Company, Inc.'

"II. That during the year 1925 when said goods were sold and the contracts made and the obligation incurred above mentioned said plaintiff was duly authorized to do intrastate business in the State of California, and had complied with all of the laws of the State of California, pertaining to the right of a foreign corporation to do business within this state, and had duly filed in the office of the Secretary of State a certified copy of its articles of incorporation as required by law.

"III. That in the year 1926 withdrew from the right to do intrastate business in the State of California, and since said withdrawal did not do any intrastate business in said State of California, and that said plaintiffs since the year 1925 has not maintained an office in the State of California for the purpose of transacting or doing intrastate business nor entering this state for such purpose."

Appellants first contend that there is no evidence that respondent had ever filed its articles of incorporation in California; it being their contention that there is no proof that Indian Refining Company, Inc., is the same corporation as Indian Refining Company. Frank C. Jordan, secretary of state, testified that the only record in his office of any foreign corporation by any such name is that of a Maine corporation, which was incorporated on November 4, 1904, under the name of Indian Asphalt Company, and that its name was changed to Indian Refining Company on or about May 1, 1906; that on January 24, 1914, this corporation filed in his office a certified copy of its certificate of organization and various amendments, with a designation of a certain resident of San Francisco, Cal., as its resident representative in California, for the purpose of service. He further testified: "* * * However, there is no foreign corporation filed in this office by the name of Indian Refining Company, Inc. The nearest approach to that name is as above stated. The Indian Refining Company which I just referred to filed a certificate surrendering its right to do intrastate business on January 5th, 1926."

[1, 2] While this action was brought in the name of "Indian Refining Company, Inc.," as plaintiff, it has been held that the abbreviation "Inc.," means "incorporated," and is equivalent to "(a corporation)." Goldberg, Bowen & Co. v. Dimick, 169 Cal. 187, 146 P. 672. On the same reasoning, the words "Indian Refining Co., Inc.," as used in the complaint herein, are equivalent to "Indian Refining Company (a corporation)." The word "Inc." as used in the complaint is fully shown by the evidence in the record to be merely descriptive and not a part of the name of the corporation. Section 357 of the Civil Code reads as follows: "The misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended." One witness testified that he was assistant to the controller of the Indian Refining Company, and that "the correct name of plaintiff in this case is Indian Refining Co., but has heretofore often been referred to and many of its records are kept under the name of 'Indian Refining Co., Inc.' The two names refer to the plaintiff, a Maine corporation." There was ample evidence to sustain the first finding complained of.

The objection raised to the second finding is based upon the variation in names, just referred to. The evidence shows the action is based upon merchandise sold in the year 1925. No failure to comply with the law of the state of California prior to 1926 being claimed, nor any evidence thereof being pointed out, other than that assumed to arise from this difference in names, the evidence is sufficient to sustain the second finding of the court.

Appellants next contend that, even though plaintiff had complied with the law relative to a foreign corporation doing business in this state, including the filing of its articles of incorporation with the secretary of state, and the designation of an agent, and had thereafter on January 5, 1926, filed with the secretary of state a certificate surrendering its right to do intrastate business in the state of California, it still cannot maintain this action, for the reason that, after filing said certificate of withdrawal, it has continued to do business in the state of California, and that the third finding of fact above set forth is not supported by the evidence. The transaction out of which this action arose occurred in August, 1925, at a time when, under the evidence introduced, the plaintiff was lawfully doing business in California. If we assume that a foreign corporation may not, after filing a certificate of withdrawal from intrastate business in California, maintain an action here on account of business done prior to the withdrawal, if it has in fact continued to do business in this state after the purported withdrawal (see S. F. Breweries, Limited, v. Superior Court, 80 Cal. App. 433, 251 P. 935), there remains the question as to whether this plaintiff corporation so continued to carry on intrastate business, after notice of withdrawal.

[3] Appellants first insist that the bringing of this action in itself constituted doing business in this state, within the meaning of the statutes governing this case. St. 1923, p. 1037, § 7. We think that this contention cannot be upheld. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 P. 411. Where a foreign corporation has complied with the provisions of law enabling it to do business in this state, and has subsequently withdrawn from such intrastate business, and filed the certificate thereof in the proper manner, there is nothing in our law to prevent it from subsequently maintaining an action to collect

an account that arose while it was lawfully doing business in this state, and the filing of such an action does not constitute doing business within the meaning of the statute.

It is further argued that the evidence itself shows that the plaintiff did, in fact, continue to do business in California after the filing of the certificate of withdrawal referred to. Appellants rely upon the following testimony of one H. A. Meek: "Q. You say you are the Pacific Coast representative of the Indian Refining Company? A. Yes sir. Q. Where is your principal place of business? A. Lawrenceville, Illinois. Q. That is where this correspondence has been? A. Our credit department. Q. Your credit department is located back there? A. Yes. Q. And what you have charge of out here is just a branch? A. Yes, the whole Pacific Coast. Q. The oil that is now being handled by Mr. Roberts and by you is being handled as distributors and jobbers to the customers? A. Not exactly. Mr. Roberts is simply my customer. I am still in the employ of the Indian Refining Company, and I sell to various people up and down the coast, of which Mr. Roberts is one of my customers. He is the distributor for Havoline oil in San Francisco, San Mateo county, and the north coast territory."

The record also shows the following testimony: "Q. Mr. Meek, at this time or since this suit was brought, plaintiff was not distributing oil from California. All oils are shipped from Lawrenceville, Illinois, are they not? A. Yes sir. Q. Since 1926 what time was it? A. The change in marketing policy was inaugurated in our company during the summer of 1925 to become effective all over the United States exclusive of the five states surrounding our refinery, just as rapidly as our property could be disposed of. That was in the summer of 1925. Our Los Angeles Branch property was sold in October, 1925, and our San Francisco plant in December, 1925, and starting with January, 1926, we had no stock of any kind or description on the Pacific Coast. Q. That is the company. A. The Company. Q. You were handling through jobbers? A. We handle nothing now but carload lots shipped direct to our distributors who have exclusive territory franchises."

Appellants cite Estate of Wellings, 192 Cal. 506, 221 P. 628, as to what constitutes "doing business" within the meaning of the statute. In that case, a trust company organized in Michigan, one of its main purposes being to act as executor and trustee under appointment made in last wills, sought to be appointed and to act as such under a will being probated in this state. It was, of course, held that this was doing business in this state, within the meaning of the statute. It has, however, been held in other states that doing business in the manner indicated by the evidence here is not doing business within the meaning of statutes similar to the statute here in question. See Pembleton v. Illinois Commercial Men's Ass'n, 289 Ill. 99, 124 N. E. 355; Dinuba Farmers' Union Packing Co. v. J. M. Anderson G. Co., 193 Mo. App. 236, 182 S. W. 1036; Badische Lederwerke v. Capitelli, 92 Misc. Rep. 260, 155 N. Y. S. 651; McDowell v. Starobin Electrical Supply Co., Inc., 104 Misc. Rep. 596, 172 N. Y. S. 221; M. E. Smith & Co. v. Dickinson, 81 Wash. 465, 142 P. 1133. In the case of W. W. Kimball Co. v. Read, 43 Cal. App. 342, 185 P. 192, 193, the court said:

"If appellant was engaged wholly in interstate commerce and was not doing any intrastate business, the statute is inapplicable, because, in view of the commerce clause of the federal Constitution, the state cannot put any burden upon persons or corporations engaged wholly in interstate commerce. Manifestly the sales, followed by the delivery of the pianos in this state, upon orders sent from this state to the appellant in the state of Illinois, are transactions in interstate commerce and beyond the scope of the statute. (Citing cases.) * * *

"The right of a foreign corporation to sue to collect the purchase price of merchandise sold in interstate commerce is succinctly stated by the United States Supreme Court in Sioux Remedy Co. v. Cope, 235 U. S. 197, 204, 59 L. Ed. 193, 35 S. Ct. 57, 60, see, also, Rose's U. S. Notes: 'We think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose.'"

[4, 5] The burden is on the defendant to show that the plaintiff, in attempting to maintain this action, is within the bar of the statute. W. W. Kimball Co. v. Read, supra. There being evidence that plaintiff was not distributing oil in California, that beginning with January, 1926, it had no stock of any kind on the Coast, that it shipped only in carload lots, from Illinois, to customers here, to whom the goods were sold, we think the finding complained of is sustained by the record. The inference could fairly be drawn, from the evidence that, since the filing of the certificate of withdrawal from intrastate business, the plaintiff has been engaged wholly in interstate business.

For the reasons given the judgment is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

103 Cal. App. 70

ALBRECHT v. JOHNSON et al. (Civ. 3626.)

District Court of Appeal, Third District, California. Jan. 3, 1930.

1. Sales ⚷342—Purchaser, surrendering ranch held liable for goods delivered to ranch contrary to notice, where he agreed with vendors of ranch, in consideration for release from contract, to pay.

Purchaser, surrendering ranch *held* liable for gasoline and oil delivered to premises contrary to instructions, and used on the ranch after he had notified seller of gasoline and oil not to deliver any more to ranch, unless ordered to do so by certain company, and unless invoices were signed by ranch foreman, where he had agreed with vendors of land, as part of consideration passing to them for releasing him from contract, to pay for oil and gasoline in question.

2. Appeal and error ⚷931(1)—It must be assumed trial court resolved conflict in evidence in appellee's favor.

On defendant's appeal from judgment for plaintiff, it must be assumed that trial court resolved conflict in evidence in favor of plaintiff.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by L. F. Albrecht against J. W. Johnson and others for goods sold and delivered. From the judgment, defendant Johnson appeals. Affirmed.

W. P. Rich, of Marysville, for appellant.

Loyd Hewitt, of Yuba City, for respondent.

JAMISON, Justice pro tem. This action was brought by plaintiff, as assignee of the Standard Oil Company, against defendants, for oil and gasoline alleged to have been furnished to defendants for use upon what is known as the "Diggs Ranch," owned by the estate of Marshall Diggs, deceased.

On May 15, 1925, appellant entered into a contract with defendants C. E. McLaughlin and Jackson Diggs, executors of the said estate, for the purchase by him of the said Diggs ranch, and therein he agreed to pay all expense necessary for taking care of a 400-acre peach orchard and crops on said ranch, from and after May 1, 1925. Appellant took possession of said ranch upon the execution of said agreement, and remained in possession until April 29, 1926. Early in the year 1926 it became apparent that it would be impossible for appellant to carry out and perform his part of said contract. After some negotiations had taken place, appellant and the said executors, on April 29, 1926, entered into an agreement by the terms of which appellant surrendered to them the possession of the ranch, his liability for the expense of conducting and caring for said ranch to cease from said last-named date, he agreeing to pay all bills incurred by him in operating the ranch prior to that date. During the period that appellant had been in the possession of said ranch, gasoline and oil had been furnished for use thereon by the Standard Oil Company. On January 28, 1926, appellant notified the Standard Oil Company not to deliver any more oil or gasoline to the said ranch, unless ordered to do so by the Valley Meat Company, and unless the invoices were signed by Hugh Asbill, appellant's ranch foreman. Thereafter no gasoline or oil was delivered to said ranch until February 23, 1926, just prior to which last-named date the Standard Oil Company was requested to make deliveries of oil and gasoline to said ranch by the said Jackson Diggs, who told the representative of the said company to go ahead and deliver gasoline and oil to said ranch, and that, if appellant did not pay for same, he would. Thereupon between the 23d day of February, 1926, and March 31, 1926, the said company made 12 deliveries of gas and oil to said ranch; several of said deliveries being receipted for by appellant's ranch foreman, Hugh Asbill, and other deliveries being receipted for by other of appellant's employees on said ranch, no orders for any of said deliveries having been made by appellant, or by said Valley Meat Company. It appears that gasoline and oil were necessarily used in conducting operations on said ranch, and were so used in February and March of 1926.

[1, 2] Appellant claims that he is not liable for any of the gasoline or oil furnished for the use of said ranch after date of the aforesaid notice, to wit, after January 28, 1926, and he cites the case of De Prosse v. Royal Eagle, etc., Co., 135 Cal. 408, 67 P. 502, 503, in support of this contention. The last-named case announces the rule that "there is no principle of law involved in the action of quantum meruit which will justify a recovery for services rendered, in the face of positive directions not to render those services, by the party from whom it is sought to recover." And appellant claims that the same rule applies where material or supplies are furnished under these conditions. Appellant also cites the case of Montgomery v. Thomson, 152 Cal. 319, 92 P. 866, where it was held that such notice might be retracted by subsequent oral agreement. Under certain conditions the doctrine of estoppel or waiver might operate to prevent subsequent reliance upon such notice.

In the case under consideration it appears that appellant was present at the ranch when some of the deliveries of this gasoline and oil were made by agents of the Standard Oil Company. The same was received and receipted for by his employees, including his foreman. From the evidence produced in this case the trial court had ample ground upon which to found the inference that said oil and gasoline were used in the necessary operation of said ranch, while it was in the pos-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

session of appellant. But, aside from these questions, there is proof of another matter which impels this court toward an affirmance of this judgment, and that is the evidence produced by respondent to the effect that, as part of the consideration passing to the said executors from appellant for releasing him from his said contract to purchase the said ranch, he agreed to pay for the oil and gasoline which are the subject of this action. It is true that appellant denies that he made any such agreement, but this denial but produces a conflict in the evidence, and it must be assumed that the trial court resolved this conflict in favor of respondent. Taylor v. United States F. & G. Co., 86 Cal. App. 382, 260 P. 898.

We are of the opinion that there is substantial evidence to support the findings and judgment of the trial court.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

102 Cal. App. 643

In re REGNART'S ESTATE. (Civ. 6861.)★

District Court of Appeal, First District, Division 1, California. Dec. 19, 1929.

Rehearing Denied Jan. 18, 1930. Hearing Denied by Supreme Court Feb. 17, 1930.

1. Husband and wife 🔑262(1)—Deeds naming husband and wife grantees presumptively vested property in spouses as tenants in common (Civ. Code, §§ 162–164 [St. 1897, p. 63]).

Deeds naming as grantees both husband and wife presumptively vested property in spouses as tenants in common, interest conveyed to wife being presumed under Civ. Code, §§ 162–164 (St. 1897, p. 63) to be her separate property, and that conveyed to her husband the community property of marriage.

2. Husband and wife 🔑49½(8)—That deed was to husband and wife was evidence husband intended gift to wife of interest conveyed her.

Fact that deed was in form to both husband and wife was in itself evidence of husband's intention to make gift to his wife of interest conveyed to her.

3. Husband and wife 🔑265½—Administration of estate of wife grantee in deed with husband did not estop heir from claiming husband's interest was community (Civ. Code, § 164 [St. 1897, p. 63]).

Administration of estate of wife as one of grantees of deed conveying property to husband and wife *held* not to estop heir of wife either as administratrix or as one of distributees from claiming interest of husband to be community property of spouses under Civ. Code, § 164 (St. 1897, p. 63).

4. Husband and wife 🔑262(2)—Petitioners for distribution of husband's estate as separate property must overcome presumption that husband's interest conveyed to himself and wife was community property (Civ. Code, § 164 [St. 1897, p. 63]).

Burden of adducing evidence sufficient to overcome presumption, under Civ. Code, § 164 (St. 1897, p. 63), that interest of husband in property conveyed to himself and wife as grantees should be community property, rested upon petitioners for distribution of husband's estate claiming husband's interest to be separate property.

5. Husband and wife 🔑264—Sole appraiser's report that decedent's interest was separate estate held insufficient to overcome presumption property conveyed to decedent and wife was community property (Code Civ. Proc. § 1961; Civ. Code § 164 [St. 1897, p. 63]).

Report of sole appraiser in administration proceedings that deceased husband's interest in property conveyed to himself and wife was his separate estate was not competent evidence within contemplation of Code Civ. Proc. § 1961 to overcome presumption, under Civ. Code, § 164 (St. 1897, p. 63), that husband's interest was community property.

6. Husband and wife 🔑264—Evidence held insufficient to overcome presumption that property conveyed to deceased husband and wife was community property (Civ. Code, § 164 [St. 1897, p. 63]).

In administration proceedings, evidence *held* insufficient to overcome presumption that interest which husband's heirs claimed as his separate property conveyed to deceased husband as one of grantees of deed, with wife, was community property under Civ. Code § 164 (St. 1897, p. 63).

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

In the matter of the estate of George Philip Regnart, deceased, also known as George P. Regnart; W. A. Brooke, administrator, etc. From parts of the decree of final distribution Minnie M. Craig appeals, opposed by the administrator and Herbert W. Regnart and others. Reversed.

J. E. McCurdy, of San Mateo, and I. F. Chapman and Wm. Penn Humphreys, both of San Francisco, for appellant.

H. A. Blanchard, of San Jose, for respondents.

PER CURIAM. An appeal by Minnie M. Craig, the daughter and only child of Cora B. Regnart and the stepdaughter of George P. Regnart, deceased, from parts of the decree of final distribution entered in the estate of the latter.

The court found a portion of the estate, to wit, $8,009.79, to be the proceeds from the sale of the separate property of the deceased, and distributed the same to the respondents herein, who are his nephews and nieces.

★Rehearing denied. Hearing denied by Supreme Court.

Appellant contends that the property from which the above sum was derived was the community property of the deceased and Cora B. Regnart, his wife, who predeceased him, and that the above finding is unsupported. This is the only question presented by the appeal, it being conceded that, if the above sum was community property, as alleged, the whole thereof, as provided by subdivision 8 of section 1386 of the Civil Code, should have been distributed to appellant.

It is admitted that four parcels of real property were acquired by the spouses in the years 1909 and 1916, the deed in each instance running to both as grantees, and the same were owned by them until the death of Mrs. Regnart, who died intestate on February 4, 1922. George P. Regnart was appointed administrator of his wife's estate, but, having died before qualifying, the appellant was appointed and qualified as administratrix thereof on March 24, 1923. The administratrix filed an inventory wherein it was stated that the estate owned an undivided one-half interest in the real property mentioned, and that the other half interest was owned by the estate of said George P. Regnart. The latter died intestate on March 23, 1923, and W. A. Brooke was appointed and qualified as the administrator of his estate. An inventory was filed by the administrator describing the above parcels and containing the same declarations as to the respective interests of the spouses as that filed in the estate of Mrs. Regnart. The sole appraiser, who acted in both estates, reported that the undivided interests of the decedents constituted the separate property of each respectively. Orders were filed in each estate confirming sales of the undivided interests of each in the same parcels of real property, the sales being made to the same purchasers for like amounts, and in neither estate were objections filed to the returns of sale or appeals taken from the orders confirming the same. The estate of Mrs. Regnart was finally distributed on November 2, 1927, appellant receiving one-half and the other half being distributed to the heirs of George P. Regnart. It was testified by appellant and a brother of Mrs. Regnart that the latter and George P. Regnart were married in 1906; that the latter was employed in a planing mill at San Mateo; that shortly after the marriage Mrs. Regnart opened a boarding and lodging house at that place and conducted the same until her death in 1922; that during the six or seven years immediately previous to 1922 George P. Regnart was not employed; that the real property in question was purchased with the money earned by Regnart while employed as above and the proceeds from the business carried on by Mrs. Regnart. No evidence to the contrary was adduced.

[1, 2] At the time the property was acquired section 164 of the Civil Code, which referred to the preceding sections 162 and 163, provided that "all other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument * * *." St. 1897, p. 63. The deeds presumptively vested the property in the spouses as tenants in common (Pabst v. Shearer, 172 Cal. 239, 156 P. 466), the interest conveyed to Mrs. Regnart being presumed under the above section to be her separate property (Gilmour v. North Pasadena, etc., Co., 178 Cal. 6, 171 P. 1066), and that conveyed to her husband the community property of the marriage (Pabst v. Shearer, supra; Miller v. Brode, 186 Cal. 409, 414, 199 P. 531). Respondents contend that appellant, as administratrix of Mrs. Regnart's estate, having treated her interest in the property as her separate estate, is estopped from claiming that the remaining interest was not the separate property of the husband. So far as appears, the court in distributing Mrs. Regnart's estate followed the presumption that the interest conveyed to her was her separate property. Moreover, the fact that the deed was in form to both husband and wife was in itself evidence of his intention to make a gift to his wife of the interest conveyed to her (Gilmour v. North Pasadena, etc., Co., supra), and no claim to the contrary was made by those interested.

[3-5] There was nothing connected with the administration of Mrs. Regnart's estate which estopped appellant, either as administratrix thereof or as one of the distributees, from claiming the interest of Regnart to be the community property of the spouses (Baker v. Brickell, 87 Cal. 329, 25 P. 489, 1067; Dean v. Parker, 88 Cal. 283, 26 P. 91), and in this contention she was supported by the presumption that such was the effect of the deed (Civ. Code, § 164), in accordance with which the court, in the absence of proof to the contrary, was bound to find (Gilmour v. North Pasadena, etc., Co., supra; Pabst v. Shearer, supra; Estate of Jolly, 196 Cal. 547, 238 P. 353; Code Civ. Proc. § 1961). The burden of adducing evidence sufficient to overcome this presumption rested upon respondents. Estate of Nickson, 187 Cal. 603, 203 P. 106. While, as claimed by them, it was not essential in order to do this that an express agreement be shown, circumstantial evidence being sufficient (Code Civ. Proc. § 1961), the report of the sole appraiser that Regnart's interest was his separate estate was not competent or relevant evidence against appellant (Malville v. Kappeler, 4 Cal. Unrep. 843, 37 P. 934; Baum v. Reay, 96 Cal. 462, 29 P. 117, 31 P. 561;

Ainsworth v. Bank of California, 119 Cal. 470, 477, 51 P. 952, 39 L. R. A. 686, 63 Am. St. Rep. 135); and the record discloses no competent evidence, direct or indirect, reasonably supporting the conclusion that the interest conveyed to Regnart vested in him as his separate property.

[6] The appellant being supported in her claim, not only by the presumption mentioned, but by all the competent evidence in the case, the finding of the court to the contrary is unsupported, and the portions of the order appealed from are accordingly reversed.

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102 Cal. App. 635

CHILSON (HARBESON, Intervener) v. JEROME, County Auditor. (Civ. 37.)

District Court of Appeal, Fourth District, California. Dec. 18, 1929.

1. Statutes 🔑206—Statute will be so construed to give it full force and effect as far as possible.

Courts will construe statute so as to give it full force and effect as far as possible, so that it may stand in its entirety.

2. Constitutional law 🔑48—Construction will be given statute which will sustain and render it valid in case language will reasonably permit thereof (Civ. Code, § 3541).

Where language of statute will reasonably permit, a construction will be given thereto which will sustain and render it valid, rather than defeat it, in accordance with Civ. Code, § 3541.

3. Constitutional law 🔑48—Courts will not hold law invalid and without effect unless clearly compelled to do so.

When actions of legislative body result in legislation duly passed and approved by Governor, courts will not hold law invalid and without effect, a mere form without a purpose, unless clearly compelled to do so by circumstances of the case.

4. Statutes 🔑225—Statute should be construed with reference to whole system of law.

Statute should be construed with reference to whole system of law of which it forms a part, so that all may be harmonized and given effect.

5. Statutes 🔑225½—Generally, statute having special application controls general one without regard to date of passage.

Generally, a statute having a special application controls a general one without regard to dates of their passage, and an act general in its character will not annul provisions of one covering a special subject, even though it seems to cover the same general ground.

6. Statutes 🔑158, 159—There is presumption against implied repeal of statutes; inconsistency must be clear, actual, and irreconcilable before implied repeal will be said to exist.

There is a presumption against implied repeal of statutes, and inconsistency between statutes must be clear, actual, and irreconcilable before repeal by implication will be said to exist.

7. Statutes 🔑163—General statute in apparent conflict with statute having special application need not be entirely disregarded in case both may be given effect.

Where a statute having a special application comes into apparent conflict with one of general scope, the latter need not be entirely excluded from its field of operations, where the two may be so construed as to give them both effect without actual conflict and antagonism.

8. Highways 🔑97¾—Law relating generally to right of county to assist in construction of city streets, and law specially applying to expenditures therefor, held not in conflict (County Aid Act, § 1, as amended by St. 1925, p. 236, § 2; California Vehicle Act, as amended by St. 1925, p. 389).

County Aid Act (St. 1923, p. 123) § 1, as amended by St. 1925, p. 236, § 2, relating generally to right of county to assist in construction of streets within incorporated city, and California Vehicle Act (St. 1923, p. 517), as amended by St. 1925, p. 389, having special application relating to expenditures of county portion of income derived under the general revenue-producing provision thereof, *held* not in conflict, but each complete in itself.

9. Counties 🔑162—Appropriation of money to assist in municipal improvements is determination that aid should be given therefor (California Vehicle Act, § 159, as amended by St. 1925, p. 389).

An appropriation of money to assist in municipal improvements in accordance with authority of California Vehicle Act, § 159 (St. 1923, p. 568, § 159, as amended by St. 1925, p. 389), is in itself a determination that aid should be given city for such work.

10. Counties 🔑162—County board of supervisors appropriating money to assist in paving city streets was under no duty to designate fund (California Vehicle Act, § 159, as amended by St. 1925, p. 389).

Resolution of board of supervisors appropriating money for paving of city streets in accordance with authority of California Vehicle Act, § 159 (St. 1923, p. 568, § 159, as amended by St. 1925, p. 389), and directing its payment out of county fund designated as motor vehicle fund, named a fund out of which money could be paid lawfully, in that board after appropriating money was under no duty to designate fund from which it should be paid.

Appeal from Superior Court, Orange County; Benjamin F. Warmer, Judge.

Action by W. E. Chilson against W. C. Jerome, as Auditor of the County of Orange, wherein Charles E. Harbeson intervened. Judgment for defendant, and intervener appeals. Affirmed.

Thomas L. McFadden, Leonard Evans, McFadden & Holden, and Leo J. Friis, all of Anaheim, for appellant.

Charles D. Swanner, of Santa Ana, for respondent.

MARKS, J. Plaintiff and intervener, as taxpayers and citizens of Orange county, sought to restrain the respondent, as auditor of the county of Orange, from drawing a warrant on the treasurer of the county of Orange in the sum of $10,000 in favor of the city of Santa Ana, a municipal corporation of the fifth class, situated within such county, the money to be used by the city in paying part of the expenses of paving South Main street, one of its public streets.

The parties stipulated to all of the necessary and material facts and judgment was rendered in favor of respondent. Under the agreed statement of facts there were but two questions of law for the court below to determine, namely: First, do the provisions of section 1 of the act of the Legislature of the state of California, entitled, "An Act authorizing counties to improve or assist in the improvement of streets lying in municipalities," approved April 30, 1923 (St. 1923, p. 123), as amended April 30, 1925 (St. 1925, p. 236, § 2), conflict with the provisions of the "California Vehicle Act" (St. 1923, p. 517), as amended May 19, 1925 (St. 1925, p. 389), and if so, which act controls; and, second, does a resolution of the board of supervisors of the county of Orange appropriating this money and directing its payment to the city of Santa Ana out of a county fund designated as the "Motor Vehicle Fund," name a fund out of which the money can be paid lawfully?

Appellant presents a third question, namely: Does the resolution of the board of supervisors determine that the paving of South Main street was at the time of its passage, a street improvement of general county interest? And, also: Does it further determine that county aid should be given to assist in paving this street? This last question only becomes important if this court should hold that the provisions of the act approved April 30, 1923 (St. 1923, p. 123), as amended April 30, 1925 (St. 1925, p. 236), which we will, for convenience, refer to as the County Aid Act, are controlling over the provisions of the California Vehicle Act.

The County Aid Act provides that: "The board of supervisors of any county may by resolution adopted by a four-fifths vote of the members thereof determine that the proposed establishing, laying out, opening, widening, extending, straightening, construction, improvement or altering of any street or other public way or any portion thereof within an incorporated city or extending along or across the boundary thereof or the establishing, modifying or changing the grade thereof or the separation of the grades of any two or more streets or other public ways which intersect each other or the separation of the grades of any such street or other public way and any steam, electric or street railroad crossing such street or other public way or the construction of the necessary pavements, curbs, culverts, bridges, tunnels, subways, viaducts, drainage facilities or other structures incident to or a part of such street or other public way or the acquisition by purchase, condemnation or otherwise of any lands, rights of way or other property necessary for any of the purposes hereinbefore mentioned is of general county interest and that county aid shall be extended therefor. Such resolution must refer to the proposed new or existing street or portion of street or other public way, the general nature of the improvement proposed and the nature of the aid to be furnished by the county and the fund or funds from which it is to be paid." St. 1923, p. 123, § 1, as amended by St. 1925, p. 236, § 2.

The act further provides that the county aid may consist of the contribution of money, or the furnishing of materials, engineering services or labor, or in the loan of its road-building machinery. The expense of the aid may be paid by the county from "the general fund, the general road fund, the fund composed of moneys received from the state pursuant to the California Vehicle Act or pursuant to chapter two hundred sixty-seven of the Statutes of 1923 * * * or from any other fund available for such purposes." It also provides (St. 1923, p. 123, § 2, as amended by St. 1925, p. 236, § 3) for the taking over of any city street as a county highway, and its return to the control of the municipality.

Section 159 of the California Vehicle Act (St. 1923, p. 568, § 159, as amended by St. 1925, p. 389) provides that a certain portion of the "net receipts" derived under the terms of the act shall be paid to the county and "shall be deposited in the road funds of the several counties receiving the same and shall be expended by such counties exclusively in the construction and maintenance of public roads, bridges, and culverts in said counties respectively; provided, that the board of supervisors of any county may in its discretion expend any portion of such sums so received by such county in the construction, maintenance and repair of streets, bridges and culverts within those incorporated cities therein, the legislative bodies of which by ordinance authorize such work of construction, maintenance and repair." This act has to do with the control, operation, licensing of motor vehicles and their drivers, and the disposition of the funds received by the state under the revenue producing terms of the act, and provides certain penalties for the violation of its provisions. The general fields of operations of the two acts are widely separated, and only approach each other on the question of the use of the county portion of the revenue derived under the California Vehicle Act in aiding cities in the improvements of their streets.

It is admitted that the city of Santa Ana was within the boundaries of the county of

Orange and that it had taken all steps necessary to authorize it to receive the county aid under either of these acts.

On the 27th day of March, 1927, the board of supervisors of the county of Orange, at a regular meeting, and by a vote of three for and two against, passed and adopted the following resolution: "That the sum of Ten Thousand Dollars ($10,000.00) be expended from the Motor Vehicle Fund in the construction of South Main Street in the city of Santa Ana, by paving and otherwise improving the same, it appearing that the Board of Trustees of said City have authorized such improvement and ordered the construction of said work; and that the County Auditor be directed to draw a warrant for said amount to be paid to the City of Santa Ana for the improvement of said street; and Be It Further Resolved: That the previous action of this Board in regards to the said appropriation be and the same is hereby rescinded." The resolution did not pass by the four-fifths vote required by the County Aid Act, so, if it stands at all, it must do so under the provisions of the California Vehicle Act.

Many more varieties of work and improvements may be performed under the County Aid Act than under section 159 of the California Vehicle Act, as will appear from their provisions already quoted. Under the former act the cost of the aid may be paid by the county from money raised from general taxation, or received from special sources, or from any other funds of the county available for such purposes. The aid may consist of the furnishing of either money, materials, services, labor, or the use of machinery by the city. Assuming, but not holding, that the large powers and authority granted under this act are lawful, the county may enter upon and engage in an extensive program of street opening, improvement and maintenance of city streets, building of bridges, separation of grades, etc., done largely at county expense and under its engineers and with its equipment, subject to the consent of the municipality, provided that four-fifths of the board of supervisors determine that the improvement of the streets are of general county interest, and the county funds are available.

Under the California Vehicle Act, the work or improvements for which aid may be furnished consists of the construction, maintenance, and repair of streets, bridges, and culverts. The cost of the aid must be paid from money received by the county from the "net receipts" paid to it by the division of motor vehicles of the state. The aid can consist only of money.

[1-4] It is the well-settled rule of law in this state that the courts will construe a statute so as to give it full force and effect as far as is possible so that it may stand in its entirety. Kydd v. San Francisco, 37 Cal. App. 598, 174 P. 88; Hunt v. Manning, 24 Cal. App. 44, 140 P. 39. If the language will reasonably permit, a construction will be given statutes which will sustain and render them valid and operative rather than defeat them. Section 3541, Civ. Code; Glassell Development Co. v. Citizens' National Bank, 191 Cal. 375, 216 P. 1012, 28 A. L. R. 1427; Cuthbert v. Woodman, 185 Cal. 43, 195 P. 673. The Constitution vests the law-making powers of the state in the Legislature, and when the action of this body results in legislation duly passed and approved by the Governor, the courts will not hold the law invalid and without effect, a mere form without a purpose, unless clearly compelled to do so by the circumstances of the case. Bickerdike v. State, 144 Cal. 681, 78 P. 270. A statute should be construed with reference to the whole system of the law of which it forms a part so that all may be harmonized and given effect. 23 Cal. Jur. p. 784. It therefore becomes the duty of this court to give force and effect to both the County Aid Act and section 159 of the California Vehicle Act if it can consistently do so without doing violence to the terms of either act. The provisions of neither of these acts have been before the upper courts for construction. We find, however, that the rules of statutory construction are well established in this state by a long line of well-considered authorities that render the solution of the question before us less difficult than it might otherwise be.

[5] It is a general rule of construction that a statute having a special application controls a general one without regard to the dates of their passage and that an act general in its character will not annul the provisions of one covering a special subject, even though it seems to cover the same general ground. People v. Pacific Implement Co., 130 Cal. 442, 62 P. 739; McNeil v. Kingsbury, 190 Cal. 406, 213 P. 50; Riley v. Forbes, 193 Cal. 740, 227 P. 768; Bateman v. Colgan, 111 Cal. 580, 44 P. 238; Glassell Development Co. v. Citizens' National Bank, supra.

[6] There is a presumption against implied repeals (Inyo County v. Hess, 53 Cal. App. 415, 200 P. 373), and it is the duty of the courts to give full force and effect to all statutes not expressly repealed in so far as this may be reasonably possible so to do. It is well settled that the inconsistency between statutes must be clear, actual, and irreconcilable before a repeal by implication will be said to exist. People v. Pacific Implement Co., supra; In re Johnson, 167 Cal. 142 (Ex parte Cannon) 138 P. 740; In re Mitchell, 120 Cal. 384, 52 P. 799; Board of Education v. Talbert, 52 Cal. App. 657, 199 P. 555.

[7] In the case of a statute having a special application coming into apparent conflict with one of general scope, the latter need not be entirely excluded from its field of operations where the two may be so construed

so as to give them both effect without actual conflict and antagonism. Cohn v. Isensee, 45 Cal. App. 531, 188 P. 279.

The County Aid Act provides a broad plan for a county to assist a municipality in its street improvement program, and provides that the supervisors of a county may use almost any of the county funds available to pay for them, while the California Vehicle Act limits the county aid to three specified forms of work, and limits the money to be used to that derived from a single source. There is another important distinction in the action required on the part of municipalities to obtain aid under the two acts. The California Vehicle Act provides that the legislative body of the city must by ordinance authorize the work of construction, maintenance, and repair, before the aid can be given by the county, which was done in the case before us. An ordinance is the most solemn form of legislation on the part of a city. The County Aid Act contains no such provision.

[8, 9] To the extent that the County Aid Act goes far beyond the provisions of the California Vehicle Act, it must be held to be an act having a general purpose and effect and that the California Vehicle Act and section 159 thereof is one having a special application relating only to the expenditure of the counties' portion of the income derived under the general revenue-producing provisions of the act. We therefore hold that the two acts are not in conflict, but that each is complete in itself, and where the legislative body of a municipality by ordinance authorizes the improvement of a given city street, the board of supervisors can pass a resolution giving county aid to the work by a majority vote only, and need not find that the proposed improvement is of general county interest, nor describe the character of the aid to be extended; the resolution being passed under the authority of section 159 of the California Vehicle Act. The appropriation of money to assist in a municipal improvement in itself determines that aid should be given the city for such work.

[10] The case of White v. Hayden, 126 Cal. 621, 59 P. 118, 119, disposes of the second contention of appellant. In this case the Supreme Court said: "However this may be, if it be the auditor's duty to designate the fund, and as no such duty is imposed upon the board, we do not see that the auditor would be bound by the act of the board, but that it would rather be his duty to draw the warrant on the proper fund, whether the board had designated the fund or not. The board has performed its legal function when it has allowed and certified the claim, and if it has made a mistake in indicating the fund, or has gone beyond its powers to designate the fund, the duty of the auditor remains to draw his warrant as the law in the particular case would authorize."

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

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103 Cal. App. 63

CARDOZA v. LEMOS. (Civ. 7063.)

District Court of Appeal, First District, Division 2, California. Jan. 2, 1930.

Joint tenancy ⚷3—Evidence supported finding that niece of deceased was entitled to property as surviving joint tenant (Civ. Code, § 2235).

Evidence in action by administratrix for purpose of recovering certain property in possession of deceased's niece as belonging to the estate *held* sufficient to support finding that defendant was entitled to property as surviving joint tenant, either on ground that relation between joint tenants was not that to which presumption of exercise of undue influence attached, under Civ. Code, § 2235, or on ground that such presumption was overcome by evidence.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Clara Cardoza, as administratrix with the will annexed of the estate of Domingos Duart, deceased, against Libbie Lemos. Judgment for defendant, and plaintiff appeals. Affirmed.

George O. Bahrs and Ralph Starke, both of San Francisco (Henry G. Sanford, of San Francisco, of counsel), for appellant.

G. P. Hall, of Petaluma, and Henry J. Soldati, for respondent.

KOFORD, P. J. The representative of the estate of said deceased prosecuted this action against the defendant for the purpose of obtaining a decree determining that certain property in possession of defendant belonged to the said estate. During his lifetime said deceased established with the defendant, his niece, a joint tenancy with the right of survivorship in and to all his property. This joint estate existed for a long time and continued until his death. Defendant now possesses and claims the property as surviving joint tenant. Plaintiff's complaint alleged that defendant occupied a fiduciary relation towards her uncle because of the trust and confidence reposed by him in her; that she used her position as confidential advisor to practice fraud and undue influence upon her uncle, and in that manner procured the creation of the joint tenancy. The trial court, sitting without a jury, found for the defendant, and plaintiff appeals.

The findings are in great detail, but are

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

well summarized in the following excerpt: "The creation of said joint tenancy in said property was made by said decedent with full knowledge of the legal effect thereof and with the intent that the defendant would become entitled to the possession thereof and the title thereto upon his death; that the defendant, Libbie Lemos, did not at any time influence the said decedent, Domingos Duart, in the creation of said joint tenancy and the said joint tenancy was created by said decedent of his own free will and volition and without the receipt of any advice or suggestions from said defendant."

The points on appeal are all to the one effect that the decision is not supported by the evidence. Appellant's briefs are devoted to an exposition of all the frailties, contradictions, inaccuracies, and inconsistencies developed upon cross-examination of the defendant added to the contention that the evidence established that respondent occupied toward her uncle such a position of confidential advisor that a presumption of insufficient consideration and of having exercised undue influence upon him arose by the provisions of Civil Code, § 2235, and that respondent failed to overcome this presumption by evidence.

The evidence in the record is sufficient to support the findings and decision of the court, either upon the ground that the relation between the joint tenants was not that to which the presumption of Civil Code, § 2235, is attached, or upon the ground that respondent overcame such presumption by evidence. The evidence shows that a close and affectionate relationship existed between uncle and niece for 35 years; that she nursed and cared for him in sickness and old age; that she customarily accompanied him upon shopping and business trips to town, and that she customarily acted as interpreter for him. On the other hand, there is substantial evidence to establish that deceased was quite competent to handle his own business affairs and did so, although he could speak but very little English; that he knew his own mind and exercised his own will; that respondent used no influence upon him to cause him to establish the joint estate; that he took independent advice, particularly that he had explained to him by the officials of the banks where he transacted business the full legal effect of the various documents by which the joint tenancy was established; and, finally, that he intended to reward respondent for her long years of service to him by making her the owner of his property upon his death by means of the joint tenancy with right of survivorship.

Appellant contends for the application of each one of the several rules assigned in opinions on appeal, from time to time, for reversing the trial court's findings of fact, but the evidence in this case is not such as to call for a discussion of them. The evidence fully supports the judgment and findings even conceding the most that is claimed for such rules by appellant.

Some time after the creation of the joint tenancy the deceased republished and amended his last will and testament by which he bequeathed his property partly to respondent and partly to other nieces and nephews. Appellant claims great evidentiary value for this fact. This is the most that can be claimed for it. No doubt it was considered together with the other evidence by the court. That fact did not establish a case for the plaintiff. We would have a similar apparent inconsistency if the will were given force to the exclusion of the joint tenancy with survivorship. The latter at that time was in full existence and operation and allowed to remain so until decedent's death.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

102 Cal. App. 582

BIRKHAUSER v. ROSS et ux. (Civ. 34.)

District Court of Appeal, Fourth District, California. Dec. 16, 1929.

1. Pleading 🔑48—Complaint must distinctly state ultimate facts relied on to constitute cause of action.

Complaint must clearly and distinctly state ultimate facts relied upon to constitute cause of action so that court may fully understand issues, and adverse party may plead to them and may plead judgment in bar of subsequent action.

2. Judgment 🔑18(3)—Where court can see that purported description of property in judgment in reality describes nothing, judgment is void.

Where court can see that purported description of property involved in judgment in reality describes nothing, judgment is void.

3. Judgment 🔑18(3)—In action to cancel debtor's instruments conveying property to wife, pleadings held not to support judgment except as to certain property sufficiently described.

In action by creditor to cancel and set aside, as fraudulent and void as against creditors, bill of sale from debtor to wife covering bees and other goods mentioned and also other instruments, judgment for plaintiff *held* not supported by pleadings except as to property described in bill of sale and certain property levied upon by sheriff which was sufficiently described in complaint.

4. Husband and wife 🔑49½(1), 49¾(1)—Gift from one spouse to another is valid, even though without consideration, if not made to defraud creditors (Civ. Code, § 1040).

Under Civ. Code, § 1040, gift from one spouse to the other is valid, even without consideration, if it is not made to defraud creditors.

5. Fraudulent conveyances 🔑298(3)—Where evidence shows husband was solvent at time of conveying either separate or community property to wife, and there is no evidence conveyance was made to defraud creditors, transaction cannot be set aside (Civ. Code, §§ 158, 1040, 3442).

Under Civ. Code, § 158, permitting husband and wife to make contracts with each other, section 1040, relating to gifts, and section 3442, providing that transfer of property cannot be adjudged fraudulent solely on grounds that it was not made for valuable consideration, where evidence shows that husband was solvent at time of conveyance of either his separate or community property to his wife, and there was no evidence that conveyance was made with intent to defraud any creditor, transaction cannot be set aside.

6. Husband and wife 🔑255—Wife's separate estate in property taken by sheriff was not liable for debts of husband.

Where personal property levied upon by sheriff was produced by bees purchased on contract for $1,000, upon which $550 had been paid and of this sum at least $350 was paid by wife out of income from her separate property, to this extent she had separate estate in honey and other property taken which was not liable for debts of her husband.

7. Payment 🔑43—Where there was no agreement as to application, payments must be credited upon earliest items of account.

Where there was no special direction or agreement that payments should be applied upon any special items of bill, they must be credited upon earliest items.

8. Judgment 🔑693—Wife not party to judgment against husband was not bound by judgment or concluded from contesting claim on which judgment rested.

Wife, not being party to judgment against husband, was not bound by judgment or concluded from contesting claim on which judgment rested.

9. Appeal and error 🔑1042(5)—Striking of material allegations relating to defendant's solvency held harmless, where evidence was admitted on question of solvency.

Court's striking paragraph containing allegations relating to solvency of defendant which were material *held* harmless, where evidence was admitted at trial on question of his solvency.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Frank Birkhauser against J. Edgar Ross and wife. From a judgment for plaintiff, defendants appeal. Reversed.

J. Edgar Ross and Anna M. Ross, in pro. per.

George L. Sanders, of Los Angeles, and D. C. Bitler and W. F. North, both of El Centro, for respondent.

MARKS, J. On February 21, 1924, judgment was rendered in the superior court of Imperial county in favor of respondent and against appellant J. Edgar Ross, in the sum of $2,000, which was subsequently reduced by the court to $1,400. Respondent collected the sum of $121.21 upon an execution and the remainder of the judgment remains unsatisfied. Under another execution he levied upon 102 cases of honey, 4 sacks of beeswax, 3 boxes of beeswax, and 3 boxes of comb beeswax foundation of the value of about $1,400, which were claimed by appellant Anna M. Ross as her separate property. She gave a bond to release the property from the levy of the execution.

Respondent filed an action to subject the personal property, above described, to his judgment and to cancel and set aside as fraudulent and void as against creditors, a bill of sale from J. Edgar Ross to Anna M. Ross, his wife, dated September 11, 1918, and recorded December 2, 1918, whereby the husband sold to his wife 490 colonies of bees and the equipment used in conducting his apiaries in Imperial county, together with an automobile and a truck. The bill of sale was prepared by respondent, who is an attorney at law, for J. Edgar Ross, who was then his client. The complaint attempted to reach other property and cancel other instruments executed between them, its allegations being in the following form: "That after the contracting of the debt on which the aforesaid judgment was recovered the said J. Edgar Ross assigned and transferred by an instrument in writing entitled a bill of sale, to-wit: on or about December 2nd, 1918, all of his personal property to the defendant Anna M. Ross, and on or about the same date conveyed by deeds and other instruments all of his real property to said Anna M. Ross; that said Anna M. Ross is the wife of said defendant J. Edgar Ross; that the said Anna M. Ross accepted the same; that said transfer and assignment was without valid consideration and for the sole purpose of defrauding the creditors of said defendant, including this plaintiff. That the defendant J. Edgar Ross has from time to time since the commencement of the debt for which plaintiff so secured said judgment herein turned over to, paid and delivered to the defendant Anna M. Ross, the wife of said defendant J. Edgar Ross, all of the monies received by said J. Edgar Ross from various sources as well as all of the property owned by said J. Edgar Ross, all without valid consideration for the same and for the purpose of defrauding the creditors of said J. Edgar Ross and in particular this plaintiff thereof."

The court found in favor of the respondent and rendered judgment accordingly.

The portions of the findings of fact and conclusions of law material to this appeal are as follows: "That subsequent to incurring the debt which is the basis of the judgment set forth in the creditor's bill and complaint, the defendant J. Edgar Ross from time to time paid, delivered and diverted to his wife and codefendant Anna M. Ross all monies and property received collected, and acquired by him, and transferred, conveyed and assigned by deeds and other instruments in writing, all property, in Riverside County and elsewhere in California, both real and personal acquired by him since their marriage, to his wife and codefendant Anna M. Ross; that said transfers, conveyances and assignments were each and all without consideration and not intended as a gift, but were made for the purpose of diverting and transferring said property into his wife's name to defraud this plaintiff and other creditors of said defendant J. Edgar Ross. That the property heretofore seized by the Sheriff of the County of Imperial, under the execution issued October 9th, 1924, on the judgment rendered in the Superior Court of the State of California, in and for the County of Imperial, in Action No. 6658, in favor of plaintiff herein, to-wit: 102 cases of honey, 4 cases of beeswax, 3 boxes of beeswax and 3 boxes of sheet comb or foundation, and never was the separate property of Anna M. Ross, but was at all times and is now the property of said defendant J. Edgar Ross, and at the date of said seizure by said sheriff aforesaid was in the custody, control, and management of said J. Edgar Ross and was and is subject to sale under said execution and the proceeds thereof should be applied to the payment of his debts and obligations and in satisfaction of said judgment aforesaid and the undertaking executed by said Anna M. Ross and her sureties thereon are liable for the value thereof. That from the foregoing Findings of Fact, the Court determines as Conclusions of Law. First: That all the property, both real and personal, now standing in the name of Anna M. Ross is community property of said J. Edgar Ross and Anna M. Ross, and was acquired by them since their marriage, and was transferred, conveyed, assigned and diverted to said Anna M. Ross by her husband J. Edgar Ross and at his direction and request by deeds and other instruments in writing, subsequent to incurring the debt which is the basis of the judgment set forth in said plaintiff's complaint and creditor's bill herein. Second: That the transfers and conveyances of real and personal property heretofore made by said J. Edgar Ross to said co-defendant Anna M. Ross and now of record in Riverside County and elsewhere in California, were not intended as a gift from husband to wife, and are fraudulent, void and without consideration, but were made for the purpose of defrauding the creditors of said defendant J. Edgar Ross and should be set aside and cancelled."

By the judgment it was decreed: "That the conveyances and transfers of real and personal property dated September 11, 1918, executed by the defendant J. Edgar Ross to Anna M. Ross, his wife, and recorded by her December 2, 1918, in the office of the County Recorder of the County of Imperial, California, were made with intent to defraud the creditors of said J. Edgar Ross and are void as against plaintiff in this action; that the conveyances made at the direction and request of said defendant J. Edgar Ross to said Anna M. Ross, his wife, of property located in Beaumont, Riverside County, California, and heretofore standing of record in the name of said Anna M. Ross, were each and all of community property acquired by said defendants herein since their marriage and were without consideration and not intended as a gift from husband to wife, but each and all were made with the intent to defraud the creditors of said defendant J. Edgar Ross and are each and all void as against the plaintiff in this action and were made subsequent to the incurring of the debt which is the basis of plaintiff's judgment set forth in the complaint and creditor's bill herein. And it is further adjudged, that the property seized by the Sheriff of Imperial County, California, under the execution issued October 9th, 1924, in Action 6658 was at the time of seizure in the custody, and under the control and management of said defendant J. Edgar Ross and the property of said J. Edgar Ross and plaintiff was and is entitled to have same subjected to and sold under execution and the proceeds derived therefrom applied in satisfaction of said execution and judgment. * * * And it is further adjudged, that the plaintiff in this action is at liberty to proceed upon his execution heretofore issued upon the judgment in his favor mentioned in the complaint and creditor's bill or entitled to the issuance of another execution, as he may be advised; and that the said defendants J. Edgar Ross and Anna M. Ross deliver to the Sheriffs of Imperial County and Riverside County, California, upon any such execution said property standing in the name of said Anna M. Ross, and particularly 102 cases of honey, 4 cases of beeswax, 3 boxes of beeswax and 3 boxes of sheet comb or foundation, or in lieu thereof the value of same as set forth in the undertaking filed by said Anna M. Ross in said action, and such Sheriffs are instructed and directed to levy upon any property, real or personal, standing in the name of said Anna M. Ross, not exempt from execution, to be sold and applied to satisfy said judgment of plaintiff and interest and costs of this action."

[1-3] The first questions presented on this appeal are whether or not the pleadings support the judgment and whether or not the evidence supports the findings. It will be remembered that, other than the descriptions of the property levied upon by the sheriff of Imperial county, and the bill of sale of September 11, 1918, the complaint alleges that J. Edgar Ross after contracting the debts to

plaintiff conveyed by deeds or other instruments, assigned, transferred, or turned over to Anna M. Ross all and his real and personal property and all moneys received by him. This is the only description of such property in the complaint and the answer of appellants does not furnish any further description. It is a fundamental principle of pleading that the complaint must clearly and distinctly state the ultimate facts relied upon to constitute the cause of action so that the court may fully understand the issues, and the adverse party may plead to them, and may plead the judgment in bar in any subsequent action. Preston v. Central California Water & Irrigation Co., 11 Cal. App. 190, 104 P. 462; Dennis v. Crocker-Huffman Land & Water Co., 6 Cal. App. 58, 91 P. 425; Philbrook v. Randall, 195 Cal. 95, 231 P. 739. Where the court can see that a purported description in reality describes nothing, it is void. De Sepulveda v. Baugh, 74 Cal. 468, 16 P. 223, 5 Am. St. Rep. 455. The only property sufficiently described in the complaint, upon which an issue could be joined, was that described in the bill of sale, and that levied upon by the sheriff of Imperial county. In so far as the judgment attempts to go beyond this property it is not supported by the pleadings. The evidence showed that Anna M. Ross had the record title to a house and two lots situated somewhere in Beaumont, Riverside county, Cal., a cherry orchard in Riverside county in the neighborhood of Beaumont, and some lots in Imperial county. There was no attempt to get into the record any description of this property so that the evidence does not supply the lack of description in the pleadings.

About September 11, 1918, J. Edgar Ross consulted respondent in his capacity of an attorney at law about the transfer to his wife of the personal property described in the bill of sale. The instrument was prepared by respondent and executed by the parties. The evidence shows that all of this property was sold and the proceeds invested in a ranch in Imperial county, which was taken for an incumbrance thereon in 1920, and lost by appellants. As the value of the personal property had passed out of the assets of appellants, and both of them, the attempt to cancel the bill of sale in 1927 was nothing more than an idle gesture that had no bearing on the real merits of this case.

The personal property levied upon by the sheriff of Imperial county was not acquired by an of the fruits of the transaction of September 11, 1918. Some years before this date appellants owned some property in the city of Brawley which they traded for a house and lot in the city of Los Angeles. It does not appear in whose name the record title to this property was placed. Some time prior to the date of the bill of sale the Los Angeles property was traded for a cherry ranch in the neighborhood of Beaumont in Riverside county. The deed to this property placed the title in the name of Anna M. Ross, presumptively as her separate property. She lived on this ranch for several years with her children, claimed it as her separate property as a gift from her husband, received all of the income therefrom, and paid all of the expenses of caring for it. There is no evidence in the record that would even indicate that this transaction was tainted with fraud in the slightest degree. What little evidence of alleged fraud respondent presented was directed to the time he prepared the bill of sale for J. Edgar Ross, and did not pretend to refer to anything done prior to that date.

[4-6] A husband and wife may make contracts with each other (section 158, Civ. Code), and a gift from one to the other is valid, even without consideration (section 1040, Civ. Code), if not made to defraud creditors. A transfer of property cannot be adjudged fraudulent solely on the grounds that it was not made for a valuable consideration. Section 3442, Civ. Code. At the time the cherry orchard was acquired by Mrs. Ross, either the community, or her husband, owned property of the value of a number of thousand dollars, and the only indebtedness shown to exist at that time was the sum of $62.75 owed by J. Edgar Ross to respondent, which was subsequently paid. Where the evidence shows that the husband was solvent at the time of the conveyance of either his separate or the community property to his wife, and there was no evidence that the conveyance was made with an intent to defraud any creditor, the transaction cannot be set aside. Burton v. Mullenary, 147 Cal. 259, 81 P. 544. The personal property levied upon by the sheriff of Imperial county was produced by bees purchased on a contract from a Mr. Schope for $1,000, upon which about $550 had been paid at the time of the trial. Of this sum at least $350 was paid by Mrs. Ross out of the income from cherries sold from her separate property and to this extent at least she had a separate estate in the honey and other property taken by the sheriff which was not liable for the debts of her husband.

As the judgment will have to be reversed, we will notice some apparent errors occurring at the trial so that they may be avoided in a future trial, if one be had.

[7, 8] In March, 1918, J. Edgar Ross employed respondent as his attorney in various litigations, which lasted until July, 1919. All cases were civil actions, except one. The attorney's fees charged by respondent were not to exceed $35 in justice court cases and not to exceed $100 in superior court actions, except in one case. He testified that his maximum charge in justice court cases was $35. On October 7, 1918, J. Edgar Ross was arrested upon a warrant issued out of the recorder's court of the city of Brawley, under the provisions of sections 701 to 714 of the Penal Code, upon a charge of threats made to do

great bodily harm to Ray Mitchell and others. Upon the hearing Ross was represented by respondent and the magistrate made an order requiring Ross to " 'pay a fine of three hundred dollars and invest the same in United States Liberty Loan bonds of the fourth issue, and be imprisoned in the city jail for a period of 90 days, but that, upon your paying your fine as stated and turning same over to your faithful little wife, the jail sentence will then be remitted.' Thereupon defendant filed a purported notice of appeal to the superior court of Imperial county. A statement prepared and presented by such appellant was settled and allowed which, together with the transcript, was filed in the superior court. Upon the matter coming on to be heard, the superior court, without taking any evidence and apparently basing its action upon the statement alone, made an order vacating and setting aside the order made by the recorder's court, and ordered that defendant (petitioner here) be required to give a peace bond in the sum of $500, to remain in force six months from and after October 8, 1918." Ross v. Superior Court, 39 Cal. App. 590, 179 P. 536. This quotation describes all of the services rendered by respondent in the criminal action. The order of the superior court was vacated and annulled by the Second District Court of Appeal in the case last cited. Respondent did not appear as attorney for Ross in this last proceeding. His bill rendered some time in 1919 for his services in the recorder's court and before the superior court on appeal was $2,000, and furnished by far the largest item of respondent's total bill against Ross of $2,312.75. Respondent admitted payments on account in the sum of $133.28, and as there was no special direction or agreement that the payments should be applied upon any special items of the bill, they must be credited upon the earliest items which would more than pay all of the indebtedness incurred prior to the $2,000, which was not finally earned, if earned at all, until January 17, 1919. Anna M. Ross was not permitted to contest the validity of the claim upon which respondent's judgment against her husband rested in the first trial of this case in the court below. She was not a party to this judgment of $1,400 and was not bound by respondent's judgment against her husband or concluded from contesting the claim on which that judgment rested. Burton v. Mullenary, supra; Mullenary v. Burton, 3 Cal. App. 263, 84 P. 159.

There were two trials of this action in the court below, one in November, 1925, and the other in January, 1927. The first trial resulted in a judgment in favor of appellants. A motion for new trial was granted, and the second trial resulted in a judgment in favor of respondent. At the first trial J. Edgar Ross appeared and attempted to act for himself and his wife in defending the suit. He was not permitted to do so on the ground that he was not an attorney at law and therefore could appear only for himself, and upon the further ground that his interest in the action was adverse to that of his wife. Mrs. Ross appeared in person with T. T. Porteous, an attorney at law, and moved in open court that he be substituted for her as her attorney in the action. The trial then proceeded with Mr. Porteous appearing as attorney for Mrs. Ross and Ross defending in propria persona. The notice of motion for new trial made by respondent was served on appellants personally and not on Mr. Porteous. There is nothing in the record showing that Mrs. Ross had been substituted for Mr. Porteous in the action or that she or her attorney were present at the hearing of the motion for new trial. This presents the very grave question of whether or not the first judgment rendered in favor of Mrs. Ross was ever vacated, and whether it is not now a final judgment in her favor. The record here may not be complete on the matter of substitutions, so we are merely suggesting this question to the trial court. It also appears that the notice of the time and place of the second trial was served on Mrs. Ross personally and not on her attorney. She was not present at this trial, and the court proceeded in her absence under the provisions of section 594, Code of Civil Procedure. If the service of the notice was not regular, the trial should not have proceeded against her.

[9] The court struck paragraph 8 from appellants' amended answer on motion of respondent. Part of the allegations of this paragraph alleging, among other things, the solvency of J. Edgar Ross were material and should not have been stricken. Evidence was admitted at the trial on the question of his solvency, so he was not injured by the order. If the case is tried again he should have the right to present this evidence under proper pleadings.

The other errors complained of will in all probability not occur at a retrial of the case.

Judgment is reversed.

We concur: SLOANE, P. J.; BARNARD, J.

102 Cal. App. 677

ARMSTRONG et ux. v. ADAMS. (Civ. 35.)★

District Court of Appeal, Fourth District, California. Dec. 19, 1929.

Rehearing Denied Jan. 13, 1930. Hearing Denied by Supreme Court Feb. 17, 1930.

1. Pleading ⚷205(1)—Dismissal for insufficiency of complaint cannot be sustained if any count in complaint setting up several counts is good as against general demurrer.

If any count or cause of action in complaint setting up several counts or causes of action is good as against demurrer, a judgment of dismissal for insufficiency of complaint cannot be sustained.

2. Damages ⚷142—Under general allegation of damages, plaintiff may prove and recover those damages which naturally and necessarily result from act complained of.

In action for damages for culpable negligence of attorney, plaintiff may prove and recover, under general allegation of damages, those damages which naturally and necessarily result from act complained of and such damages need not be specially pleaded.

3. Attorney and client ⚷129(2)—Allegation, in action for negligence of attorney, that client had lost interest which accrued on judgment up to time of reversal thereof, held sufficient allegation of damages.

In action for damages for culpable negligence of attorney, allegation that attorney failed to prepare findings in a certain case in which he was acting as attorney for plaintiff in careful and lawyerlike manner, and that he caused court to sign and adopt defective and imperfect finding, on which ground the judgment for plaintiff was reversed, and thereby plaintiff lost interest which accrued on judgment up to time of reversal thereof and which would have accrued thereon to time when new trial could have been had, *held* sufficient allegation of damages.

4. Appeal and error ⚷917(1)—On appeal, facts pleaded must be accepted as true for purpose of considering ruling on demurrer.

Facts pleaded in complaint must be accepted as true on appeal, for purpose of considering ruling of trial court on demurrer.

5. Attorney and client ⚷112—Failure of attorney to include in findings amount of loss sustained by client held actionable negligence.

Where attorney, in action for damages for difference in value between property as conveyed and its value had it contained as many acres as represented in preparing findings at direction of court, failed to include in finding amount of loss sustained by client, as shown by difference in acreage between tract of land as conveyed and as it had been represented, *held* actionable negligence.

6. Attorney and client ⚷112—Attorney could not escape liability to client for negligence in drawing up finding on ground that findings were adopted by judge (Code Civ. Proc. § 634).

Attorney, directed by court to prepare findings as permitted by Code Civ. Proc. § 634, could not escape liability to client for negligence in drawing up such findings on ground that they had been adopted and signed by judge.

7. Action ⚷48(1)—Complaint held not demurrable for misjoinder, where client's action against attorney for damages and for cancellation of note for services arose out of same transaction (Code Civ. Proc. § 427, subd. 8).

Complaint against attorney for culpable negligence containing four causes of action, first, for loss of interest on judgment reversed because of insufficiency of findings which had been prepared by attorney, second, for cancellation of note and mortgage given for services, third, for cancellation of such note and mortgage on ground of fraud, and, fourth, for cancellation of note and mortgage on ground of undue influence, *held* not demurrable on ground of misjoinder of causes of action, under Code Civ. Proc. § 427, subd. 8, since each cause of action arose out of the same transaction.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by J. P. Armstrong and wife against G. P. Adams. Judgment for defendant, and plaintiffs appeal. Reversed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Joseph L. Lewinson and F. Walton Brown, both of Los Angeles, for appellants.

G. P. Adams and W. W. Orme, both of Los Angeles, for respondent.

SLOANE, P. J. This is an appeal from a judgment of dismissal upon failure and refusal of plaintiffs to amend, after sustaining demurrer to their third amended complaint.

The present action was brought by plaintiffs against the defendant for damages resulting from alleged culpable negligence of defendant, as their attorney, in preparing findings in support of a judgment in favor of plaintiffs in an action to recover damages for deceit and failure of consideration in a real estate transaction.

It is alleged in the complaint in the present action that plaintiffs employed defendant to represent them and to prosecute an action to recover damages from Walter F. Rau and Mary Rau, arising on a transaction effecting an exchange of properties; that the property received by the plaintiffs here in such exchange consisted of an orange grove and improvements thereon, situated in the county of San Bernardino; that this property was accepted in the exchange transaction on the representation that it contained 55 acres; that it was disclosed after the deal had been consummated that it only contained 44.59 acres; that an action for damages to recover the difference in value between the property as conveyed and its value, had it contained the 55 acres as represented, was instituted against the Raus in the superior court of San Bernardino county; that the case was tried before the court without a jury, and proof introduced in behalf of plaintiffs that the property in question was worth $9,360 less

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★Rehearing denied. Hearing denied by Supreme Court.

than it would have been had it contained 55 acres as was represented, and that the court at the conclusion of the trial announced its judgment for the plaintiffs in said sum, and directed defendant here, the attorney for the plaintiffs, to prepare findings; that proposed findings were drawn up by plaintiffs' said attorney, and accepted and adopted by the court, but that said findings, as thus prepared and adopted, instead of stating that the property in question, had it contained 55 acres as represented, would be worth $9,360 more than it was worth with an acreage of only 44.59 acres, stated "that had said property embraced 55 acres, instead of 44.59 acres, the value thereof would be $9,360.00"; and that no statement of the difference in value between the property as conveyed and as represented was contained in the findings; that the defendants in said action appealed therefrom on the judgment roll alone, and that on such appeal to the District Court of Appeal the judgment was reversed.

The original judgment is alleged to have been made and entered about October 7, 1922. and the judgment of reversal about April 15, 1925. The complaint also alleges that the defendant attorney willfully, knowingly, and with an intent to conceal his negligence in preparing said findings, withheld all information of the fatal omission therein, and that plaintiffs had no notice or knowledge thereof until after the judgment of reversal in the Court of Appeal.

The complaint states that the defect in the findings was the ground on which the Court of Appeal reversed the judgment. It is apparent that the findings in question were insufficient to support the judgment, and, as a matter of fact, the opinion of the Court of Appeal, as reported in 72 Cal. App. 288, 236 P. 937, 938, shows conclusively that the judgment of reversal was based on the insufficiency of the findings. The court says: "It is perfectly clear that the facts as found furnish no basis whatever for damages in the sum stated, or in any amount."

Under the new section 956a of the Code of Civil Procedure and section 4¾ of article 6 of the Constitution, these defects of the findings could be cured by the appellate court, but, as the law then stood, and as is pointed out in the opinion, the appellate court was without authority to amend the findings, or to disregard the conclusiveness of the record as presented. No attempt seems to have been taken at any step in the proceedings to correct the error, and it does not appear whether a new trial was ever had or a recovery obtained from the defendants in that action for the damages sustained in the property exchange.

Plaintiffs' action in the present case is for damages and injuries, consequences alleged to have resulted from the negligence of plaintiffs' attorney in drafting these findings and in concealing and withholding from plaintiffs knowledge of the fatal omissions. The complaint contains four alleged causes of action.

The first demands damages on account of the loss of interest on the judgment against the Raus, from the date of its entry to the date of its reversal, in the sum of $2,430 and costs, which loss is alleged to have been the direct and proximate result of defendant's negligence in preparing the findings.

The second cause of action asks for the cancellation of a note and mortgage given by plaintiffs to defendant in consideration of the attorney's services, consisting in a large part of the services alleged to have been rendered valueless by the defective findings.

The third cause of action demands a cancellation of said note and mortgage under allegations that the plaintiffs were induced to execute them under the belief entertained by plaintiffs and created by the willful and fraudulent withholding of information as to the insufficiency of the findings in question, to sustain plaintiffs' judgment for damages and the consequent failure of consideration for the note and mortgage, based on defendant's claim for legal services.

The fourth cause of action seeks the cancellation of the same note and mortgage by reason of alleged undue influence of defendant as the confidential attorney and adviser of plaintiffs, and their reliance on his integrity and good faith.

A general demurrer was filed by defendant to each and all of these causes of action, on the ground that neither of them or all of them together stated facts sufficient to constitute a cause of action against defendant, and also demurring specially to each cause of action on the grounds of uncertainty, ambiguity and unintelligibility, and further alleging a misjoinder of causes of action.

The demurrer to the complaint, which was plaintiffs' third amended complaint, was sustained in its entirety, and, plaintiffs refusing and failing to further amend, the judgment of dismissal from which this appeal was taken was made and entered.

[1] The correctness of the judgment of dismissal depends on whether or not either of the alleged causes of action is sufficiently pleaded. Respondent concedes the rule that, if any count or cause of action in a complaint setting up several counts or causes of action is good as against demurrer, a judgment of dismissal for insufficiency of the complaint cannot be sustained. Jensen v. Dorr, 159 Cal. 742, 116 P. 553; Brandt v. Brandt, 178 Cal. 548, 174 P. 55; Jones v. Iverson, 131 Cal. 101, 63 P. 135; Etchas v. Orena, 127 Cal. 588, 60 P. 45.

Respondent calls attention to the fact that all of the decisions cited referred to rulings on general demurrer. It will hardly be contended, whether the demurrer is general or special, that, if one of several causes of action properly joined in the complaint is sufficiently pleaded, the action as a whole can be dismissed.

In this case, each of the four causes of action is demurred to generally for want of sufficient allegation of facts, and specially on the grounds of ambiguity, uncertainty, and unintelligibility. Dealing first with the special demurrer, it will be noticed that on each of the grounds stated to each of the causes of action the objection is directed solely to the insufficiency, uncertainty, ambiguity, and unintelligibility of the statement of damages. If the allegations of the complaint demurred to set forth a legal right on the part of the plaintiffs, and wrongful violation of that right by defendant and damage proximately resulting therefrom, a cause of action is stated, and it is not necessary to point out in detail in the pleadings the nature and extent of such damage, unless special damages are claimed; and if, in an attempt to do so, redundant matter is pleaded, it cannot be laid to uncertainty or ambiguity, if the essential elements of the cause are plainly presented, and show some actual damage.

[2] We are discussing now the sufficiency of a complaint to sustain plaintiffs' standing in court and right to recovery of some sort of judgment. Under the ad damnum clause as general allegation of damages, a plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of, and such damages need not be specially pleaded. 8 Cal. Jur. p. 887.

"Under a general allegation of damages, a plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of. These damages the law implies will proceed from the act, although the amount may often be in the reasonable discretion of the jury. They are called 'general,' as contradistinguished from 'special' damages, which are required to be specially stated in the declaration." Mitchell v. Clarke, 71 Cal. 163, 167, 11 P. 882, 884, 60 Am. Rep. 529.

"The question as to how general damages from the breach of a contract have arisen otherwise than as disclosed by the general allegation of damages, is the subject of evidence, rather than pleading." Lillie v. Weyl-Zuckerman & Co., 45 Cal. App. 607, 188 P. 619, 620.

[3] Considering the ruling on the special demurrer, as applied to the plaintiffs' first cause of action here, we find that each of the grounds of demurrer is based on an allegation that it cannot be determined therefrom:

"(a) How, or whether the interest of $2,430.00, which it is sought to recover, has been lost, or whether it ever will be lost.

"(b) How, or in what way plaintiffs or either of them have been damaged by any acts of defendants or of what the damage consists."

The particular allegations of the first cause of action to which these objections are addressed are as follows: "That by reason of the failure of defendant to prepare said findings of fact in a careful and lawyerlike manner, and of the fact that defendant caused and procured the court to sign and adopt in said action the defective and imperfect findings which were prepared by defendant in his capacity as attorney for plaintiffs in said action as aforesaid, plaintiffs have incurred loss and damage, in that said judgment rendered in said action against Walter F. Rau and Mary Rau, was reversed by said District Court of Appeal, and plaintiffs have lost the benefit thereof; that plaintiffs have lost the interest which accrued on said judgment up to the time of the reversal thereof, and would have accrued thereon from said time to the time when a new trial of said action could have been had, to-wit: as plaintiffs are informed and believe and therefore allege, on or about the first day of July, 1926, amounting to the sum of Two thousand four hundred thirty dollars ($2,430.00), to the damage of plaintiffs in the sum of Two thousand four four hundred thirty dollars ($2,430.00)."

Whatever defense might be made to the measure of damages herein set forth, there cannot be said to be a failure to allege damage from the negligent acts of defendant, nor that there is anything ambiguous, uncertain, or unintelligible in the allegations; and it cannot be contended that the allegations of fact leading up to the reversal of plaintiffs' judgment fails to show that the reversal of such judgment, under the circumstances set forth, caused damage to plaintiffs sufficient to sustain a judgment in some amount, if shown to be the result of defendant's negligence and breach of duty. We reach the same conclusion as to the sufficiency of the first cause of action against the general demurrer.

[4, 5] The remaining and important question is, Was there actionable negligence on the part of defendant in failing to properly prepare the findings in the damage suit, in which he was acting as attorney for the plaintiffs?

We are satisfied that, under the facts pleaded, which, for the purpose of considering the ruling on demurrer, must be accepted as true, the defendant is liable for any damages proximately resulting from the fatal omission in the findings. The general rule as to liability of attorneys for their clients is stated in 3 California Jurisprudence, p. 670, § 73, as follows: "The law implies a promise on the part of an attorney, that he will execute the business entrusted to his professional management, with a reasonable degree of care, skill and dispatch, and the attorney is liable for a violation of this obligation, provided damage results therefrom."

This rule calls for at least ordinary skill and care in the course of the attorney's professional employment. This rule is stated in Gambert v. Hart, 44 Cal. at pages 542, 552, as follows:

"The rule firmly established in this country by the weight of authority is that an attorney is bound to use ordinary skill and care in the course of his professional employment.

"In the late work of Shearman & Redfield on Negligence, section two hundred and twelve, it is said: 'The true rule of liability undoubtedly is, that an attorney is liable for a want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise.' This is the principle recognized in Wilson v. Russ [50 Am. Dec. 386], 20 Me. 421; Goodman v. Walker, 30 Ala. 482 [68 Am. Dec. 134]; Cox v. Sullivan, 7 Ga. 144, and numerous other American cases, and, we think, is not only established by authority but is founded in reason and justice."

It may be conceded that where the mistake or omission of the attorney arises from controvertible interpretation of law, or some uncertainty or ambiguity of fact, the rule for liability for damages may not be strictly applied, but in this case, the mistake and omission complained of was obviously as to the most important part of the case, the finding of the amount of loss sustained by plaintiff from the difference in acreage between the tract of land conveyed, and as it had been represented. This difference in value was the main issue in the case, and the amount of recovery given by the judgment was to be determined by it. It is the last thing that should have been overlooked in preparing the findings.

Whether the failure to make such finding was the result of culpable negligence, want of skill, or mere indifference, it was, from the standpoint of liability, inexcusable. The same is true if it was a mistake of the stenographer, which was overlooked by the defendant, as would appear likely from the wording of the finding.

[6] Counsel for defendant do not very confidently question the liability of an attorney where there is responsibility for such an error as this. They rather try to place the ultimate blame on the judge who adopted and signed the findings. This position cannot be maintained. It is true that the findings became the findings of the court, but section 634, Code of Civil Procedure, recognizes the right of the court to direct a party to prepare and submit findings, and it is the accepted practice to leave it to the attorneys for the successful party to draft and submit findings. While it is, of course, the duty of the court before signing findings of fact and conclusions of law to see that they state the facts and conclusions as approved by the court, it will, however, not do to release the attorney from responsibility to his client for a mistake or oversight of the court, which has been induced by an error of the attorney. It cannot be claimed in this instance that the finding as made may have been the finding intended by the court, because the amount of recovery given in the judgment is the precise amount calling for the omitted finding, and dependent upon such finding to sustain the judgment.

The mistake was one for which the defendant was primarily responsible. It resulted in the reversal of plaintiffs' judgment, and presumptively to their damage.

We are of the opinion that the demurrer to the complaint in this action, at least as to the first cause of action, should have been overruled, and that the judgment of dismissal was erroneous. As this finding will necessitate a reversal and new trial, we do not deem it necessary to consider the sufficiency of the other causes of action as pleaded, since the pleadings will be open to further consideration and amendment, if necessary, in the trial court.

[7] The demurrer on the ground of misjoinder of causes of action is not well taken, for the reason that the ground of relief demanded in each arises from the same transaction, namely, the employment by plaintiffs of the defendant as their attorney, his actionable negligence in this matter, and his alleged fraudulent concealment of the consequences of his act from the plaintiffs. Code Civ. Proc. § 427, subd. 8.

The judgment is reversed.

We concur: BARNARD, J.; MARKS, J.

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102 Cal. App. 756

BANK OF UNITED STATES v. FOREMAN.*
(Civ. 3959.)

District Court of Appeal, Third District, California. Dec. 26, 1929.

Rehearing Denied Jan. 25, 1930. Hearing Denied by Supreme Court Feb. 24, 1930.

1. Bills and notes 🔑525—Evidence held not to support finding that bank knew that indorsement on note was conditional.

In bank's action on note against indorser, evidence *held* not to support finding that bank purchased knowing that indorsement was made on condition that part of proceeds of note was to be held on deposit for indorser's security.

2. Pleading 🔑237(4)—Permitting indorser after trial to plead that note was conditionally indorsed held improper (Code Civ. Proc. § 470).

In action by bank as holder of note, permitting indorser after trial to amend pleading and set up that note was indorsed on condition that part of proceeds be held on deposit for indorser's security *held* improper, since under Code Civ. Proc. § 470, pleading may be amended at trial in discretion of court only for purpose of conforming to evidence adduced in response to valid issues, and amendment should not be allowed which raises new issues.

3. Bills and notes 🔑529—Relieving indorser of part of obligation on note on ground that holder fraudulently converted such part held improper, where fraud was not issue.

Relieving indorser from part of obligation on note, on theory that bank as holder fraudulently converted certificate of deposit to its use,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Hearing denied by Supreme Court.

contrary to instructions of indorser that part of proceeds of note be held on deposit for his security, *held* improper, where fraud of bank was not issue at trial of case, since charge of fraud must be alleged and clearly established.

4. Bills and notes ⚿371—Accommodation indorser, although innocent, held liable for note, where purchaser had no knowledge of conditional indorsement (Civ. Code, §§ 3137, 3138, and § 3145, subd. 3).

In action by bank as holder of note to recover amount thereof against accommodation indorser, where it appeared that neither the accommodated maker nor party acting for maker who obtained indorser's consent to indorse note informed bank that indorsement was made on condition that bank would keep part of proceeds of note on deposit for security of indorser, in consequence of which bank did not have knowledge of conditional indorsement, indorser *held* liable under Civ. Code, §§ 3137, 3138, and section 3145, subd. 3, on dishonor by maker and due notice thereof to indorser, since when a loss is sustained which must be borne by one of two innocent parties, it will fall on him whose acts occasioned loss, even though he be free from actual fault.

5. Bills and notes ⚿125—Absent provision to contrary, where note does not provide for interest, holder is entitled to legal rate of interest from maturity (Deering's Gen. Laws 1923, Act 3757).

Under Deering's Gen. Laws 1923, Act 3757, where note does not provide specifically for interest in absence of any provision to contrary, holder is entitled to recover legal rate of interest from date of maturity.

6. Appeal and error ⚿909(5)—Where indorser was relieved of part of liability on note on ground of conditional indorsement which was not in issue, reviewing court must assume that record disclosed situation justifying recovery for full amount of note.

Where indorser was relieved from part of liability on note on ground that indorsement was on condition that bank hold such part on deposit as security for indorser, which condition was not made an issue, reviewing court must assume that record disclosed without conflict that purchaser was holder of note in due course and note was unpaid and nonpayment thereof duly protested and that holder was entitled to recover full amount thereof.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the Bank of the United States against L. O. Foreman. From a judgment for plaintiff for a sum less than amount demanded, plaintiff appeals. Modified, with directions.

Hearing denied by Supreme Court; SHENK, J., dissenting.

John W. Hart and Delvy T. Walton, both of Los Angeles, for appellant.

John C. Stick and Stick, Moerdyke & Gibson, all of Los Angeles, for respondent.

R. L. THOMPSON, J. This is an appeal by the plaintiff from an unsatisfactory judgment in its favor upon several promissory notes. September 9, 1925, the Cox-Klemin Aircraft Corporation of New York executed, unconditionally indorsed, and transferred to the plaintiff for a valuable consideration nine promissory notes for $5,000 each. Prior to the transfer they were each indorsed by the defendant. The notes were in the following form:

"$5,000.00 New York, Sept. 9, 1925.

"Sixty days after date we promise to pay to the order of Cox-Klemin Aircraft Corp. Five thousand & no/100 Dollars, at Bank of United States. Value received.

"No. ———. Due Nov. 9.

"Cox-Klemin Aircraft Corp.
"L. Charles Cox, Pres."

Indorsed:

"Cox-Klemin Aircraft Corp.
"L. Charles Cox, Pres.
"L. Charles Cox.
"L. O. Foreman."

The aircraft corporation was financially involved. The defendant Foreman was a substantial stockholder in the corporation and resided at Los Angeles. A plan existed to liquidate the indebtedness by executing and discounting notes of the corporation, and by then recapitalizing the institution on the basis of a much larger valuation. This plan was disclosed to the defendant by a Mr. Smyth, a member of the New York law firm of Lee, Smyth & Wise, which had charge of the refinancing project. For the purpose of extending his financial standing to the paper, the defendant filled out these nine notes at his office in Los Angeles, in the form above quoted, with the exception that the dates were left blank and the notes were not then signed or indorsed by the aircraft corporation. The defendant then affixed his unqualified indorsement on the back of each note and sent them to Mr. Smyth to be executed and indorsed by the aircraft corporation and discounted at the bank. The following message of instructions was sent to Smyth by the defendant:

"S. C. 48, 106 N. L.
"G. S. Los Angeles, Calif. 9

"Nathan Smyth, Care Lee, Smyth and Wise, 7 Dey St., New York, N. Y.: This will authorize you to turn over to Capt. Cox forty-five thousand dollars worth of notes which you now have bearing my endorsement for the purpose of being discounted at Bank of United States proceed(s) to be used as follows to take up notes bearing my personal endorsement amounting to thirty thousand dollars with W. S. Guardian Co. American Trust and Seventh Avenue National and forward same to me here together (with) certificate of deposit for fifteen thousand dollars to be held by me which is to cover cash balance left there per Cox wire (period) Wire me when Guardian is paid also any other information. L. O. Foreman."

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The bank had no knowledge of this telegram or the conditions which it contained. The defendant never personally met any of the officers of the bank. He dealt entirely through Smyth. Prior to accepting and paying the aircraft corporation notes, the following message was sent to the defendant from B. K. Marcus, the vice president of the bank through whom the sale of the notes was negotiated:

"Cox Klemin Aircraft Corporation offer us for discount nine of their notes each for five thousand dollars dated today payable sixty days after date at our bank in New York. Notes endorsed by you and Cox. Please telegraph confirming your endorsement."

The defendant confirmed the transaction by telegram in the same language contained in the following letter subsequently sent to him by Marcus:

"New York, September 10, 1925.

"* * * We confirm having sent you the following telegram on September 9th * * * (here follows the language of the foregoing telegram) to which you replied as follows: 'My endorsement on nine notes each for five thousand dollars of Cox Klemin Aircraft Corporation and endorsed by Cox is Okay.'

"Acting on your telegram we have discounted for the Cox-Klemin Aircraft Corporation the notes herein mentioned."

These notes were discounted by the plaintiff bank September 9, 1925, acting solely through Mr. Marcus, its vice president. The transaction was negotiated through the assistance of one Freedman, who was employed for this purpose by Mr. Smyth in behalf of the aircraft corporation. Cox was also present at the time. Neither Smyth nor Foreman was present. The bank consented to discount the notes, but insisted upon 25 per cent. of the amount remaining with the bank for deposit in compliance with its customary bank rule. Mr. Cox, however, insisted that the aircraft corporation required the immediate use of approximately $45,000. It was then arranged that the aircraft corporation should execute an additional note of $15,000, which it did. The defendant had no knowledge of this $15,000 note and it did not contain his indorsement. In lieu of the cash for this last note, a certificate of deposit payable to the aircraft corporation was issued, indorsed, attached to the note, and retained in the bank. When this note matured in 60 days, it was paid by transfer of the certificate to the bank and the cancellation thereof. The transaction regarding the last note appears to have been a mere formal circuitous method of conforming to the rule of the bank. On the face of the transaction the entire amount involved was $60,000. As a matter of fact the aircraft corporation was negotiating nine of its notes for $5,000 each, and was paid by the bank $45,000 less the interest on the notes until the date of maturity. Thirty thousand dollars of this sum was turned over to Smyth, who paid the obligations pursuant to his telegram of instructions from the defendant. The certificate of deposit was not sent to the defendant.

None of these notes were paid. At the time of their maturity they were duly presented for payment and dishonored. Notice of dishonor and nonpayment was regularly served. Suit was thereupon filed. The complaint stated a simple cause of action for the nonpayment of these nine promissory notes. The answer merely denied seriatim the allegations of the complaint. At the beginning of the trial on April 26, 1927, a motion on the part of the defendant for a continuance was denied. On the following day the trial was concluded and the cause was submitted. May 23d a court memorandum for judgment in favor of the plaintiff was filed. June 14th the defendant served and made a motion to amend his answer to conform to the proofs, which was granted over plaintiff's objection. The amendment was filed June 21st.

In this amendment to the answer, for the first time the defendant alleged that the notes were indorsed and transferred to the bank upon the express condition that $15,000 of the proceeds therefrom were to be held on deposit for his security; that the bank took the notes with knowledge of this condition: and that the defendant was entitled to credit for this sum on his obligation arising from his indorsement of the notes. The trial court took this view of the case, and adopted findings to the effect that the defendant was not a holder or transferee of the notes, but was a mere accommodation indorser thereof; that the notes were forwarded to Smyth to be delivered to the bank and discounted for the benefit of the aircraft corporation on condition that $15,000 of the proceeds therefrom should remain on deposit in the bank, represented by a certificate of deposit which was to be delivered to and held by the defendant as his security; that on September 9, 1925, the bank accepted and discounted these notes with full knowledge of the said conditions, but failed to comply therewith; that without the knowledge of the defendant an additional $15,000 note of the aircraft corporation without the defendant's indorsement was also at the same time discounted at the bank, in payment for which a $15,000 certificate of deposit was issued to the aircraft corporation, indorsed to the bank and held by it as security for the payment of this last note upon the maturity of which the note was paid by the cancellation of the certificate; that the notes became due on November 9, 1925, but that no part of the principal or interest from the date of maturity was paid; that the notes were duly presented and dishonored and that notice of nonpayment and dishonor thereof was regularly served; and that the bank fraudulently converted and appropriated to its own use the $15,000 represented by the certificate of deposit, to the defendant's damage in that sum.

Thereupon the court rendered judgment for the plaintiff for the sum of $30,000 and interest only, crediting the defendant with said sum of $15,000.

From this judgment the plaintiff has appealed. It is contended that the court erroneously permitted the defendant to amend his answer and that the evidence does not support the allegations of the amendment. It is also asserted that the bank was an innocent purchaser of the notes before maturity, for value, without knowledge of the alleged conditions or infirmities, and that the plaintiff is entitled to judgment for the full amount of the notes with interest from the date of maturity.

An accommodation indorser of a note for the benefit of the payee, prior to delivery, is ordinarily liable to all parties subsequent to the payee. Section 3145, subd. 3, Civ. Code.

There is no evidence of knowledge on the part of the bank of the condition of transfer of the notes to the effect that $15,000 of the proceeds were to be retained by the bank as security for the defendant. Smyth was not an agent of the bank. The defendant had never before dealt with this bank, and except for the unconditional telegram confirming authorization to discount the notes, above quoted, he never communicated with the bank regarding the transaction. The defendant dealt entirely through Mr. Smyth. The negotiations on the part of the aircraft corporation were conducted entirely through Mr. Marcus, the vice president. He disclaims any knowledge of the conditions upon which the notes were to be transferred.

Mr. Marcus testified regarding the $15,000 certificate as follows:

"We regarded the $15,000 loan as the mechanics for creating a $15,000 balance and the rest of the money to be at the disposal of the Cox-Klemin Aircraft Corporation, that is $45,000, and the most that Cox could withdraw of the $60,000 I loaned to Cox-Klemin was $45,000.

"Q. As a matter of fact was not this fifteen thousand dollar certificate of deposit to be security for these nine notes of five thousand dollars each? A. It was not.

"Q. Was not that what Cox told you should be done? A. It was not."

Mr. Marcus said he had but one communication with Smyth regarding the transaction, which conversation took place over the phone, and that nothing was said about delivering the $15,000 certificate to the defendant, or about any conditions which Foreman imposed upon the transfer of the notes. He said he was not even told that the $30,000 which was turned over to Smyth was to be used at the request of the defendant to pay specific obligations. He was asked:

"Did any one tell you that? A. No.

"Q. Did you know it? A. No."

Regarding the conditions upon which the notes were to be transferred, all that the record discloses is that Mr. Smyth testified that:

Marcus called him up and inquired about the financial standing of the defendant and that he then told Mr. Marcus that "those notes aggregated $45,000, * * * we had them to turn over to Captain Cox to be discounted under Mr. Foreman's instructions, and that he (Mr. Marcus) stated that they were going to keep $15,000 on deposit, my recollection being (that sum was to be) represented by a certificate of deposit, and that I told him * * * yes I so understood the transaction. * * *

"Q. Did you tell Mr. Marcus that Mr. Foreman wanted that $15,000 to remain on deposit in connection with this loan to be made on the nine notes aggregating $45,000? A. I am quite certain I did not say anything about Mr. Foreman's desires to that effect. The conversation was that *the bank* * * * wanted to keep $15,000 on deposit and would give a certificate of deposit for that amount. Mr. Marcus did not say anything to me about the additional loan of $15,000 to the Cox-Klemin Aircraft Corporation."

[1] Assuming that the defendant instructed Smyth to discount the notes only on condition that he was to hold a certificate of deposit for $15,000 of the proceeds, the record is nevertheless devoid of any evidence that this information was ever imparted to the bank. Marcus even took the precaution to wire the defendant for confirmation of his authority to discount the notes. This confirmation was promptly sent unconditionally. The record contains no evidence that the bank had any previous knowledge of the alleged condition. We are unable to find circumstances which would even place the bank on inquiry as to the existence of such a condition. The defendant appears to have been ignorant of the execution of the additional $15,000 note and certificate of deposit. He never complained of a failure to send him the certificate. This transaction was evidently a mere method of conforming to the bank rule to retain on deposit about twenty-five per cent. of the proceeds of such transactions. The bank accepted the financial standing of the defendant as ample security for the nine notes aggregating $45,000, and did not permit the balance of the money to leave its control. The defendant was the only responsible party on the notes upon whom the bank relied. His name was not on the last $15,000 note. That may reasonably account for the bank retaining the certificate of deposit for this sum. Our attention is not called to any evidence showing knowledge of the condition or infirmities of the notes on the part of the bank. Nor will the circumstances support a finding of fraud or collusion on the part of the bank with respect to the transaction. We are therefore impelled to hold that the record shows the bank to have been an innocent purchaser and holder of the nine notes, prior to maturity, for value, without knowledge of any conditions or in-

firmities thereof. Neither the amendment to the answer nor the findings in conflict with this conclusion are supported by the evidence.

[2] A pleading may be amended at the trial in the discretion of the court only for the purpose of conforming to the evidence adduced in response to the valid issues. Section 470, Code Civ. Proc. Amendments to pleadings at or following the trial and before judgment is rendered, should not be allowed over the objection of the adverse party, which raises new issues that were not included in the original pleadings. Firebaugh v. Burbank, 121 Cal. 186, 53 P. 560; Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011; Tower v. Wilson, 45 Cal. App. 123, 135, 188 P. 87; Williams v. Youtz, 178 Cal. 107, 109, 172 P. 383.

[3] In the present case the defendant was relieved by the trial court of his obligation to the extent of $15,000 on the theory that the bank fraudulently converted the certificate of deposit to its own use contrary to the instructions of respondent. Certainly the fraud of the bank was not an issue at the trial of the case. The plaintiff had no opportunity to defend upon an accusation of fraud. A charge of fraud must be alleged and clearly established. 12 Cal. Jur. 800, § 62; 12 R. C. L. 416, § 164; 31 Cyc. 685; 10 Standard Enc. of Proc. 49; Harrison v. McCormick, 89 Cal. 327, 26 P. 830, 23 Am. St. Rep. 469; Abrams v. Daugherty, 60 Cal. App. 297, 304, 212 P. 942.

[4] Since the evidence in the present case fails to show that the bank had actual notice of the conditions or infirmities in the transfer of the notes, but upon the contrary shows the notes were purchased in good faith for a valuable consideration prior to maturity, the bank must be deemed to have been a holder thereof in due course, and the accommodation indorser of the notes was therefore liable for the payment thereof upon dishonor of the notes by the maker after due notice thereof. Section 3145, subd. 3, Civ. Code.

It is the policy of the law merchant, and has long been an established rule, to encourage the free circulation and credit of negotiable paper.

Accordingly it has been uniformly held that the holder of such instruments in due course without knowledge of their infirmities may recover upon the obligations regardless of defects which might impeach their validity between former parties. Section 3138, Civ. Code; 3 R. C. L. 997, § 207.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Section 3137, Civ. Code.

Smyth was not the agent of the bank. Regardless of the nature of restrictions or conditions upon the transfer of the notes which may have been communicated to him, in the absence of evidence of knowledge thereof on the part of the bank, the appellant must be deemed to be the holder in due course free from infirmities and therefore entitled to payment of the notes in full. Goodale v. Thom, 199 Cal. 307, 314, 249 P. 11; Smith v. Armstrong, 85 Cal. App. 624, 631, 260 P. 347; Havens v. Foskett, 81 Cal. App. 653, 254 P. 642; Johnson v. Ulrey, 201 Cal. 456, 469, 257 P. 505, 511. In the last-mentioned case, which was an appeal from a judgment in favor of the holder of a promissory note in due course, wherein the defendant in his answer formally charged a fraudulent transfer thereof to the holder, the court said: "The evidence fails to show that Brown, the cashier of the bank, had any knowledge of the unlawful scheme of Carrere and Little. The bank, therefore, took appellant's note free of any notice or knowledge of said fraud, and, having given a valuable consideration therefor, is entitled to enforce the payment thereof against appellant."

Clearly the defendant was the victim of the plan of the aircraft corporation to refinance its affairs. That organization procured $45,000 of the bank's money. The aircraft corporation was evidently defunct. The bank discounted the notes, relying upon the responsibility of the defendant. Whether the loss was sustained through the fault of the aircraft corporation or through the unfaithfulness of the attorney Smyth is not material so far as this action is concerned, so long as the bank was ignorant of the wrong. So far as the record discloses, both the plaintiff and the defendant were innocent parties. One or the other must lose, in this transaction, this substantial sum. Since the defendant indorsed the notes and thus created the situation which led to the sale and discounting of the notes, he must suffer the loss. It is the law that when a loss is sustained which must be borne by one of two innocent parties, it will fall upon him whose acts occasioned the loss even though he be free from actual fault, but especially if it occurs through his negligence by imposing undue confidence in another. This doctrine is founded upon the theory that in delegating his trust to another who proved false, he has created a relationship tantamount to that of an agency which he may not refute. 3 R. C. L. 999, § 209.

[5] The notes do not provide specifically for interest. Under such circumstances, in the absence of any provision to the contrary the holder is entitled to recover the legal rate of interest from the date of maturity, which in the state of California is 7 per cent. per annum. 1 Deering's Gen. Laws 1923, p. 1384, Act 3757; 14 Cal. Jur. 681, § 7.

[6] It follows that the findings of knowledge of the infirmities of the notes and fraud on the part of the appellant are unsupported by the pleadings or evidence, and should be disregarded. Since the condition upon which

the notes were to be discounted was not made an issue by the pleadings upon which the case was actually tried, we must assume that the record shows without conflict that the appellant was the holder of the notes in due course; that they were unpaid and the nonpayment thereof duly protested; and that the bank is therefore entitled to recover the full amount of $45,000, together with the legal rate of interest thereon from November 9, 1925, which was the date of maturity. The valid findings of the court will support this judgment.

The judgment is modified accordingly, and the trial court is directed to enter judgment in favor of appellant for $45,000, with 7 per cent. interest thereon from November 9, 1925, together with costs of trial and costs on appeal.

We concur: FINCH, P. J.; PLUMMER, J.

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103 Cal. App. 14

LEWIS et al. v. ELK HILLS 36 OIL CO. et al.*
(Civ. 3910.)

District Court of Appeal, Third District, California. Dec. 30, 1929.

Rehearing Denied Jan. 29, 1930. Hearing Denied by Supreme Court Feb. 27, 1930.

1. Corporations 🔑110—Finding that stockholders purchased shares through representations that land, not yet paid for, was owned by company in fee, held not to warrant conclusion of promoters' fraud.

Finding that stockholders, suing to cancel capital stock issued in return for land contract, had purchased their stock through inducement of advertisements and solicitors, and were misled and deceived by statements that company owned land in fee, on which oil prospecting was to be done, whereas deed had not been delivered or whole of purchase price paid, did not warrant conclusion of fraud of promoters, for want of finding that plaintiffs were induced to make purchase by false representation, and that representation was sole reason for buying the stock.

2. Fraud 🔑3—Conclusion of "fraud" must be based on findings of defendant's intent to deceive, knowledge of falsity of representations, and that plaintiff relied thereon and was injured.

To support conclusion of actual "fraud," there should be findings of ultimate facts showing intent to deceive, that representations were known to be false by the party making them, and were actually false, and were representations of facts, and that plaintiff relied thereon and was injured.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Fraud.]

3. Corporations 🔑30(2)—Promoters occupy fiduciary relation towards corporation and persons becoming stockholders.

Promoters occupy fiduciary relation or relation of trust and confidence towards corporation and persons becoming stockholders, and must act with utmost good faith in their dealings with corporation.

4. Corporations 🔑30(4)—Promoters, choosing directors to represent company in proposed purchase of property, must select competent, trustworthy, and independent persons.

Promoters, given power of selecting directors to represent company in purchase of property under scheme of organization, must select competent, trustworthy, and independent persons, who will act honestly in the interests of the stockholders.

5. Corporations 🔑110—Stockholders could have stock issue canceled to extent stock exceeded value of property received by new corporation in exchange, where stock was issued promoters by dummy directors.

Where promoters appointed board of dummy directors, who voted issuance to promoters of excessive stock for property and thereupon tendered their resignation, other persons, becoming stockholders, were entitled to have stock issue to promoter canceled to extent that it represented amount in excess of cost of property paid corporation.

Appeal from Superior Court, Kern County; Wm. D. Dehy, Judge.

Action by J. S. Lewis and others against the Elk Hills 36 Oil Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. L. Carnahan, of Los Angeles, and F. E. Borton and James Petrini, both of Bakersfield, for appellant.

Wiley & Harvey, of Bakersfield, for respondent.

PULLEN, Justice pro tem. Elk Hills 36 Oil Company is a California corporation, with an authorized capital of $500,000, divided into 500,000 shares, of the par value of $1. Prior to its incorporation Rose L. Burcham was the owner of certain property in Kern county, and while so the owner she gave A. W. Mason the right to purchase the property for the sum of $20,000, $10,000 payable in cash, the balance on deferred payments, a deed to be placed in escrow, and to be delivered when the total purchase price had been paid. Upon the execution of the contract Mason induced the defendants Foster and Johnstone to lend them financial assistance in raising the initial payment of $10,000, and through their joint efforts the first payment of $10,000 was made and the deed placed in escrow. Apparently unable to raise further money among themselves to meet the deferred payment, they decided to organize a corporation for the purpose of raising the balance of $10,000 due upon the property, and also to obtain funds to prospect the land for oil and gas.

Accordingly Mason, Johnstone, and Foster, through what is commonly known as dummy

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★Rehearing denied. Hearing denied by Supreme Court.

directors, caused a corporation to be organized, known as Elk Hills 36 Oil Company. These directors, during their incumbency, passed a resolution wherein it was resolved that the corporation should purchase from L. Dorritt Mason, who was the wife of A. W. Mason, the latter's contract with Rose L. Burcham, and in exchange therefor the corporation should issue to her 300,000 shares of its capital stock, and the residue thereof, to wit, 200,000, should be sold at par. Application was made to the commissioner of corporations for permission to so dispose of its stock, and approval thereof obtained. Accordingly, 300,000 shares were issued to Mrs. Mason for her transfer of the contracts to the corporation. Thereafter these qualifying directors resigned, and the defendants Mason, Johnstone, Peairs, Flickinger, and Jameson were elected in their stead. At no time did Mason disclose to Peairs, Johnstone, or Flickinger the amount of the contract price for the land, and at no time did these defendants pay in the aggregate on account of the purchase price of this land any sum in excess of $10,000, and at the time of the transfer of the contract to the corporation the court found the fair, reasonable value of the land did not exceed $20,000.

The court also found that whatever Mrs. Mason did in the matter of transferring her interests in the contract was done at the request and for the benefit of Mason and his copromoters, and it was further found that neither Peairs nor Flickinger paid or invested anything of value toward the development of the corporation, and that whatever these two directors should receive for their services in co-operating in the formation of the corporation should be paid them out of whatever share of stock Mason would receive from the corporation for the transfer of his interest in the land to the corporation.

As a result of a sales campaign something over 38,000 shares were sold at par to various individuals, among whom were plaintiffs, who bring this action upon behalf of the corporation to have all shares issued to Mrs. Mason in excess of 10,000 canceled. Plaintiffs prevailed in the trial court and defendants appeal.

[1, 2] Respondents urge that the defendants occupied such a position of trust toward the corporation as to forbid the transaction set forth above, and also that defendants induced them by fraudulent representations to become purchasers of the stock, the representation complained of being that the corporation owned the land in fee, whereas, in fact, there was due upon the purchase price thereof the sum of $10,000. As to the latter objection the court found the facts to be:

"That upon the appointment and election of the defendants A. W. Mason, M. P. Flickinger, W. A. Johnstone, H. A. Peairs, and J. W. Jameson, said company, through and by its said board of directors, commenced a campaign for the sale of the unissued portion of its capital stock through published advertisements and solicitors, and that these plaintiffs purchased shares of the capital stock of the said company at the price of one ($1.00) dollar per share, through the inducement of said advertisements and said solicitors, but that these plaintiffs were not informed through said advertisements or through said solicitors of the amount of stock issued in exchange for said contract to purchase said land, but were misled and deceived by statements of said advertisements and solicitors that said company owned said land in fee, whereas, at the time of the purchase of stock by these plaintiffs, said deed had not been delivered to said L. Dorritt Mason, and no deed of said premises had been made or delivered to said company, and that said balance of said purchase price, to-wit, ten thousand ($10,000.00) dollars, still remained unpaid, and that each of said plaintiffs in the purchase of his stock in said company relied on said statement that said company owned said land in fee."

This finding falls short of the necessary elements upon which the court could base a conclusion of fraud. As appellants point out and as is set forth in 12 California Jurisprudence, 839, under "Fraud and Deceit":

"Findings of merely probative facts bearing upon the question of actual fraud do not show a case of actual fraud as defined by the Code; there should be findings of ultimate facts, such as that there was an intent to deceive the plaintiff or to induce him to act, that the misrepresentations were known to be false by the party making them, or were made in a manner not warranted by his information, that such representations were actually false, that they were representations as to facts, and not mere matters of opinion, that the plaintiff believed and relied upon the false statements and was induced solely thereby to give his consent to the contract, and that he was injured."

[3-5] The court did not in the case at bar find plaintiffs were by the acts induced to make the purchase of stock or that such representations were the sole reason for them buying the stock, also the question of what is meant by ownership in fee is not free from doubt. We do not believe that the findings of the trial court, nor the evidence taken at the trial and set forth in the record before us, justifies a conclusion that plaintiffs' purchase of stock was induced by fraudulent representations. And this is so, whether an attempt is made to recover for the individual purchaser, or, as here, to cancel the excessive issuance of stock to defendants. We believe, however, that the relationship of the defendants toward the corporation at the time of the transfer of the contract to the corporation was such as to justify the complaint of the respondents.

Appellants attempt to find support for their action in the case of Burbank v. Dennis, 101 Cal. 90, 35 P. 444, 446. In that case Mr. Justice Garoutte, speaking for the court, quotes with approval the case of Densmore Oil Co. v. Densmore, 64 Pa. 43, and holds that the application of the principles of law therein declared furnishes the legal solution of the case then being considered. In that case it is said, in quoting from the case of Densmore Oil Co. v. Densmore, supra:

"'There are two principles applicable to all partnerships or associations for a common purpose of trade or business, which appear to be well settled on reason and authority. The first is that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell the property to the association at any price that may be agreed upon between them, *no matter what it may have originally cost*, provided there is no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. * * * The second principle is that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them *to purchase property for the purpose of such a company, and then sell it at an advance, without a full disclosure of the facts.*'"

This principle of law is not determinative of the issues here, as appellants contend, for the reason that appellant Mason and his copromoters were not dealing with an independent board of directors, but with mere figureheads placed upon the board as puppets of the promoters, and solely for the purpose of effecting the organization and voting the issuance of a block of stock to Mason and thereupon tendering their resignations, which was done. Inasmuch as a corporation can act only through its board of directors, the principle of law laid down in the cases cited must presuppose consideration by an independent board of directors, and not the act of a board which is the creation of the promoters.

Appellants Mason and Johnstone were clearly promoters of the Elk Hills 36 Oil Company, and as such occupied a peculiar relation towards the corporation, which they brought into being, as well as towards other persons who, on their invitation and solicitation, became members of the body which they created. They occupy in these respects a fiduciary relation, or a relation of trust and confidence, and the utmost good faith is required of them in their dealings with the corporation. In those cases where the scheme of organization gives the promoters the power of selecting the directors who are to represent the company in the proposed purchase, they are bound to select competent, trustworthy, and independent persons, who will act honestly in the interests of the stockholders. Dickerman et al. v. Northern Trust Co. et al., 176 U. S. 181, 20 S. Ct. 311, 44 L. Ed. 423.

We think it unnecessary to pass upon other points urged by appellants, for it is evident that, without an independent board of directors, appellants cannot bring themselves within the rule urged by them. And the evidence clearly discloses, and the trial court explicitly finds, that defendants did not deal with an independent board of directors, but that, in the formation of said corporation, said defendants and E. L. Foster used and employed certain named persons to act as the incorporators and as members of the first board of directors of said corporation, and that all of said persons named did not at any time ever have any interest whatever in said real estate or in said corporation or in any stock thereof, but acted solely and only as dummy directors for the benefit of and at the direction of said defendants and said E. L. Foster.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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103 Cal. App. 20

PEOPLE v. BRAGDON. (Cr. 1097.)

District Court of Appeal, Third District, California. Dec. 30, 1929.

1. Jury 🔑92—Excusing juror for cause on ground that one of attorneys for defendant was attorney for juror in pending civil action held not error.

Excusing juror in prosecution for arson for cause, on ground that one of attorneys for defendant was attorney for juror in pending civil action, *held* not error.

2. Criminal law 🔑722½—Statement of district attorney held not objectionable as leading jury to believe that defendant not only set fires involved in case, but had set another fire to collect insurance.

In prosecution for setting fire to barns to obtain insurance money, opening statement of district attorney that he would prove that defendant received a considerable portion of insurance money on hotel which had previously burned *held* not reversible error as tending to cause jury to believe that defendant not only set fires involved in case, but had set another fire for purpose of collecting insurance.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Criminal law 🔑369(11)—Evidence held not objectionable as causing jury to believe that defendant not only set fires involved, but had set another fire to collect insurance.

In prosecution for setting fire to barns, admitting statement made by defendant in which he stated he received insurance money paid on account of loss of hotel by fire and map showing location of hotel *held* not objectionable as causing jury to believe that defendant not only set fires involved in case, but had set another fire for purpose of collecting insurance.

4. Criminal law 🔑512—Uncorroborated testimony of accomplice held insufficient to warrant conviction for setting fire to barns to obtain insurance money.

Uncorroborated testimony of an accomplice was not sufficient to warrant conviction in prosecution for setting fire to barns to obtain the insurance money.

5. Criminal law 🔑419, 420(10)—In prosecution for burning barns to obtain insurance money, evidence that defendant's mother stated there was around $5,000 in taxes on place held hearsay.

In prosecution for burning barns to obtain insurance money, evidence that defendant's mother stated there was around $5,000 in taxes on the place *held* hearsay and inadmissible.

6. Criminal law 🔑1169(2)—Admitting witness' testimony regarding conversation with accomplice before defendant had hired accomplice to burn building, although error, held not prejudicial; similar evidence being before court without objection.

In prosecution for burning barns to obtain insurance money, admitting testimony of witness regarding conversation with accomplice before defendant had hired accomplice to set fire to building, although error, *held* not prejudicial, where testimony was but milder statement of what was brought out on defendant's cross-examination of the accomplice and verdict of guilty was amply warranted by evidence.

7. Criminal law 🔑1119(3)—Reviewing court could not consider alleged intemperate language of district attorney, when statements were not contained in transcript (Rules of Supreme Court and District Courts of Appeal, rule 2, § 7).

District Court of Appeal could not review alleged intemperate language used by district attorney in his argument to jury in prosecution for setting fire to barns, made in reply to statements of counsel for defendant, where transcript did not contain statements as required by Rules of Supreme Court and District Courts of Appeal, rule 2, § 7.

Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

Harold H. Bragdon was convicted of burning two insured barns with intent to defraud insurer, and he appeals. Affirmed.

L. C. Smith and Arthur M. Dean, both of Redding, and John S. Reid, of Weaverville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of burning two insured barns on the Bragdon ranch in Trinity county with the intent to defraud the insurer. This appeal is from the judgment of conviction and the order denying a new trial.

The barns are referred to as the "upper barn" and the "lower barn," each of which was insured against loss by fire in the sum of $1,000. The prosecution did not contend that the defendant personally set fire to the barns, but that he hired Lloyd Clayton Smith to do so. Smith was residing on the ranch with his family at the time of the fire, but the defendant was outside the county. The barns were burned between 3 and 4 o'clock in the morning of February 27, 1929.

Smith testified that he was hired by the defendant to burn the barns in the latter part of January, 1929, or the early part of February. He further testified: "I was working in the mine there. * * * Bragdon, he comes out with a mining man by the name of Kaufman, I believe, and Charlie Heath. They was looking the mine over, and I went around with him a little while. Finally I went back to work * * * and pretty soon Bragdon came down to where I was working. We talked around a little bit about the mine. He wanted to know how I was getting along, how much I was taking. I wasn't making much, maybe a dollar or so a day. I don't know everything that he said. He asked me if I wanted to make a proposition. 'Well,' I said, 'I don't know. I might.' I happened to think of a conversation I had with another party before that about the fires, so I just thought I would try it on him. I asked him what he wanted me to do, burn the barns? * * * He said, 'How much do you want?' I said, 'Three or four hundred dollars.' He said that was too much, that he wouldn't pay it. * * * He said he thought the insurance was taken off, or part was off, * * * or outlawed, or something to that effect. * * * He finally offered me $200 and pay my grocery bill. * * * Then he * * * said he would give me $250 cash if I did the job, and while we were talking we fixed up kind of a code like, so he would let me know to do the job, but he wanted to wait till he got the upper barn insured. * * * When he got it fixed up, he would let me know. If he sent word for me to go ahead and fix the upstairs, that was to set the barn off across from the cottage; if he told me to go ahead with the drift, that was to touch the upper barn off." February 20th the defendant mailed a registered letter at Woodland directed to "Mr. L. C. Smith, % Bragdon Ranch, Lewiston, Calif." The letter was delivered to Smith February 24th. Smith testified that

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the envelope contained two letters, one signed by the defendant and the other unsigned. Both were shown to be in the defendant's handwriting and were introduced in evidence. The unsigned letter reads as follows:

"Mr. L. C. Smith—Dear Sir: That has been taking off of everything but upper barn and it will take me time to get fixed up again so get it at once. That is the one towards Rush Creek by wagon shed and not the one you wanted to get. There is $1,000 on it and $100 to you and we will get the other later. My men will be up in the next day or two so get this fixed at once and don't say a thing to Charley. If they don't take it over I am going to start it up myself as soon as we get this money and you can have a job. It will only take 10 or 12 days to get it. * * * We can make a good job of things later but there is a lot of red tape to go through and it will take a long time to get it fixed and I want to put on more where it will pay both of us. I will send another letter giving you orders to move so you can show Paulsen what the letter was you rec. so he will know what I wrote you about and won't suspect anything wrong so be sure and show it to him and Charley. Burn this up as soon as you get it."

On February 23 the defendant wired Smith: "Party coming Monday have Mead tunnel cleaned and go ahead with drift."

Smith further testified that about February 25th the defendant arrived at the Bragdon ranch; that the witness there said to the defendant, "I didn't get your letter until this morning," and that the defendant replied that "he had the other barn fixed up now, to go ahead and do the whole job; said he would give me $300 and he only had two or three days left now on the insurance on the barns, and I only had two or three days to do the job in." Smith explained his reason for not burning the letter as follows: "After I done the job, I just got to thinking that I might need that to force payment out of him." He testified that he put the unsigned letter "in a tobacco can and hid it out back of the woodshed." After he had admitted to the sheriff of the county that he had burned the barns, he also stated that he had hidden the letter in the manner stated. The sheriff thereupon went to the Bragdon ranch and found the letter at the place indicated.

[1] The court excused a juror for cause on the ground that one of the attorneys for defendant was attorney for the juror in a pending civil action. Appellant contends that this was prejudicial error. There is no merit in the contention. People v. Malone, 68 Cal. App. 615, 617, 229 P. 1000.

[2, 3] The defendant's mother was the owner of the Bragdon ranch. In his opening statement to the jury the district attorney stated that he would prove that at the time of the fire taxes on the ranch were delinquent to the amount of $5,000 or $6,000; that "in July, 1928, there had been a hotel building on the premises, but that burned and that there was considerable insurance on the hotel building * * * and that the defendant * * * received a substantial portion thereof." A map of the premises, on which appeared a black space to indicate the location of the hotel, was admitted in evidence. A statement, made by the defendant, was introduced in evidence, in which he stated that he received the sum of $1,500 out of the insurance money paid on account of the loss of the hotel. Appellant contends that such statement by the district attorney was prejudicial misconduct and that the admission of the map and defendant's statement constituted reversible error, on the ground that the natural effect thereof was to cause the jury "to believe that the defendant not only set the fires involved in this case, but had set another fire for the purpose of collecting the insurance." There is nothing in the statement of the district attorney or in the evidence referred to which indicates that the fire of July, 1928, was of incendiary origin. It appears rather that the district attorney was attempting to prove that the defendant had a motive for burning the barns, on the theory that, having received part of the insurance money when the hotel was burned, he hoped to receive a part of the insurance money on the burning of the barns.

[4] It is true, of course, that Smith's testimony alone, he being an accomplice, is insufficient to warrant a conviction; but the unsigned letter, proved by independent testimony to be in the defendant's handwriting, strongly tends to connect him with the commission of the crime and amply corroborates Smith's testimony. The telegram mentioned also tends to corroborate such testimony.

Counsel for defendant cross-examined Smith in part as follows:

"Q. Then you, out of a clear sky, in response to a statement of the defendant in this case, said right, without any previous conversation, 'What do you want me to do? Burn your barns down?' Is that what happened? A. I had another conversation with another party before that."

On redirect examination, the following occurred:

"Q. * * * You said * * * when he asked you to make a proposition, that you said, 'Do you want me to burn your barns?' * * * Why did you say that? A. Well, just conversation with Harley Mead one time up at my place.

"Q. What was that?

"Mr. Smith: Objected to as hearsay, as to this defendant, incompetent, irrelevant and immaterial.

"The Court: Overruled.

"A. Talking about the other fire, and Mead talking about it, he said, 'It is a wonder that Bragdon has not tried to make a proposition to you to burn his barns down, by now.' I said, 'Maybe he will.' That's where I got the idea, and when he talked about a proposition it flashed through my mind that's what he wanted to talk about, so I said it."

On recross-examination the witness was examined as follows:

"Q. Now then, you gave certain portions of testimony, or conversation that you had with Harley Mead. Will you give the rest of that conversation? A. He was staying there. He was boarding at my place at the time, we were talking about the fire, and he said, 'People figured that he had the big house burned down.' He said the barn caught fire across the way and somebody put it out, and he came out there and was kind of mad that they didn't let the barns go at the same time that the big house did.

"Q. Who said that? Harley Mead? A. Harley Mead, yes.

"Q. What did you say? A. I don't remember, I didn't know anything about it."

Harley Mead was called as a witness by the prosecution and examined as follows:

"Q. Do you remember having a talk with him (Smith) in regards to the sentiment of certain persons or people in Lewiston in regard to the burning of the hotel?

"Mr. Smith: We object to that as incompetent, irrelevant, immaterial and hearsay. * * *

"The Court: Overruled. * * *

"A. I have a faint recollection of speaking to him something about some people made the remark that they thought that he either set it himself or had someone set it."

[5, 6] No attempt is made by the respondent to justify the overruling of the aforesaid objections of the defendant, and it does not appear upon what theory the rulings can be upheld. At the trial the district attorney said, in relation to the testimony offered: "It is not hearsay for the reason that the conspiracy has not been concluded until the insurance money has been paid." The answer to this argument is that there is not the slightest evidence of the existence of a conspiracy at the time to which the testimony relates, Smith's conversation with Mead having taken place prior to the time at which the defendant first broached the subject of burning the barns to Smith, according to the uncontradicted evidence of the prosecution. It is to be observed, however, that the most damaging part of the objectionable evidence was elicited by counsel for the defendant in the cross-examination of Smith and that Mead's testimony is but a milder statement of what was brought out on such cross-examination. A witness was permitted to testify, over the defendant's objection, that in a conversation at which the defendant was not present, the defendant's mother "stated there was around $5,000 in taxes on the place." This evidence was clearly hearsay and inadmissible, but the same fact was clearly proved by other testimony which was not objectionable. The other errors in the admission and rejection of evidence are of minor importance and need not be specifically discussed.

While under other circumstances the errors referred to might require a reversal, it cannot be said in this case that they have resulted in a miscarriage of justice. The defendant neglected to become a witness, and while this fact cannot in any manner affirmatively prejudice his case (Pen. Code § 1323), his failure to testify leaves the most damaging evidence given against him wholly uncontradicted. Not only does Smith's testimony in relation to the conspiracy and the agreement as to a "code" for secret communications from the defendant stand uncontradicted, but the independent testimony to the effect that the defendant wrote the unsigned letter and sent the "code" telegram is likewise uncontradicted and the statements therein are unexplained. Under such circumstances only a most credulous jury would return a verdict of not guilty.

[7] Complaint is made of intemperate language used by the district attorney in his argument to the jury, made in reply to statements of counsel for the defendant. The transcript does not contain such statements, as required by rule 2, section 7, of the Rules of the Supreme Court and District Courts of Appeal, and in the absence thereof this court is left in the dark as to the provocation, if any, which induced the district attorney to use the language of which complaint is made. The language so used is not of such character as to constitute prejudicial misconduct if the provocation was great.

The judgment and the order are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

JONES v. BARION. (Civ. 7066.)*

District Court of Appeal, First District, Division 2, California. Jan. 2, 1930.

Rehearing Denied Jan. 28, 1930. Hearing Denied by Supreme Court March 3, 1930.

1. Automobiles 🔑244(6)—Jury was justified in finding driver of automobile negligent, where pedestrian struck by car was just beyond middle of street and driver's windshield was hazy.

In action for injuries sustained by pedestrian, struck by automobile when crossing street after advancing only a few feet beyond the middle of the street, evidence which showed that defendant's windshield was hazy and that he could see only a few feet from the wiper warranted jury's finding of defendant's negligence because of condition of windshield and failure to see plaintiff or because of having swung out too far to left.

2. Automobiles 🔑245(72)—Contributory negligence of pedestrian struck while crossing street, after failing to see automobile approaching, held for jury.

In action by pedestrian for injuries sustained when struck by defendant's automobile, while attempting to cross street, plaintiff's contributory negligence *held* question of fact for jury, where he testified that he looked in both directions before entering and while crossing street, though he failed to hear or see defendant's car.

3. Automobiles 🔑245(72)—Pedestrian, run over by automobile which he failed to see, will not be held contributorily negligent as matter of law.

Pedestrian, who is run over by automobile in the street without first seeing car, cannot be held guilty of contributory negligence as matter of law.

4. Trial 🔑296(4, 5)—Instruction that there is no positive duty to stop, look, and listen in crossing street held not reversible error, in view of entire charge.

In pedestrian's action for injuries sustained when struck by automobile, instruction that there is no positive duty to stop, look, and listen when pedestrian is about to cross city street, and that neither pedestrian nor automobile has superior right of way, and that each is entitled to use highway, *held* not reversible error as leading jury to believe pedestrian was under no duty to look or listen, in view of context of instruction and other instructions relative to contributory negligence.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by William Jones against Christian O. Barion. Judgment for plaintiff, and defendant appeals. Affirmed.

Courtney L. Moore, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff obtained a verdict and judgment for damages for personal injuries sustained by being struck by defendant's automobile. Defendant appeals. He attacks the sufficiency of the evidence and complains of the giving of one instruction.

[1] The evidence shows that the respondent after dark walked westerly from Second towards Third street upon the north sidewalk of Folsom street in San Francisco. At the northeast corner of Third and Folsom streets, a building was under course of construction. Building material obstructed the sidewalk and also a part of Folsom street almost out to the nearest of the street car tracks. This obstruction extended towards Second street from Third street a distance of from 75 to 125 feet. When respondent arrived at this obstruction, he turned out into the street and continued as if to cross to the south side of Folsom street. When he was a few feet beyond the middle of the street (according to his version) he was knocked unconscious by the appellant's automobile. He had heard and seen nothing of appellant's automobile before that, although he said he had looked in both directions before entering and while crossing the street. Appellant testified that he was proceeding at a moderate speed astride the northern or his most right-hand street car rail and saw nothing of the respondent except the flash of a shadow before the impact. He testified:

"Q. What was the condition of the weather on that night? A. Well, my machine was on the outside of the boat (he had shortly before crossed the bay on the ferry boat from Oakland) and the windshield was hazy. I had a hand wiper, I could only see, I should judge, about a few feet, just from the wiper. The right-hand side of the wiper was all hazy and the bottom of the windshield was hazy.

"Q. What was the condition of the weather in San Francisco? A. It was like a high fog, when you drove you would pick up a little moisture on the windshield."

Appellant also testified that his lights were lit; that his automobile had already passed the first part of the obstruction and had reached a point about 40 feet from Third street before the right-hand part of the front of his automobile struck respondent. Both appellant and respondent testified to the effect that the atmospheric visibility was good.

Under the evidence outlined, the jury would have been warranted in finding the appellant negligent for the condition of his windshield and his failure to see respondent or for his having swung out too far to his left. We should add here that a police officer corroborated the respondent as to the place of the impact by locating the place in the street where respondent lay unconscious.

[2, 3] Contributory negligence under the evidence was a question of fact for the jury. According to respondent's testimony, he exer-

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*Rehearing denied. Hearing denied by Supreme Court.

cised a great deal of care before entering and while in the street. No witness was able to contradict him, for no one saw him. Appellant argues that respondent either looked negligently or negligently failed to look for automobiles, and therefore urges this court to hold that respondent was guilty of contributory negligence as a matter of law. The facts of this case are not clear enough for that. We cannot say as a matter of law respondent was negligent in not seeing appellant's automobile approach and in failing to avoid it. The rights of the pedestrian and the motorist are reciprocal. To apply the principle contended for to the usual automobile-pedestrian case, such as this is, would have the effect of subordinating the rights of the pedestrian to that of the motorist. To discard respondent's testimony that he looked, because of the assumption that, if he looked, he would have seen appellant's automobile, fully lighted, approaching at a moderate rate of speed on the west-bound track and that he would have been able, with the exercise of ordinary care, to avoid being struck, would simply be to discard respondent's testimony and accept the appellant's. We have only the testimony of the appellant for the manner of the approach of his automobile. We cannot say as a matter of law that a pedestrian who is run over by an automobile in the street without first seeing it is guilty of contributory negligence.

[4] Complaint is made of the first sentence of instruction No. XXXII. This instruction began as follows: "There is no positive duty to stop, look and listen when a pedestrian is about to cross a city street. (1) The law is that neither the pedestrian nor the automobile has a superior right of way, and that each is entitled to use the highway, and that the conduct of both must be regulated with reference to this fundamental rule. * * *" Appellant says: "It is entirely superfluous to any possible issue, and should not have been given. If superfluity were its only fault the giving of it might possibly not be ground for reversal, but it contains the additional fault of conveying to the jury the idea that there was no duty on Jones to either look *or* listen *or* to use the senses that he had to discover the approach of danger."

The sentence was not a necessary part of the instructions in this case. However, we do not agree with appellant that this sentence, taken in connection with the sentence immediately following it, could have misled the jury. The court stated that there was no positive duty to stop, look *and* listen. This is not the same as stating that a pedestrian need never do any one of these three things. Moreover, in instruction No. LIII, the court affirmatively instructed that it was respondent's duty to look before entering the street, to continue to look, to right and to left, and to continue so to do. Instruction No. XXXII does not even technically conflict with instruction No. LIII unless we change the wording of the former. The instruction complained of was not reversible error in this case.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

KRAUSE et al. v. RARITY et al. (Civ. 6963.)★

District Court of Appeal, First District, Division 2, California. Dec. 26, 1929.

Rehearing Granted Jan. 23, 1930.

1. Trial 🔑165—Motion for nonsuit admits truth of plaintiff's evidence and every legitimate inference therefrom, and on such motion evidence should be interpreted most strongly against defendants.

Motion for nonsuit admits truth of plaintiff's evidence and every inference which can be legitimately drawn therefrom, and on such motion evidence should be interpreted most strongly against party making motion.

2. Negligence 🔑93(1)—Guest, riding in rear seat of automobile when struck by train, having no power or control over driver or automobile, cannot be contributorily negligent.

Guest, riding in automobile in rear seat when struck by train at crossing, having no power or control over driver or automobile, and never attempting to exercise any, cannot be held contributorily negligent, since under such circumstances negligence of driver cannot be imputed to guest.

3. Automobiles 🔑224(3)—Railroads 🔑327(12)—Guest, riding in rear seat and having no power or control over driver or automobile, held not required to warn driver of approaching danger of collision at railroad crossing.

Guest, riding in rear seat of automobile, having absolutely no power or control over driver or automobile, and never attempting to exercise any, *held* not required to warn driver of approaching danger of collision at crossing.

4. Automobiles 🔑242(8)—Railroads 🔑346(5)—Presumption exists that guest in rear seat of automobile used due care and caution for his own protection.

Presumption exists that guest, riding in rear seat of automobile and killed when automobile was struck by train at railroad crossing, used due care and caution for his own protection, and did all that was reasonably required.

5. Automobiles 🔑245(87)—Railroads 🔑350(21)—Riding in automobile driven by man with only one eye held not contributory negligence as matter of law.

Riding in automobile driven by man with only one eye *held* not contributory negligence as matter of law.

★Rehearing granted. 285 P. 879.

6. Automobiles 🔑224(3)—Railroads 🔑327 (12)—That driver of automobile was blind in one eye was mere fact to be considered with all other facts and circumstances in determining contributory negligence of guest.

In action for damages for death in railroad crossing collision of guest, against driver of automobile and railroad, fact that driver was blind in one eye *held* merely a fact to be considered by jury with all other facts and circumstances in determining whether deceased was guilty of contributory negligence.

7. Automobiles 🔑245(87)—Railroads 🔑350 (21)—Contributory negligence of guest, riding in rear seat of automobile when struck by train at crossing, held for jury.

In action for death of guest riding in rear seat of automobile, which was struck by train at crossing, deceased's contributory negligence *held* question of fact for jury.

8. Automobiles 🔑245(24)—Railroads 🔑350 (22)—Negligence of driver of automobile, struck by train at crossing, held for jury under testimony showing country was strange, that view was obstructed, and he saw nothing.

In action for death of guest riding in rear seat of automobile, which was struck by train at crossing, negligence of driver *held* question of fact for jury, where he testified he was unacquainted with country and road, and did not see warning signs or railroad tracks or engine, and heard no signal, and that view was obstructed.

9. Negligence 🔑93(1)—Heirs of guest riding in automobile struck by train could recover against railroad, if negligent, notwithstanding driver's negligence.

Though driver of automobile may have been guilty of negligence as matter of law at time of collision with train at crossing, if railroad was guilty of negligence proximately causing death, heirs of decedent, who was guest in automobile, would not be barred from recovery, since negligence of driver could not, under such circumstances, be imputed to guest.

10. Railroads 🔑350(6)—Negligence of railroad, causing collision with automobile at crossing resulting in death of guest, held for jury.

In action for damages for death of guest, riding in rear seat of automobile which was struck by train at crossing, railroad's negligence *held* question of fact for jury.

11. Trial 🔑143—Directed verdict is not authorized, where there is any conflict in evidence of a substantial character.

Where there is any conflict in evidence of a substantial character, directed verdict is not authorized.

12. Railroads 🔑350(7)—Whether signals required of train approaching crossing were given held question for jury, where testimony in regard thereto was conflicting.

In action for damages for death of guest riding in rear seat of automobile when struck by train at crossing, conflicting testimony regarding giving of signal by train when approaching crossing *held* to present question of fact for jury whether signals were given.

13. Damages 🔑96—New trial 🔑74—Amount of damages in personal injury action is within sound discretion of jury, or trial judge on motion for new trial (Code Civ. Proc. § 657, subd. 5).

Amount of damages in personal injury action is committed first to sound discretion of jury, and next to discretion of trial court, who, in ruling on motion for new trial, may consider evidence anew, determine anew facts, and set aside verdict, if excessive, under Code Civ. Proc. § 657, subd. 5.

14. Appeal and error 🔑1004(3)—Decision of trial court and jury on amount of damages cannot be set aside, unless plainly and outrageously excessive, suggesting passion, prejudice, or corruption.

Decision of trial court and jury on amount of damages cannot be set aside, unless verdict is so plainly and outrageously excessive as to suggest at first blush passion, prejudice, or corruption.

15. Death 🔑99(4)—$35,000 for death of husband and father 42 years old, in good health, with annual income over $4,000 and life expectancy over 26 years, held not excessive.

$35,000 to two minor children and wife for death of husband and father 42 years of age, in good health, with proven income of from $4,000 to $5,000 per annum, and an expectancy of life of 26.72, years, and contributing from $250 to $300 per month to children and wife *held* not excessive.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Betty Krause and another, minors, by their guardian ad litem, Lena Krause, and another, against John W. Rarity and another. Judgment for plaintiff, and defendants named Rarity and Atchison, Topeka & Santa Fé Railway Company separately appeal. Affirmed.

Leo J. McEnerney, of San Francisco, and Ray W. Hays, of Fresno, for appellant Rarity.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant Atchison, Topeka & Santa Fé Railway Company.

PRESTON, Justice pro tem. This is an appeal by the defendants John W. Rarity and the Atchison, Topeka & Santa Fé Railway Company, a corporation, from a judgment entered against them upon a verdict of a jury in the sum of $35,000. Plaintiffs are the wife and two minor children, who are the sole heirs, of William Krause, deceased, and they brought this action, charging that William Krause's death was due to negligence of the defendants John W. Rarity and the Atchison, Topeka & Santa Fé Railway Company.

On September 12, 1927, at about the hour of 6 o'clock p. m., said William Krause and one

O. E. Orr were guests and passengers of the defendant John W. Rarity in his Jewett coach automobile. Rarity was driving said automobile in a westerly direction along a public highway in Fresno county known as "Central Avenue," which is a rural highway, paved and practically level. Across said highway the appellant Atchison, Topeka & Santa Fé Railway Company owned and operated a railroad track and railroad, extending in a northerly and southerly direction, and known as "Mattie Spur." The country surrounding the place where the collision occurred is practically level. The railway track was about one foot lower than the paved highway. At the time of the accident there was a ditch about 3 feet high on the north side of Central avenue and parallel thereto. Upon this bank there was at the time a growth of foliage, which varied in height from 1 to 5 feet. For a quarter of a mile immediately east of the railway there was at the time of the accident a grape vineyard. The rows in this vineyard, which extended in an easterly direction, were about 6 feet high and the vines were in full foliage.

About 12 or 14 feet east of the railway tracks, and about 12 feet north of the highway, there was a standard railroad crossing sign. It consists of an upright post, approximately 10 feet high, painted white, and at the top of which are two crossarms, painted white, with the words "Railroad Crossing" in large black letters thereon. About 300 feet east of the railroad and 20 feet north of the highway there was a smaller sign, a target sign, consisting of an upright post 6 feet high, at the top of which is a metal disc about two feet in diameter, with the letters "R R" in black on a white background. One of the witnesses testified that this sign, at the time of the accident, was hidden by weeds. There was, at the time of the accident, one tree on the north line of the highway, about 70 feet east of the track. This tree stands 20 feet high and is approximately 12 feet across the spread of its branches. On the south line of the highway, east of the tracks, was a row of olive trees that came within about 28 feet of the railroad tracks.

As said automobile was attempting to cross said spur track it was struck by a locomotive of the appellant Atchison, Topeka & Santa Fé Railway Company, and as a result of said collision the said William Krause received injuries from which he died almost instantly.

Plaintiffs allege that the death of William Krause was caused by the negligence and careless operation and handling of the automobile by defendant John W. Rarity, and contributory thereto and concurrent therewith the negligence and carelessness of defendant Atchison, Topeka & Santa Fé Railway Company in so operating and conducting its locomotive as to drive the same toward and upon said highway crossing without giving or sounding any warning whatsoever of the approach thereof, either by sounding a whistle, bell, or otherwise.

The defendants and appellants filed separate answers and have also prosecuted separate appeals.

The appellant railway company in its answer interposed a general denial, and further pleaded as an affirmative defense that the injuries to and death of said William Krause were contributed to and proximately caused by his own negligence in this: That at all times after said William Krause came within 300 feet of said crossing, the locomotive and train of defendant railway company, which was approaching said crossing, were plainly visible, and the noise of the train and engine were plainly audible to said William Krause, and that said William Krause did not look for any train that might be approaching upon defendant railway company's track, and did not warn or caution the driver of said automobile that said automobile was approaching a railway track, and should be operated cautiously and under control, and did not listen for the noise of any train that might be approaching said crossing.

As a further and separate defense to said complaint said railway company alleged that the collision and injuries to and the death of said William Krause were contributed to and proximately caused by his own negligence in this: That he permitted the driver of said automobile to operate the same at a high rate of speed as the same approached the railway crossing and as said William Krause knew that said automobile was so approaching said crossing, and said William Krause so allowed the said automobile to be driven at a high and dangerous rate of speed to and upon the said crossing without cautioning or warning the driver of said machine to approach said crossing with his machine under control, with an opportunity to look for and listen for any train or engine that might be approaching said crossing.

The answer and defense of John W. Rarity was substantially as follows: That at the time of the collision he was operating his automobile with reasonable care and at a lawful and proper rate of speed; that he did not know of the existence of the railway track, or of the fact that a railway track crossed Central avenue; that he did not hear or see the locomotive until it was too late for him to avoid collision with it; that he did not know of the approach of the locomotive, because of the fact that no whistle was blown or bell rung, and because of the fact that the foliage upon the north side of Central avenue obscured the locomotive from his view; that he had only one eye, and that by reason thereof his vision was limited; that, because of the fact that the setting sun was directly in the line of his vision, he watched the highway directly ahead of him, and that because of the position of the sun he could not and did not see the railway sign; and that, as he was at that time driving in a rural district, he was driving at a lawful and proper rate of speed, to wit, 30 miles an hour. Appellant Rarity contended throughout the trial that, because of the conditions outlined, the burden was cast upon respondents to show that he was negligent in operating his automobile, under the circumstances shown by the evidence.

The appellant railway company first contends that the court erred in denying its motion for a nonsuit. In support of this contention it is argued, first, that deceased, William Krause, was guilty of contributory negligence as a matter of law; second, "the accident was solely and proximately caused by the negligence of defendant Rarity."

[1, 2] In considering whether or not the motion was properly denied, it is important to keep in mind the court's power and limitations with reference to the granting of nonsuits. The motion admits the truth of plaintiffs' evidence and every inference which can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the party making the motion, which in the case at bar would be the appellant railway company. Stieglitz v. Settle, 175 Cal. 131, 165 P. 436; Goldstone v. Merchants Ice & Cold Storage Co., 123 Cal. 625, 56 P. 776; Estate of Arnold, 147 Cal. 583, 82 P. 252; Bloom v. Allen, 61 Cal. App. 28, 214 P. 481; Bakos v. Shell Oil Co. of California (Cal. App.) 271 P. 127; Gregg v. Western Pac. R. R. Co., 193 Cal. 212, 223 P. 553. In the light of the foregoing well-established rules, let us examine first the evidence touching the alleged contributory negligence of the deceased. The evidence is undisputed that William Krause, the deceased, was a guest of John W. Rarity, and at the time of the accident was sitting in the rear seat of Rarity's automobile, and had absolutely no power or control over Rarity or the automobile in which he was riding, and never attempted to exercise any. Under such circumstances alone Krause could not be held guilty of contributory negligence, for the law is well settled in this state that the negligence of the driver of the machine cannot be imputed to a passenger therein, in the absence of any evidence showing that the latter exercised some control over the driver, or that he possessed the power to supervise or direct the manner in which the automobile should be operated. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 P. 1059; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319; Marchetti v. Southern Pacific Co. (Cal. Sup.) 269 P. 529, 530. Therefore, if deceased was guilty of contributory negligence, it must have been some act either of commission or omission on his part, other than being a mere guest of Rarity, which of itself constituted contributory negligence. There is, however, no evidence in the record tending to show any such act of negligence on the part of the deceased.

[3] It is argued by the defendant railway company that the railroad signs, track, and engine were open and visible to deceased, and that he should have warned Rarity of the approaching danger, etc. Practically the same contention was made in the case of Marchetti v. Southern Pacific Company, supra, and there the Supreme Court said:

"This argument, we think, is satisfactorily and completely answered by the following statement of the law on this subject, found in 3 Cal. Jur. pp. 853 and 854: 'A passenger in a motor vehicle approaching a railway crossing is under no legal obligation to warn the driver, either of the presence of the tracks or of an approaching train; the view being unobstructed and the driver reasonably competent and vigilant. And, while it is the passenger's duty to look and listen, it is not his duty to stop for a successful observation, since he has no authority over the driver, but is wholly subject to the latter's action. The passenger has a right to suppose that the driver, on approaching a railway crossing with which he is familiar, will exercise due care for the protection and safety of his passengers, and that, even when so near the crossing as to be in apparent danger of collision with an on-coming train, he will or may take some action which will avert an accident. Nor is the passenger obliged, even when the danger of collision becomes suddenly imminent, to displace the driver, seize the operating levers, and endeavor to avoid the impending catastrophe. Nevertheless, it has been said that the passenger must look out for himself, and may not, in a place of danger, as on approaching a railway crossing, rely blindly on the driver. But a passenger in a machine operated by another cannot be said as a matter of law to have been negligent in not calling the chauffeur's attention to the danger of a collision."

The facts of the Marchetti Case are very similar to those in the case at bar, and we deem the foregoing a sufficient answer to the railway company's contention.

[4] Appellant railway company further insists that, if deceased had used ordinary care for his own safety, he would have seen and heard the locomotive and could have warned Rarity of the impending danger in time to have averted the accident, and, having failed to do so, was guilty of contributory negligence as a matter of law. In support of this contention the following cases are cited: Parmenter v. McDougall, 172 Cal. 306, 156 P. 460; Thompson v. L. A., etc., Railway Co., 165 Cal. 748, 134 P. 709; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 P. 152, 5 L. R. A. (N. S.) 1059. These cases, undoubtedly, contain a correct statement of the law upon the subject of a passenger's duty in case of *known danger*. They have little or

no application to the case at bar, for the reason already stated, and for the additional reason that it does not appear that there was anything that could have been done by the deceased which would have averted the collision, had deceased seen the engine or track in time to have warned Rarity of the impending danger, and there is no assurance that the latter could have brought his machine to a stop before reaching the railroad tracks.

Furthermore, Rarity and Orr both testified that they did not see the crossing signs, or hear the engine, and that no bell was rung and no whistle blown. They were seated in the front seat of the automobile, and there is some evidence in the record that Rarity's view was somewhat obstructed. This testimony is some justification for assuming that deceased, who was in the rear seat of the automobile, did not hear the noise of the engine, or hear the bell or whistle, or see the cross signs, and also some evidence that the bell was not rung nor the whistle blown. Another witness, a lady living near by, also testified that no bell or whistle or other warning was given by the railroad engine. There is a presumption that deceased used due care and caution for his own protection, and did all that was reasonably required of him. There is no evidence in this case to overcome or dispel this presumption. See Marchetti v. Southern Pacific Co., supra; also Shields v. King (Cal. Sup.) 277 P. 1043.

In Carpenter v. Atchison, etc., Ry. Co., 51 Cal. App. 60, 195 P. 1073, 1075, the court said: "Conceding that deceased did see the approaching train and said nothing to the driver of the automobile or otherwise interfered with his operation thereof, nevertheless we cannot say as a matter of law that by reason of such omission he was guilty of negligence. * * * The sole ground upon which the negligence of deceased is predicated is the fact that he could, had he looked, have seen the approaching train, and therefore, argues respondent, he should in the exercise of ordinary care for his safety have done something to escape the result of the collision. This question, however, in view of the presumptions arising, is one of fact to be determined by the jury from all the circumstances in the case."

[5-7] Appellant railway company contends that deceased was guilty of negligence as a matter of law for riding in a car driven by a man with only one eye. No authority is cited in support of this contention. The only testimony in the case regarding Rarity's eyesight is that he lost his left eye some 16 years before the accident; that he had been driving an automobile for 8 or 9 years prior to the accident, and that so far as he knew his vision was not affected by the missing eye, and that the eyesight of the remaining eye was good. The fact that Rarity was blind in one eye was a fact to be considered by the jury with all the other facts and circumstances in the case, in determining whether deceased was guilty of contributory negligence. We cannot say as a matter of law that deceased was guilty of contributory negligence. In view of all the facts and circumstances in the case, the question of contributory negligence on the part of deceased was one of fact to be determined by the jury.

[8] Neither can we say as a matter of law that "the accident was solely and proximately caused by the negligence of the defendant Rarity." Under the authority of such cases as Koster v. Southern Pacific Co. (Cal. Sup.) 279 P. 788, Barnett v. Atchison, Topeka & Santa Fé Railway Co. (Cal. App.) 278 P. 443, Hoffman v. Southern Pacific Co. (Cal. App.) 281 P. 681, and Young v. P. Elec. R. Co. (Cal. Sup.) 283 P. 61, and the physical facts as the railway company contends existed at the time of the collision, Rarity was undoubtedly guilty of negligence, as a matter of law. There are, however, several material differences between the facts in the above cited cases and the case at bar, as far as Rarity is concerned. For example: In the instant case, Rarity and Orr both testified they were unacquainted with the country and road, and did not see the warning signs or the railroad track or engine, and heard no signal, and that the view was obstructed in the manner above set forth. We are of the opinion that Rarity's negligence was also a question of fact for the jury.

[9, 10] However, the law is well settled that although Rarity, the driver of the car, may have been guilty of negligence as a matter of law, nevertheless, if the appellant railway company was guilty of negligence proximately causing the death of William Krause, the heirs of Krause, who was a guest of Rarity's in the car, would not be barred from a recovery, as such negligence of Rarity could not be, under the circumstances, imputed to Krause. This was also a question of fact for the jury. Baldwin v. Pacific Electric Railway Co. (Cal. Sup.) 281 P. 380. We conclude, therefore, that the trial court did not err in denying the motion for a nonsuit.

[11] The appellant railway company also contends that the court erred in refusing to direct a verdict in favor of said appellant at the close of all the evidence. We are unable to agree with this contention. The law is well settled that a directed verdict is not authorized, where there is any conflict in the evidence of a substantial character. Kohn v. National Film Corporation, 60 Cal. App. 112, 212 P. 207; Estate of Fleming, 199 Cal. 750, 251 P. 637; Estate of Baldwin, 162 Cal. 471, 123 P. 267; Young v. Pacific Electric Ry. Co., supra.

[12] In this case there is a decided conflict between the testimony of the employees of the railway company and the other witnesses as to whether or not a whistle was blown or a bell was rung at the crossing at the time of

the accident. Rarity and Orr both testified that they heard none, and the witness Mrs. Koumarin, who lived near the crossing at the time of the accident, testified that there was no whistle blown or bell rung, and the engineer and fireman in the employ of appellant railway company testified that they blew the whistle and rang the bell. Under such circumstances, it was a question of fact for the jury to determine, and the court was not authorized to direct a verdict in favor of said appellant.

Both appellants contend that the court erred in giving certain instructions and refusing certain other instructions. A great many of the instructions given are severely criticized by both appellants. We have examined carefully all instructions, both given and refused, and we are of the opinion that, when the instructions given are taken as a whole they fully and correctly state the law applicable to all phases of the case. Both appellants offered a large number of instructions, and a great many were refused, and it is entirely unnecessary for us to discuss each refused instruction. Suffice it to say we find no prejudicial error was committed by the trial court in refusing or giving any of the instructions complained of.

[13, 14] The appellants also contend that the amount of the verdict is excessive as a matter of law. We are likewise unable to agree with this contention. A motion for a new trial was made upon several grounds, among them being "excessive damages, appearing to have been given under the influence of passion or prejudice." Code Civ. Proc. § 657, subd. 5. The motion for a new trial was denied. The rule is well established that the amount of damages in this kind of an action is committed first to the sound discretion of a jury, and next to the discretion of the judge of the trial court, who in ruling upon the motion for a new trial may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal the decision of the trial court and the jury on the subject cannot be set aside, unless the verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury. Reneau v. Hirsch, 88 Cal. App. 1, 262 P. 1100, and cases there cited.

[15] We have carefully examined the entire record, including the evidence, and there is nothing in the record to show that the verdict was not the result of a fair and honest judgment of the jury. The uncontradicted evidence shows that the deceased was a man of 42 years of age, in good health, with a proven income of from $4,000 to $5,000 per annum, and an expectancy of life of 26.72 years, and contributed from $250 to $300 a month to plaintiffs. When all the facts and circumstances are considered, we think the award is not disproportionate to the compensation reasonably warranted by the facts.

Many other contentions are made by both appellants for a reversal of the judgment, but we have carefully considered them all, and find none of them of sufficient importance to warrant a reversal of the judgment or require special discussion. We have given the entire case careful consideration, and, as above stated, we have come to the conclusion that the question of negligence on the part of Rarity and contributory negligence on the part of deceased were questions of fact for the jury, and, the jury having determined that both Rarity and the Atchison, Topeka & Santa Fé Railway Company were negligent, we find no reason to disturb their findings and judgment.

Therefore the judgment will be affirmed; and it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

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103 Cal. App. 6

COOK v. MASON et al. (Civ. 3834.)

District Court of Appeal, Third District, California. Dec. 30, 1929.

1. Statutes 🔑79(1)—Law is general when it applies equally to all persons embraced in class founded upon natural, intrinsic, or constitutional distinction; "general law" (Const. art. 1, § 21).

A law is "general" and constitutional, under Const. art. 1, § 21, prohibiting granting of special privileges or immunities, when law applies equally to all persons embraced in class founded upon some natural, intrinsic, or constitutional distinction.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, General Law.]

2. Evidence 🔑14—It is common knowledge that one enlisting in army and navy first undergoes examinations and, after acceptance, receives training instilling habits of advantage in employment such as city fireman.

It is a matter of common knowledge that one enlisting in army or navy, either in war or peace times, has first to undergo examinations as to his physical and mental fitness for such service, and that after his acceptance he is subjected to vigorous training which instills habits of industry, sobriety, obedience, and fortitude that are of recognized advantage in such employment as a member of city fire department.

3. Constitutional law 🔑205(7)—Municipal corporations 🔑217(4)—Preference granted to soldiers, sailors, and marines by charter provisions relating to civil service does not contravene constitutional provisions regarding special privileges (Const. art. 1, § 21).

Preference privilege granted to soldiers, sailors, and marines by provisions of charter of city of Sacramento relating to civil service examinations *held* not to contravene Const. art. 1, § 21, prohibiting granting of special privileges or immunities.

4. Statutes ⚷64(1)—Constitutional portions of statute may stand alone if separable from void portions.

Constitutional portion of statute may stand alone and remain in force if they can be separated from portions which are void.

5. Statutes ⚷64(4)—Charter provision granting soldiers and sailors preference in civil service examinations is valid, even though clause relating to examination grade required of them is invalid.

Charter provision granting preference privilege to soldiers, sailors, and marines in civil service examinations *held* valid, even if clause to effect that honorably discharged soldiers, sailors, or marines passing average grade of 65 shall be deemed eligible, though others must have grade of 70, is invalid, since such clause may be stricken out or eliminated without destroying efficacy and purpose of remainder of section.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Petition by James E. Cook against Wallace Mason and others for a writ of mandate. From a judgment denying the writ, petitioner appeals. Affirmed.

Ray T. Coughlin, of Sacramento, for appellant.

Hugh B. Bradford and Joseph L. Knowles, both of Sacramento, for respondents.

JAMISON, Justice pro tem. This is an appeal from a judgment denying appellant a writ of mandate requiring the civil service commission of the city of Sacramento to place his name second on the civil service eligible list of said city for the postion of fireman.

The facts are not disputed and are substantially as follows: Appellant, with a number of other applicants, took the civil service examination for the position of fireman of said city, which was held on November 17, 1928. As a result of this examination appellant received an average grade of 94.03 per cent., the same being the second highest grade received by any applicant. Seventeen other applicants, all of whom were honorably discharged soldiers, sailors, or marines, passed this examination with a grade higher than 70 per cent. Applicant does not claim that he is an honorably discharged soldier, sailor, or marine.

In placing the names of said successful applicants on the eligible list, the civil service board, instead of placing appellant second on the eligible list of persons to fill the position of fireman of said city, placed him eighteenth on said list.

The civil service board claimed that, by reason of certain preferences given honorably discharged soldiers, sailors, and marines by the city charter, the said seventeen applicants, who were honorably discharged soldiers, sailors, and marines, and whose average grade was more than 70 per cent., were entitled to be placed ahead of petitioner on the civil service list and to be certified to fill vacancies as firemen of the fire department of said city ahead of appellant.

Section 43 of said charter provides that "the Civil Service Board shall formulate rules and regulations covering the selection and promotion of municipal employees. * * * All officers or employees shall be chosen or promoted, whenever a list of eligibles is furnished by the Civil Service Board, from the three candidates standing highest on the list." Sections 44 and 45 of said charter are as follows:

"Section 44. It shall be the duty of the Civil Service Board to hold examinations and to administer suitable tests to those desiring positions or who are applicants for, or who may have been recommended for promotion in the classified service, for the purpose of determining their fitness to hold such positions, or to qualify for such promotion, and from the results of said examination and tests, the Board shall prepare lists of eligibles for all positions in the classified service."

"Section 45. In all such tests, honorably discharged soldiers, sailors and marines, and widows of such and the wives of injured soldiers, sailors and marines who themselves are not qualified, but whose wives are qualified to hold such positions shall not be subject to any age limitations. If such person has attained an average percentage of 65 where the average percentage required is 70, he shall be eligible and his name shall be placed on the list above and be certified before the names of persons who have not been allowed preferences. If the name of more than one preferred claimant appears on the same list, the name of the claimant having the highest average percentage shall head the list. Preference under this section does not apply to promotions or to promotion examination."

The employees of the fire department of said city belong to the classified service. And while there is no positive statement to that effect, presumably the civil service board, under the rules and regulations formulated by it, required the applicant to have an average percentage of 70 to entitle his name to be placed on the eligible list.

Appellant contends that said section 45 is unconstitutional, in that it is in conflict with section 21, article 1, of the Constitution of this state. This section of the Constitution is as follows: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

[1] Construing this provision of the Constitution, it has been held time and again that while arbitrary discriminations by the Legislature between persons standing in the same relation to the subject of legislation will not be sustained by the courts, it is firmly settled that a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction. Ex parte King, 157 Cal. 161, 106 P. 578; City of Pasadena v. Stimson, 91 Cal. 251, 27 P. 604; City of Sacramento v. Swanston, 29 Cal. App. 212, 155 P. 101. In the case of Martin v. Superior Court, 194 Cal. 93, 227 P. 762, 765, it is said: "The classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law, but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, * * * within the class to which it is addressed."

Appellant concedes this to be the law, but he contends that before honorably discharged soldiers, sailors, and marines can be a distinctive class, that is to say, that kind of a class which is exempted from the provisions of the said section of the Constitution, it must appear that such soldiers, sailors, and marines served during times of war. In other words, that they must be veterans of some war in which the United States has engaged and that the act or law creating the class must so specify.

The attention of this court has been called to the case of Board of Directors v. Nye, 8 Cal. App. 527, 97 P. 208, where the court upheld the constitutionality of an act of the Legislature that gave a preference to dependents of veterans who served in the Civil War. In that case the court held that veterans of the Civil War constituted a class founded upon a natural distinction.

Cases cited from other states were founded upon laws granting privileges to veterans of the Civil and Spanish Wars, and in those cases the courts upheld the constitutionality of the acts granting such privileges. In the case of State ex rel. Raines v. City of Seattle, 134 Wash. 360, 235 P. 968, 971, in commenting on a law of this nature the court said: "Many states have provided by statute that, if veterans pass the examination, they may be preferred in employment to nonveterans who have passed the same examination. In some states such preference of employment was limited to honorably discharged soldiers and sailors of the late Civil War and afterwards amended to include honorably discharged soldiers and sailors of the Spanish War, which preferences were much more limited as to class, and not applying upon the same terms to all honorably discharged soldiers and sailors." Dillon on Municipal Corporations (5th Ed.) § 408.

Does the broadening of the class to whom the privilege is extended render the class no longer a distinctive one? There would seem to be no justification for so holding if the class as so broadened is still characterized by some substantial qualities or attributes which suggest the need for and propriety of the legislation.

In upholding what is generally referred to as the "Veteran Acts or Laws," they have generally been upheld on the ground that a person who has served in the army or navy in time of war would be likely to possess courage, constancy, habits of obedience, and fidelity, which are valuable qualifications for any public office or employment. 19 R. C. L. 755.

And as was said in the case of Opinion of the Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58, that in addition to this "the recognition of the service of veterans * * * would promote that love of country and devotion to the welfare of the state which it concerns the commonwealth to foster." So, in the case under consideration, the Legislature may have, and doubtless did think, that a person who has served in the army or navy and who has been honorably discharged therefrom, had by such service acquired habits of industry, obedience, and fidelity, which are valuable qualifications for any public office or employment, and, moreover, that the recognition of this service would promote the love of country and devotion to its welfare which it concerns the state to foster.

[2] It is a matter of common knowledge that a person who enlists in the army or navy, or who is accepted in such service, either in war or peace times, has first to undergo tests and examinations as to his physical and mental fitness for such service, and that after his acceptance he is subjected to vigorous training which instills habits of industry, sobriety, obedience, and fortitude that are of recognized advantage in such employment as a member of the city fire department.

[3] We are of the opinion that the preference privilege granted to soldiers, sailors, and marines by the provisions of said charter of the city of Sacramento does not contravene the said section of the Constitution.

Appellant contends that section 45 of the said charter of the city of Sacramento is unconstitutional upon another ground, namely, that the eligible grade is placed by the civil service board at 70, that is to say, an applicant is qualified for the position of fireman of said fire department if he obtains an average grade of 70, but that an honorably discharged soldier or sailor or marine is qualified if he obtains an average grade of 65, and in support of this contention, cites the case of Brown v. Russell, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357, where a veteran was placed at the head of the list without any examination as to his qualification, in which case the court ordered his name stricken from the list, holding that even though he was a veteran of the Civil War, it was necessary that he should be found qualified for the position for which he applied before he could be placed on the eligible list. Veteran acts have been sustained by the courts where they do not discriminate as to the eligibility or qualification for office, but they have been held unconstitutional so far as they require that certain offices shall be filled by veterans in preference to all other persons without regard to fitness. 43 Cor. Jur. 609.

The charter of the city of Sacramento not only provides that employees belonging to the classified service, which includes firemen, shall be appointed on no other grounds and for no other reason than their fitness for the position to be filled, but also provides that all applicants, including honorably discharged soldiers and sailors and marines, shall pass the same examination and be subjected to the same tests as to their qualifications for the employment for which they shall apply. In providing in said charter that where the average grade for eligibility is placed at 70 the honorably discharged soldier, sailor, or marine shall be deemed eligible who has passed an average grade of 65, the framers of the charter undoubtedly took into consideration the qualifying training that the honorably discharged soldier, sailor, or marine had already received from his service in the army or navy, and which placed him at an advantage over the nonservice applicant. But the authorities bearing upon this proposition that have been called to the attention of this court, while upholding the constitutionality of the laws granting preferences to veterans, yet require, as a preliminary step toward granting such preference, that the veteran shall have attained the qualifying grade. State ex rel. Raines v. City of Seattle, 134 Wash. 360, 235 P. 968; In re Opinion of the Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; In re Application of George Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447.

"In all examinations, competitive and noncompetitive, veterans have no preference over other citizens of the state; but when as a result of these examinations, a list is made up from which appointments can be made, consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to a preference without regard to his standing on the list." 43 C. J. 609, and cases there cited.

The cases of Jones v. O'Toole et al., 190 Cal. 252, 212 P. 9, and McKeon v. O'Toole, 71 Cal. App. 445, 235 P. 464, do not throw light upon the point here involved. These were both cases where the veterans had taken examinations and passed the qualifying grade, and the matter there determined was whether or not, by reason of the fact that they were veterans, they were entitled, upon applications for promotions, to a percentage over that given by the examination.

If it should be conceded that the part of section 45 requiring honorably discharged soldiers and sailors and marines to be placed on the eligible list upon attaining a percentage of 65, where the qualifying percentage is 70, is violative of the Constitution, still this does not require that the whole of said section should be declared unconstitutional.

[4, 5] It is a general rule, supported by an unbroken line of decisions, that a provision in or a part of an act may be unconstitutional and beyond the power of the Legislature to enact and still the whole act may not be void. The accepted doctrine in such cases is that the constitutional portions of the statute may stand alone and remain in force if they can be separated from the portions which are void. 5 Cal. Jur. 643, and cases there cited. It unquestionably was the intention of the framers of the charter to give the honorably discharged soldiers and sailors and marines a preference in the employment of those who came within the classified service; it is equally plain that the clause in said section 45 pertaining to the percentage of 65 can be stricken out or eliminated therefrom without destroying the efficacy and purpose of the remainder of said section. As was said in the case of Hale v. McGettigan, 114 Cal. 112, 45 P. 1049, 1052: "If the different parts of the statute are severable and independent of each other, and the provisions which are within the constitutional power of the legislature are capable of being carried into effect after the void part has been eliminated, and it is clear from the statute itself that it was the intent of the legislature to enact these provisions irrespective of the others, the unconstitutional provisions will be disregarded, and the statute read as if these provisions were not there." Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L. R. A. 249; In re Mitchell, 19 Cal. App. 567, 126 P. 856; In re Nicholls, 74 Cal. App. 504, 241 P. 399.

The words "65 where the average percentage required is" may be stricken from said section without affecting the validity of the remainder thereof; that, as so stricken, the said section 45 will require all applicants to attain an average percentage of 70, which is the qualifying percentage for all.

It appearing that all of the honorably discharged soldiers and sailors and marines who have been placed upon the eligible list ahead of appellant have passed the required examinations and tests with an average percentage of more than 70, we are of the opinion that the judgment denying the writ of mandate should be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

WALKER v. KIMBALL FRUIT CO., Inc. (two cases). (Civ. 6788, 6789.)★

District Court of Appeal, First District, Division 1, California. Dec. 24, 1929.

As Modified on Denial of Rehearing Jan. 23, 1930. Hearing Granted by Supreme Court Feb. 20, 1930.

1. Contracts ⇨42—Delivery of contract, sent by mail, is not complete until its receipt and acceptance; post office not being addressee's agent.

Where a contract is sent by mail, post office is not agent of person to whom it is addressed, and delivery is not complete until receipt and acceptance thereof.

2. Appeal and error ⇨999(1)—Jury's verdicts for sellers, in action for difference between amounts paid and guaranteed, held not implied findings, binding on appeal, that guarantees were in contracts when received through mail by buyer's state agent.

Testimony of buyer's soliciting agent that minimum price guarantees were written in duplicate contracts mailed by him to buyer's state agent, and latter's testimony that no such guarantees were contained therein when he received them about a day after their mailing, *held* not conflicting, so as to render jury's verdicts for sellers, in actions for difference between amounts paid and guaranteed, implied findings, binding on appellate court, that guarantees were in contract when received by state agent.

3. Corporations ⇨406(2)—Generally, president of commercial corporation may bind it by contracts made pursuant to its ordinary business.

Generally, president of corporation organized for commercial purposes has power to bind corporation by contracts made in pursuance of its ordinary business.

4. Corporations ⇨405—Foreign corporation's general state agent ordinarily has all authority necessary to carry on employer's business.

Ordinarily, foreign corporation's general state agent is clothed with all authority necessary to enable him to carry on employer's business.

5. Principal and agent ⇨104(2)—Buyer's soliciting agent ordinarily has no right to make price guarantees.

Making of price guarantees is not a usual or necessary right of mere soliciting agent of buyer under any ordinary state of affairs.

6. Principal and agent ⇨123(7)—Evidence held to show that buyer's soliciting agent had no authority to guarantee minimum prices for apple crops.

In sellers' actions for difference between amounts paid for their apple crops and minimum prices guaranteed, evidence *held* to show that defendant's soliciting agent had no actual authority to enter into contracts guaranteeing minimum prices.

7. Principal and agent ⇨119(6)—Sellers had burden of showing ostensible authority of buyer's soliciting agent to make agreements guaranteeing minimum prices (Civ. Code, §§ 2317, 2334).

Sellers insisting that one with whom they dealt, with knowledge that he was acting as buyer's agent, had ostensible authority to make agreements guaranteeing minimum prices, had burden of showing, in actions for difference between amounts paid for their apple crops and guaranteed prices, that agent acted within scope of his authority, in view of Civ. Code, §§ 2317, 2334.

8. Principal and agent ⇨123(7)—Evidence held not to show that buyer held out or represented soliciting agent as authorized to make price guarantees.

In fruit sellers' actions for difference between amounts paid for their apple crops and guaranteed minimum prices, evidence *held* not to show that defendant held out or represented its soliciting agent as having any authority to make such guarantees.

9. Principal and agent ⇨147(2)—Fruit sellers, knowing of past unauthorized price guarantees by buyer's soliciting agent, held precluded from recovering difference between amounts paid and guaranteed by him by failure to inquire of buyer's state agent as to extent of soliciting agent's authority.

Fruit sellers, knowing that buyer's soliciting agent had made unauthorized price guarantees in past, *held* precluded from recovering difference between amounts paid them and minimum prices guaranteed by such agent by want of good faith and ordinary care in not inquiring of defendant's general state agent as to extent of soliciting agent's authority before shipping fruit.

10. Principal and agent ⇨173(3)—Buyer's state agent's receipt and retention of contracts mailed by soliciting agent held not ratification of latter's unauthorized price guarantees, in view of evidence.

Buyer's general state agent's receipt of contracts mailed to him by soliciting agent and retention thereof without objection until after delivery of apples to buyer *held* not ratification of soliciting agent's unauthorized price guarantees, in view of state agent's testimony that contract contained no guarantees when received and his clerk's testimony as to sending sellers a letter stating that buyer was not going to make any such guarantees.

Appeals from Superior Court, Sonoma County; R. L. Thompson, Judge.

★Hearing granted. 289 P. 623.

Action by D. G. Walker and H. Walker, respectively, against the Kimball Fruit Company, Inc. Judgments for plaintiffs, and defendant appeals. Reversed.

Heller, Ehrman, White & McAuliffe and Webster V. Clark, all of San Francisco, and Geary & Geary and C. J. Tauzer, all of Santa Rosa, for appellant.

Robert Duncan, of San Francisco, E. M. Norton, of Healdsburg, and Karl Brooks, of San Francisco (John L. McNab, of San Francisco, of counsel), for respondents.

DEASY, Justice pro tem. These two cases involved practically identical states of fact, and were tried together, although separate verdicts were entered. The appeals were consolidated for hearing and submitted together.

Respondents H. Walker and D. G. Walker are father and son, and in the year 1926 were the owners of adjoining orchards situated in Dry Creek valley in Sonoma county. In July, 1926, one Kemp Ross, as agent for appellant, entered into a contract with H. Walker, reading as follows:

"This Agreement made at Healdsburg, California, this 1st day of July, A. D. 1926, between H. Walker hereinafter called the Grower, and Kimball Fruit Co., Inc., successor to Dennis, Kimball & Pope, fruit shippers, whose principal place of business is at New York, hereinafter called the shipper:

"Witnesseth: Guaranteed minimum of 90 cents on Fancy per X and 65 cents on C grade.

"That for and in consideration of the sum of One Dollar in hand paid by the shipper to the Grower and other valuable considerations, the receipt of which is hereby acknowledged, the Grower hereby places ½ his entire crops of Gravensteins apples grown on the following described property in Sonoma County, State of California, to wit: Located 5 mi. N. W. of H. Burg in Dry Creek Valley—estimated at 3000 x, packing charge not to exceed 55¢ x selling chg. 10% F. O. B. or 7% Delivered sale.

"For the season of 1926 of good merchantable quality suitable for marketing, in the hands of the shipper to market for his account. The Shipper shall receive for its services in marketing said crops, the usual commercial rates of loading and packing charges and commission established by it in that district, which Grower hereby agrees to pay. Said fruit or grapes are to be picked and delivered at Grower's expense to the nearest packing house of said Shipper, and Shipper is to furnish the materials and do the packing and loading for which the Grower has hereinbefore agreed to pay. The Shipper agrees to use due diligence to market said crops to the best advantage to all parties.

"If the Grower is indebted to the Shipper at any time during the continuance of this agreement, the proceeds of said crops are hereby pledged to secure said indebtedness; and if said indebtedness is not fully paid before December 1st, 1926, then this agreement is renewed for the next year's crop, and the proceeds are pledged for any indebtedness then existing.

"Kimball Fruit Co., Inc.
"By Kemp Ross, Shipper.
"H. Walker, Grower
"Address: Healdsburg, Cal. R. 2."

In the same month, as such agent, he also entered into a contract with D. G. Walker, reading as follows:

"This Agreement, made at Healdsburg, California, this 6th day of July, A. D. 1926, between D. G. Walker, hereinafter called the Grower, and Kimball Fruit Co. Inc., successor to Dennis, Kimball & Pope, fruit shippers, whose principal place of business is at New York, hereinafter called the shipper.

"Witnesseth: Packing chg. 55¢ x; selling chg. 10% F. O. B. sales 7% Del. sales.

"That for and in consideration of the sum of One Dollar in hand paid by the Shipper to the Grower and other valuable considerations, the receipt of which is hereby acknowledged the Grower hereby places his entire crops of Gravenstein apples grown on the following described property in Sonoma County, State of California, to wit: Located 4 mi. N. W. Healdsburg in Dry Creek Valley—Estimated at 550 x Guaranteed minimum of 90 cents on Fancy & 65 cents C. Grade.

"For the season of 1926, of good merchantable quality suitable for marketing, in the hands of the Shipper to market for his account. The Shipper shall receive for its services in marketing said crops, the usual commercial rates of loading and packing charges and commission established by it in that district, which Grower hereby agrees to pay. Said fruit or grapes are to be picked and delivered at Grower's expense to the nearest packing house of said Shipper, and Shipper is to furnish the materials and do the packing and loading for which the Grower has hereinbefore agreed to pay. The Shipper agrees to use due diligence to market said crops to the best advantage of all parties.

"If the Grower is indebted to the Shipper at any time during the continuance of this agreement, the proceeds of said crops are hereby pledged to secure said indebtedness; and if said indebtedness is not fully paid before December 1st, 1926, then this agreement is renewed for the next year's crop, and the proceeds are pledged for any indebtedness existing.

"Kimball Fruit Co., Inc.
"By Kemp Ross, Shipper.
"D. G. Walker, Grower
"Address: Healdsburg, Cal. R. 2."

Appellant does not question the fact that Ross entered into contracts with respondents, but at the trial contended that the contracts were not as claimed by respondents, and that the duplicates forwarded by Ross to appellant's agent in San Francisco, one Alexander Young, Jr., were different in form from those set out herein. The ones shown above were those delivered by Ross to the respondents. At the trial it appeared that on the duplicates mailed to Young by Ross erasures had been made, and that no guaranteed minimum price was specified for the apples.

Each of the respondents delivered apples to appellant during the season of 1926, and certain moneys were remitted to them, not amounting in either case to the guaranteed minimum price. Respondents thereupon demanded from appellant the difference claimed to be due to each of them, and upon the refusal of appellant to pay brought suits to recover such differences.

The actions were tried by a jury, which brought in a verdict for H. Walker in the sum of $2,085 and interest, and a verdict for D. G. Walker in the sum of $418 and interest. From the judgments rendered on these verdicts the defendant appealed.

The first contention of appellant is that no minimum price had ever been agreed upon, for the reason that the general agent of appellant, Mr. Young, never authorized the making of the guarantees because of the different wording in the contracts. The agent Ross testified that he mailed the duplicates to Young either from Healdsburg or Santa Rosa, and that, when he did so, the guarantees were written in exactly as they appeared in the contracts delivered to respondents. Young testified that, when he received the contracts in San Francisco, he read them, and that no provisions as to guarantees were contained in them. An interval of about a day elapsed between the mailing of them and their receipt by Young. The testimony of both witnesses may be true.

[1] Where a contract, such as the ones involved here, is sent by mail, the postoffice cannot be said to be the agent of the person to whom it is addressed, and the delivery is not complete until the receipt of the contract and its acceptance. Navajo County Bank v. Dolson, 163 Cal. 485, 126 P. 153, 41 L. R. A. (N. S.) 787.

[2] In view of this rule, it cannot well be said that there was any conflict in the evidence on the question as to whether the guarantees were in the contracts when received by Young, and hence any claim of respondents that the verdict of the jury is an implied finding on that subject, and therefore binding on this court on appeal, can have no merit.

The foregoing statement and conclusion are not decisive of the case, however, because the question of the authority of the agent Ross is not therein considered. The importance of the matter discussed will be adverted to more fully hereafter in connection with another point in the case. If Ross had authority, either actual or ostensible, to make the contracts containing the guarantees, Young's action or inaction in the matter would become immaterial.

It is contended, however, by appellant that Ross had neither actual nor ostensible authority to enter into any contracts with respondents by which minimum prices were guaranteed. Many of the exceptions taken by appellant bear upon this contention, and do not require separate consideration. If Ross had authority, either actual or ostensible, as the agent of appellant to guarantee minimum prices to respondents, the judgments must be affirmed. If he had not such authority, they must be reversed, unless the contracts were subsequently ratified by appellant.

[3] We will first consider the question of actual authority. In approaching this question it is apparent from the record that any actual authority could only have been conferred upon Ross by C. W. Kimball, the president of appellant, or by Alexander Young, its general agent in California. Appellant contends that there was no showing at the trial of any authority in C. W. Kimball, as president of appellant, to confer actual authority upon Ross. In support of this contention we are referred to the cases of Black v. Harrison Home Co., 155 Cal. 121, 99 P. 494, and Butler v. Solano Land Co., 46 Cal. App. 171, 188 P. 1019. We do not believe that these cases are controlling here, for the reason that in each of them was involved the question of alienating the lands of the corporation, the power to do which is ordinarily vested in the board of directors, and such, in effect, is the ruling in the cases cited. Rather, the rule applicable to purely business or commercial corporations is to be considered. That rule is that generally in a corporation organized for commercial purposes the president has power to bind the corporation by contracts made in pursuance of its ordinary business.

In Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, the court said at page 513, 185 P. 388, 389:

"A corporation can act only through its agents, and the president of a corporation, as the agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to execute contracts and to bind the company in so doing. He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation."

And to the same general effect is the ruling in Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 123 P. 212.

[4] The record shows that Alexander Young was appointed by defendant as its general agent for California. Ordinarily such an agent is clothed with all the authority necessary to enable him to carry on the business of his employer. The principal place of business of appellant was in New York, and it

is a fair inference from the record that, so far as the business in California was concerned, he had the same plenary power that the president exercised.

[5, 6] Coming now to the evidence on the subject of the actual authority of Ross, we find that he testified that, when Mr. Kimball had looked at the crop of apples in the orchard of the respondent H. Walker, a conversation took place between Kimball and Ross out of the hearing of H. Walker, in the course of which Kimball said to Ross something about the fine quality of the apples that H. Walker was raising, and then said, "You get this crop regardless." Ross also testified that Young on one occasion told him to go out and get apples regardless, because he was afraid that they had ordered too much box shook.

The record shows that Ross was employed to solicit shipments of apples from growers in Sonoma county to the packing plant of appellant at Healdsburg. The contract forms he used were shipping contracts. It would seem to require the stretching of imagination almost to the breaking point to interpret the words "Get apples regardless" as conferring any express authority to make guarantees. That is not under any ordinary state of affairs a usual or necessary right possessed by a mere soliciting agent.

From the foregoing we conclude that Ross had no actual authority to enter into the contracts guaranteeing minimum prices.

[7, 8] Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess. Section 2317, Civ. Code.

A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and, without want of ordinary care, incurred a liability, or parted with value, upon the faith thereof. Section 2334, Civ. Code.

In considering the question of ostensible authority, we must keep these Code provisions clearly in mind, and carefully examine the facts in the light of the rules stated therein. In the case of Cowell Lime & Cement Co. v. Santa Cruz Bank, 82 Cal. App. 519, at page 522, 255 P. 881, 882, in speaking of ostensible authority, this court said: "The determination of this character of authority is not a matter that lends itself to any hard and fast rule. It is almost wholly a question of fact."

What, then, are the facts in this case as disclosed by the record? Appellant, a New York corporation, had done a shipping and consignment business in various kinds of fruit in California for a short time prior to 1926. In that year Alexander Young, who maintained an office in San Francisco, became its general agent for California. Early in the year C. W. Kimball, president of appellant, came to California, and, being desirous of doing business in Sonoma county, where none had been done by appellant prior to that time, visited Sonoma county with Young, and there met a number of apple growers who had been requested by Young to assemble for that purpose. Neither of the respondents attended that meeting. Prior to that time, at the suggestion of Young, Ross had been employed as a solicitor, and at the meeting met C. W. Kimball for the first time. A day or so later Kimball, Young, and Ross called on respondent H. Walker, and Kimball looked over said respondent's orchard. Kimball at that time stated that Ross was his representative there, and that Ross would call to see H. Walker later in regard to the fruit. Ross thereafter called on said respondent a number of times, and finally entered into the contract which is the basis of this action. Respondent D. G. Walker did not meet Young or Kimball at that time, and dealt altogether with Ross. The original meeting took place about two months prior to the making of the contracts. Meanwhile, appellant furnished to several banks in the vicinity a statement showing the financial standing of appellant and references to Eastern concerns. This was deemed advisable, because the company had never before done business in Sonoma county, and, in view of the nature of its business, wanted to satisfy the growers that they could with safety ship their fruit to it. One of the banks so supplied with information was the First National Bank of Healdsburg, and on the second page of the document sent there the following statement appeared:

"The Kimball Fruit Company does not merchandise nor buy anything for its own account, or use the company's funds in buying and selling, but confines its operations exclusively to a commission basis."

The record shows that prior to the execution of his contract the respondent H. Walker called at the First National Bank of Healdsburg to inquire about appellant's standing, and the document above referred to was shown him. He testified that he did not read the second page, but J. H. Miller, the cashier, testified that to the best of his recollection he read the entire document to said respondent. Respondent D. G. Walker made no inquiries of any kind, except from his father. It appears from the record that both respondents knew Ross for several years, and both stated that they had heard that in former years he had been in trouble because of unauthorized guarantees made by him on behalf of persons whom he had represented as a solicitor of business.

In the light of the facts so disclosed by the record, we feel that this case is controlled by the decision in the case of Peterkin v. Randolph Marketing Co., 48 Cal. App. 300, 191 P. 947, 948. The instant case is practically on all fours with the case above referred to, the main distinction being that there the contract was an oral one and here the contracts were in writing. That distinction is unimportant.

In that case the court said: "Since plaintiff and his assignor dealt with Gow, knowing him to be acting as an agent of defendant, the burden was upon them to show that he in making the alleged agreement was acting within the scope of authority conferred upon him so to do. While counsel for respondent concedes that no express power was conferred upon Gow to either purchase or guarantee the price of the fruit delivered to defendant, he nevertheless insists that he was clothed with ostensible authority to make the agreement, and hence, since as claimed it recognized and adopted like contracts made by him with others, defendant is estopped from denying that Gow as its agent was authorized to make the alleged agreements. Conceding this to be the law, our attention is directed to no evidence whatever, either printed in the brief or contained in the typewritten transcript, which in the slightest degree tends to show that defendant had, through its agents or otherwise, purchased fruit at a stipulated price or guaranteed the price thereof, or shipped fruit other than on consignment for sale on commission."

The last-quoted paragraph is singularly appropriate here. There is no evidence here of any guarantees except those in the contracts sued on, and each respondent testified that he had never heard of any others.

Other cases exactly in point are Cannon v. Long, 135 Wash. 52, 236 P. 788; Fargason Co. v. Dudley, 173 Ark. 1148, 294 S. W. 6, and First National Bank v. Farson, 226 N. Y. 218, 123 N. E. 490, 492.

In the latter case the court said: "It is a general rule that the power of an agent to bind the principal in contracts of guaranty or suretyship can only be charged against the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such a power, or where the power is a manifestly necessary and customary incident of the authority bestowed upon the agent, and where the power is practically indispensable to accomplish the object in view."

The duty of one dealing with an agent to satisfy himself as to the scope of the agent's authority is similarly stated in the California cases of Mitrovich v. Fresno Fruit Packing Co., 123 Cal. 379, 55 P. 1064, and Allen v. San Francisco Wholesale Dairy Produce Exchange, 59 Cal. App. 93, 210 P. 41. The general tenor of the rulings in those cases is that one who seeks to charge a supposed principal with obligations resulting from the acts and conduct of an alleged ostensible agent must first show that he himself was cognizant of the facts which gave color to the alleged ostensible agency and caused him to believe that the person with whom he dealt was acting within the scope of his authority as agent.

As a result of what has been said, we must conclude that there was no holding out or representation by appellant of Ross as having any authority whatever to make the guarantees in question.

[9] It clearly appears that respondents in dealing with Ross were not acting "in good faith, and without want of ordinary care." They both knew that he had in the past made unauthorized guarantees and had been in trouble on that account, and it would certainly be the act of an ordinarily careful and prudent business man to inquire of the general agent Young as to the extent of the authority of Ross before shipping any apples under the contracts.

Respondents have referred to the following cases: Leavens v. Pinkham & McKevitt, 164 Cal. 243, 128 P. 399; Cowell Lime & Cement Co. v. Farmers & Merchants Bank, 82 Cal. App. 519, 255 P. 881; Aigeltinger v. Burke, 176 Cal. 621, 169 P. 373; Resetar v. Leonardi, 61 Cal. App. 765, 216 P. 71; Hicks v. Wilson, 197 Cal. 269, 240 P. 289, and Producers' Fruit Co. v. Goddard, 75 Cal. App. 737, 243 P. 686, which they claim support their position.

We have examined these authorities carefully, and fully agree with the conclusions therein expressed, but they are clearly distinguishable from the cases at bar. In each of them the agent by whose acts the principal was sought to be charged had been held out generally, and for a long period of time, and to the particular persons concerned, as possessing the authority he assumed to exercise, and in many instances unauthorized acts similar to the ones in issue in the cases mentioned had been ratified by the principal.

The record in this case discloses no such state of facts, and there is no evidence upon which any ostensible authority in Ross to make the guarantees can be predicated.

[10] Respondents' claim of ratification cannot be sustained. It is based upon the theory that, Young having received the contracts containing the guarantees, and having retained them without objection until after the apples had been delivered to appellant, any unauthorized acts of Ross were ratified. As we have stated, Young testified postively that, when he received the contracts, they contained no guarantees, and that he first learned that the ones he had in his possession differed from those received by respondents in the months of September, and that he repudiated the guarantees immediately. In addition to this, Miss Gielow, a clerk in Young's office, testified positively that she sent a letter to each of the respondents shortly after their contracts were received by Young in which the following language appeared: "We are not going to make any promises or guarantees of prices, but we want you to realize that we have our heart and soul in the result of this work, and that our interests are entirely for your good." It is true that respondents each denied the receipt of such a letter, but the testimony is, in other respects, uncontradicted. Surely some emphatic repudiation would have been sent had

Young known of the guarantees, instead of a form letter, which the record shows was similar to those sent to all growers whose contracts came to Young's office.

For a similar reason respondents' claim of estoppel is untenable.

It would needlessly prolong this opinion if the various exceptions were taken up and discussed. Some of them are entirely without merit, particularly those addressed to the instructions given by the court to the jury, and the others are all sufficiently covered by what has been said.

For the reasons stated, we conclude that the judgment in each of the cases must be reversed, and it is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

208 Cal. 622

LLOYD v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY et al. (L. A. 11802.)

Supreme Court of California. Dec. 31, 1929.

1. Criminal law ⚷1192—Trial court has power to hear and determine probation applications at any time prior to execution of sentence, regardless of appeal (Pen. Code, § 1203, as amended by St. 1927, p. 1493).

Under Pen. Code, § 1203, as amended by St. 1927, p. 1493, trial court has power to hear and determine applications for probation at any time prior to execution of sentence, without regard to whether defendant has in the meantime undertaken to prosecute a vain and unsuccessful appeal.

2. Mandamus ⚷61—Application for writ of mandate was proper remedy to require trial court to hear and determine probation application (Pen. Code, § 1203, as amended).

Application for a writ of mandate was proper remedy to require trial court to hear and determine application for probation, under the provisions of Pen. Code, § 1203, as amended, regardless of fact that appeal might lie from order either granting or refusing probation, since an appeal in such case would not furnish a plain, speedy, and adequate remedy.

In Bank.

Original application by Charles E. Lloyd for a writ of mandate, to be directed to the Superior Court in and for the County of Los Angeles and Hon. William T. Aggeler, Judge of Department 26 thereof. Writ granted.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Jackson Hayes, of Los Angeles, for petitioner.

T. C. Becker, of Los Angeles, for respondent.

RICHARDS, J. The petitioner applies for a peremptory writ of mandate to be directed to the superior court in and for the county of Los Angeles, and the judge thereof, commanding said court to entertain, hear, and determine the application of petitioner for probation, under the provisions of section 1203 of the Penal Code. The facts underlying petitioner's application, and which are undenied, may be briefly stated as follows:

The petitioner, after his indictment by a grand jury for the offense of involuntary manslaughter, was brought to trial thereon, and on or about April 25, 1928, was found by the jury to be guilty of said charge. Thereafter, and on April 27, 1928, after his motion for a new trial had been denied, the petitioner was by the judgment of said superior court sentenced to a term in the state prison at San Quentin for the period prescribed by law for the crime of manslaughter, whereupon the petitioner on said 27th day of April, 1928, appealed to the District Court of Appeal in and for the Second Appellate District, Division 2, which appellate tribunal, after due hearing and consideration of said appeal, and on or about April 20, 1929, made and entered its decision affirming the judgment of the trial court, and thereafter and in due course the remittitur in said cause was filed with the clerk of said superior court. People v. Lloyd (Cal. App.) 275 P. 1010. Upon taking his said appeal, petitioner had been granted a writ of probable cause, pending said appeal, and the decision thereon, and as the result thereof had remained in the county jail of the county of Los Angeles pending his said appeal, and up to and including May 21, 1929. On said 21st day of May, 1929, and after the judgment of said court had become final by its affirmance upon appeal, but before any further order of said court had been made looking to the execution of said judgment, the petitioner applied to said superior court and to William T. Aggeler, the judge thereof, for an order granting him probation, which application came on for hearing on or about May 24, 1929, whereupon the said court and the judge thereof denied the same, upon the express ground that the said court and the judge thereof had no authority to entertain said application or to grant probation thereon after appeal by said defendant from its foregoing judgment and sentence and after the affirmance thereof by the appellate tribunal upon such appeal.

In so deciding, and in so refusing to grant probation to the petitioner upon his said application, the superior court rested its decision to that effect upon the majority opinion of this court in the case of Beggs v. Superior Court, 179 Cal. 130, 175 P. 642. In so doing, however, the trial court and the judge thereof did not apparently take cognizance of the fact that section 1203 of the Penal Code of California, which had been construed by this court in the course of its foregoing opinion, had been thereafter several times amended by successive acts of the Legislature, and it is the contention of the petitioner that the effect of these several amendments of said section of the Penal Code has been such as to render the decision of this court in the case of Beggs v. Superior Court, supra, no longer applicable to applications for probation, when the same are made after appeal and affirmance of the judgment and sentence of the trial court, and that as a result thereof persons who have been convicted of offenses to which the beneficent and merciful provisions of section 1203 of the Penal Code are applicable may now, under the provisions of said section as thus amended, make application for probation after the affirmance of the judgment and sentence of the trial court upon appeal, and at any time prior to the execution of said judgment and sentence, and that in the state of the section as thus amended it has become the duty of the trial court to entertain, hear, and determine such applications for probation, and the petitioner for that reason has presented this application for a writ of mandate to compel such action on the part of the trial court.

Section 1203 of the Penal Code as it existed at the time of the decision of this court in the Beggs Case, read, as to the portion thereof affected by said decision, as follows:

> "After plea or verdict of guilty, where discretion is conferred upon the court as to the extent of the punishment, the court, upon oral suggestions of either party, or of its own motion, that there are circumstances which may properly be taken into view, either in aggravation or mitigation, of the punishment, may in its discretion refer the same to the probation officer, directing said probation officer to investigate, and to report, recommending either for or against release upon probation, at a specified time, and the court shall hear the same summarily at such specified times, and upon such notice to the adverse party as it may direct. At such specified time, if it shall appear from the report furnished by the probation officer, or otherwise, and from the circumstances, of any person over the age of eighteen years, so having pleaded guilty, or having been convicted of crime, that there are circumstances in mitigation of the punishment, or that the ends of justice shall be subserved thereby, the court shall have power, in its discretion, to place the defendant upon probation."

The decision of this court in the Beggs Case, with relation to the application of the foregoing provision of the Penal Code, was a divided opinion; two of the members of this court as then constituted dissenting from the reasoning and conclusion of the main opinion. In the main opinion, while it was apparently conceded that the limitation upon the time within which a convicted defendant would be entitled to apply for probation under the terms of said section arose by implication, it was held that the provisions of said section relating thereto were limited by the terms of sections 1191, 1263 and 1265 of the Penal Code to the brief period between the conviction of the defendant and the time provided by section 1191 for pronouncing judgment and sentence. In the dissenting opinion, however, it was reasoned that, treated both historically and logically, section 1191 of the Penal Code bore no such correlation to section 1203 thereof as would have the effect of placing a limitation upon the power of the trial court to deal with the subject of probation under the latter section, either before or after pronouncing judgment so long as it had jurisdiction of the case.

A careful rereading of section 1191, of the Penal Code, as the same was originally enacted in 1872, and as the same was later and finally amended in 1911 (St. 1911, p. 688), convinces us that the references therein as thus amended to section 1203 of the Penal Code, and to the limitation of time therein provided for the investigation of the question of probation on the part of the trial court, have reference to the period after application for probation has been made, and not to the period within which, after conviction, such application must be made. As to sections 1263 and 1265 of the Penal Code, and which remain in the form of their original adoption in 1872, we have become satisfied that neither of these sections, when historically considered, can be given the application accorded to them in the main opinion of this court in the Beggs Case, but that the better reasoning and conclusions upon this branch of the case are to be found in the dissenting opinion therein. We are enforced in this conclusion by the review of the later trend of legislation and decision touching the subject of probation as the same appears in the statutes and decisions of those other jurisdictions, state and federal, to which we shall presently refer.

Before doing so, however, we deem it necessary to first consider the several changes which have been made in the framing of section 1203 of the Penal Code by our state Legislature since the decision, in the year 1918, of Beggs v. Superior Court, supra. Section 1203 has been four times amended since the date of that decision. The first two changes therein occurring, respectively, in 1919 (St. 1919, p. 1244), and in 1921 (St. 1921, p. 1296), had no bearing upon those portions of said section which are here involved in the instant proceeding. In 1923, however (St. 1923, p. 291), the Legislature made an important change in the reading of that portion of section 1203 which is above quoted, and which amendment consisted in the insertion of the words "before judgment and sentence" in that portion of the section, which was thus made to read as follows: "The court or board or commission or other authority *before judgment and sentence* and except as hereinafter provided, may" etc. By this amendment to the section it would seem to be sufficiently plain that the Legislature intended to make express that which had theretofore rested in implication with relation to the time after conviction within which applications for probation must be presented. In the absence of any enlightenment from the journals of that session of the Legislature, it may be fairly surmised that its purpose in making said amendment was to set at rest whatever controversies had arisen over the divided views of this court as expressed in the Beggs decision and dissent, by adopting expressly the words and meaning assigned to said section by the prevailing opinion in that case, and to thus fix upon said section the express requirement that applications for probation must be made "before judgment and sentence" in each particular case.

Having thus expressly read into said section the language and intent of the main opinion in the Beggs Case, the section of the Code thus continued to read and to so expressly intend for the succeeding four years, when it was again amended by the Legislature in 1927 (St. 1927, p. 1493) in several important respects, the chief of which, however, consisted in striking out of said section the words "before judgment and sentence," which had been inserted by the previous amendment. In determining what the state Legislature really intended by striking out of section 1203 the words "before judgment and sentence," which had been inserted therein by the amendment of 1923, we are aided, we think, by the positive and uniform trend of legislation and decision which has taken place in other jurisdictions, state and federal, during the past 10 years, and with which we may fairly assume the state Legislature to have been also familiar in making such further amendment of section 1203 of the Penal Code as occurred in 1927, and to which we shall now refer.

It is a significant fact that the Criminal Code of the state of New York, from which the Penal Code of California was in its original form almost bodily taken, contained certain sections relating to the procedure of trial courts after conviction, and which embodied in identical language the provisions of sections 1191, 1263, and 1265 of the Penal Code of California as originally enacted. Subsequently to the adoption of its Criminal Code, the Legislature of the state of New York incorporated therein those provisions thereof bearing upon the subject of probation, and which are to be found in identical or similar forms of expression in the legislation of many other states, and, among those, of California, and to be embodied in the latter state in section 1203 of the Penal Code as originally adopted, and in which, as in the New

York statute, there was no express limitation as to the time prior to the execution of judgment and sentence within which applications for probation might be made.

In the case of People ex rel. Woodin v. Ottaway, 247 N. Y. 493, 161 N. E. 157, decided in 1925, the precise question as to the correlation of the several earlier enacted sections of the New York Criminal Code, and which are identical in form with sections 1191, 1263, and 1265 of our own Penal Code, as these sections originally read, upon the provisions of the later enacted probation law of New York, arose and was considered, and it was therein held that no such correlation existed as would prevent a defendant from making his application for probation at any time before the execution of the judgment and sentence, and this without regard to whether he had or had not prosecuted a vain appeal.

In the case of State ex rel. Bottomly v. District Court, etc., for Blaine County, 73 Mont. 541, 237 P. 525, also decided in 1925, the Supreme Court of Montana, in construing certain sections of the Penal Code of that state, which in their adoption had been based upon like provisions of the Penal Code of California, including section 1203 thereof, held, in a case in its main aspects identical with the instant proceeding, that the trial court had jurisdiction under the terms of the probation law of that state to suspend the execution of a jail sentence and place the accused upon probation after the dismissal of his appeal. In so deciding said court differentiated between the case before it and the Beggs Case, but in so doing referred to the "vigorous dissenting opinion" in the latter case, and then proceeded to hold that since, in the probation statute of Montana, there was no express limitation upon the power of the trial court to entertain an application for probation at any time prior to the execution of the sentence it must be held to possess such power in conformity with the liberal interpretation which should be adopted with reference to remedial legislation of this character.

In the case of State ex rel. Gentry v. Montgomery, 317 Mo. 811, 297 S. W. 30, 31, decided in 1927, it was held by the Supreme Court of Missouri, in construing a probation statute similar in its main aspects to the provisions of section 1203 of our Penal Code, that in the absence of an express limitation upon the power of the trial court to grant probation to a particular defendant after the affirmance of his appeal, it possessed such power so long as it retained jurisdiction of the cause.

The cases which have arisen in federal jurisdictions following the adoption of the act of Congress known as the Probation Act of March 4, 1925 (18 USCA §§ 724–727), the provisions of which act are in the main similar to the provisions of section 1203 of our Penal Code as it read prior to its two latter amendments, and as it now reads, have followed the same trend of liberal interpretation to the extent of uniformly holding that in the absence of an express limitation upon the power of the trial court to hear and determine applications for probation at any time prior to the execution of sentence the trial court possessed that power. Nix v. James (C. C. A.) 7 F.(2d) 591; Kriebel v. United States (C. C. A.) 10 F.(2d) 762; Evans v. District Judge (C. C. A.) 12 F.(2d) 64; Ackerson v. United States (C. C. A.) 15 F.(2d) 268; United States v. Gargano (D. C.) 25 F.(2d) 723.

The question thus uniformly decided by the several Circuit Courts of Appeals before referred to finally made its way to the Supreme Court of the United States, wherein, and in the case of United States v. Murray, 275 U. S. 347, 357, 48 S. Ct. 146, 149, 72 L. Ed. 309, decided January 3, 1928, the opinion being delivered by Chief Justice Taft, it was held that the Federal Probation Act (28 USCA §§ 724–727) gives power to trial courts to grant probation to a convicted defendant by suspending the imposition or by suspending the execution of the sentence at any time prior to the execution thereof so long as the trial court retained jurisdiction over the cause. It thus sufficiently appears that the uniform trend both of legislation and of judicial decision, state and federal, during the 10 years which have intervened since the decision of the Beggs Case, has been steadfastly in the direction of upholding the power of trial courts to grant applications of offenders for probation at any time prior to the actual execution of the judgment or sentence, in the absence of an express limitation upon the exercise of such power contained in the terms of the probation laws.

The amendment which the Legislature of this state adopted in 1927 (St. 1927, p. 1493) was in entire harmony with the then prevailing trend of both legislation and decision, insisting upon a liberal application to offenders of the merciful provisions of probation laws. The language of Chief Justice Taft in interpreting, in the case above cited, the section in the federal statute (18 USCA § 724) wherein it was declared that the trial courts "shall have power, after conviction or after a plea of guilty * * * to suspend the imposition or execution of sentence and to place the defendant upon probation," becomes very significant when it is noted that in section 1203 of our Penal Code, as amended in 1927 (St. 1927, p. 1493), the foregoing sentence in almost its identical form is to be found at the beginning of subdivision 1 thereof, wherein it is declared that "the court, judge or justice thereof, in the order granting probation, may suspend the imposing *or the execution* of the sentence, and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, * * * upon such terms and conditions as it shall determine." In commenting upon this identical language Chief Justice Taft said: "The words mean to suspend the imposition of sentence, or to suspend the execution of sentence, and that the placing of defendant upon probation is to follow the suspension of the imposition, or the suspension of the execution of sentence, without an interval of any part of the execution. That is a reasonable construction, and serves the well-understood purpose of the statute. The suspension of execution was the point in time to which the provision for probation was directed."

[1] From the foregoing considerations we are of the opinion that it was the intention of the Legislature, by its last amendment of section 1203 of the Penal Code, adopted in 1927 (St. 1927, p. 1493), expressly removing the limitation of time imposed by the express terms of its earlier amendment, to invest trial courts with the power under said amended section to hear and determine applications for probation at any time prior to the execution of sentence, and that without reference to whether the defendant had in the meantime undertaken to prosecute a vain and unsuccessful appeal.

[2] It may be said in conclusion, and without detailed discussion, that we are of the opinion, based upon the previous action of this court in similar proceedings, that the application for a writ of mandate is a proper form of remedy, regardless of the fact that an appeal might lie from the order of the trial court either granting or refusing probation, since we are of the view that an appeal in cases of this character would not furnish to either the people or the defendant a plain, speedy, and adequate remedy.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.

SHENK, J. I concur in the judgment ordering the peremptory writ, but I cannot agree with the reasoning of the opinion that it was the intention of the Legislature, by the amendment of section 1203 of the Penal Code in 1927 (St. 1927, p. 1493), merely by omitting the words "before judgment and sentence," to vest power in the superior court to grant probation at any time, even after the affirmance of the judgment on appeal. When the phrase "before judgment and sentence" was stricken from the section in 1927, the language of the section in its immediate context was restored to the same condition obtaining when the Beggs Case was decided. It must be presumed, therefore, that in adopting the language of the section in force when the Beggs Case was decided the Legislature intended to adopt the same with the construction placed thereon by the majority of this court in that case. "The familiar rule is that, when there is a re-enactment of a statute in the same language, after a construction by the courts, the new statute is presumed to be intended to have the same effect as that previously given to its predecessor." Lightner Mining Co. v. Lane, 161 Cal. 689, 700, 120 P. 771, 776, Ann. Cas. 1913C, 1093; Harris v. Barlow, 180 Cal. 142, 179 P. 682; Dalton v. Lelande, 22 Cal. App. 481, 135 P. 54; 23 Cal. Jur. pp. 783, 795, 796.

The effect of the majority opinion is to emphasize and reiterate the doctrine of the dissenting opinion, and overrule by indirection the majority opinion, in the Beggs Case. But I find it unnecessary to overrule that case, either by indirection or otherwise, for I find other changes in section 1203, as redrafted in 1927, to indicate an intention to broaden the powers of the trial court in matters of probation, so as to accomplish the obviously beneficial result so greatly stressed in the opinion of Mr. Justice RICHARDS. By the amendment in 1927, it was first declared in effect that the trial court should have power to fix the time when an application for probation should be heard and determined. It was provided that "the court, upon application of the defendant or of the people or upon its own motion, may summarily or at a time fixed, hear and determine, * * * the matter of probation," and that "at such time or times fixed by the court, the court may hear and determine such application," with the limitations thereafter provided, none of which is applicable to this case.

Assuming that there may be doubts as to the exact extent of the effect of the quoted language of the amendments, such doubts should be resolved in favor of an enlarged power, for the reason that the statute is remedial in its nature, and should be liberally construed in favor of the application for probation. This construction does no violence to the judgment of the majority in the Beggs Case, which appears to have been a correct solution of the problem on the then state of the law.

SEAWELL, J. I concur. I am disposed to agree with Mr. Justice SHENK'S treatment of the amendments of the Probation Act and their bearing upon the Beggs Case. In short, if the Legislature by its repeal of language which left the law precisely where it was at the time the Beggs Case was decided intended thereby to change the law as declared by the Beggs Case, why did it not make some express declaration to that effect? The difficulty I find in bringing myself to the view expressed in the main opinion as to the significance of the changes made in the law lies in the fact that if the Legislature of this state was mindful that the doctrine announced in the Beggs Case was in conflict with other jurisdictions, as suggested in the main opinion, and its purpose by amending the law was to bring this state within the rule of decisions of other jurisdictions, as argued in the main opinion, why did it not by unmistakable language fully and definitely complete its purpose?

I am, however, inclined to liberalize the law to the extent that the motion for probation may be entertained by the trial court at any time before execution of the sentence.

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208 Cal. 606

LESLIE v. BROWN BROS. INCORPORATION. (L. A. 9630.)★

Supreme Court of California. Dec. 30, 1929.

Rehearing Denied Jan. 27, 1930.

1. Damages 🔑189—Evidence held to show that provision in lease contract for liquidated damages on lessee's failure to complete improvements within time specified constituted penalty and was therefore invalid (Civ. Code, §§ 1670, 1671).

Where lease contract required plaintiff lessee to construct canals and ditches, to level and make land fit for agricultural purposes, and to complete improvement by certain date, evidence *held* to show that provision requiring lessee, as security for faithful completion of improvements within time specified, to deposit certain mortgages and notes secured thereby with defendant, on understanding that defendant should in case of plaintiff's default, retain security as liquidated damages, constituted a penalty and not compensation for damages actually sustained, and that it was neither impracticable nor extremely difficult to estimate cost of completing improvements in case of lessee's default, and it was therefore invalid, under Civ. Code, §§ 1670, 1671.

2. Landlord and tenant 🔑157(6)—Plaintiff, having substantially completed improvements required by lease contract, held entitled to compensation, and defendant could not retain security for performance.

Where evidence showed that plaintiff substantially performed its obligations to complete certain improvements required by lease contract, he was entitled to recover compensation as for complete performance, and defendant could not retain possession of notes and mortgages securing performance of contract; remedy being by counterclaim or by independent action for any damages sustained.

3. Landlord and tenant 🔑223(2)—Plaintiff's claim for conversion of notes securing performance of obligations under lease contract held not counterclaim to defendant's actions for rent (Code Civ. Proc. §§ 422, 437, 438, 439).

Plaintiff's claim for defendant's unlawful conversion of mortgage notes and mortgages pledged by plaintiff to secure faithful performance of lease contract requiring plaintiff to make certain improvements within time specified *held* not in any legal sense a counterclaim to any of defendant's prior actions for rent, under Code Civ. Proc. §§ 422, 437, 438, and was therefore not barred by section 439.

4. Pledges 🔑54—Lessee's failure to reply to letter reciting lessee had forfeited ownership of pledged securities held not a consent thereto.

Where plaintiff, who pledged mortgage notes and mortgages to secure faithful performance of his obligations to make improvements under lease contract, did not reply to nor in any manner manifest acceptance of terms stated in letter received from defendant's counsel, reciting that only interest plaintiff had in such securities was an option to reacquire them by completion of improvements on or before a certain date, and that, inasmuch as work was not completed within option period, option had expired, and that plaintiff forfeited his ownership therein absolutely, *held* that such silence, unaccompanied by any act, was not sufficient to indicate his consent to such letter.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Thomas O'Brien, for whom on his death was substituted James Leslie, administrator, against Brown Bros. Incorporation. Judgment for plaintiff, and defendant appeals. Affirmed.

For opinion of District Court of Appeal, see 275 P. 951.

Oliver O. Clark, Chas. R. Nelson, and Carnahan & Clark, all of Los Angeles, for appellant.

C. L. Brown, V. N. Thompson, and B. S. Allen, all of El Centro, for respondent.

PER CURIAM. The petition for hearing of this cause by this court, after decision by the District Court of Appeal in and for the Third Appellate District, was granted because of the earnest and able arguments presented by appellant with reference to the decisive question of whether the parties hereto had provided by contract for valid liquidated damages or for a penalty. After a very careful consideration of the record, we are satisfied with the opinion of the District Court of Appeal, written by Justice pro tem. McDaniel, and hereby adopt said opinion as and for the opinion of this court, as follows:

This is an appeal by the defendant from a judgment in favor of plaintiff. This suit was originally commenced by one Thomas O'Brien, now deceased. Upon his death, by order of court, the administrator of his estate, James Leslie, was substituted as plaintiff. It was brought, by amended complaint, to recover damages for the alleged conversion of certain promissory notes, secured by mortgages on real property in Imperial county, for the total sum of $11,983.25; it being alleged that on December 8, 1917, the defendant came into possession of said securities, and on December 31, 1921, wrongfully and unlawfully converted them to its own use.

★Rehearing denied.

The answer of defendant denies wrongful or unlawful conversion and pleads an affirmative defense based upon certain contracts; also, sets up three further and separate defenses on the ground that plaintiff, by failure to counterclaim upon its alleged unlawful conversion in three separate suits prosecuted by defendant against the said Thomas O'Brien, was barred from prosecuting this action by the provisions of section 439, Code of Civil Procedure. These matters hereinafter will be specifically noticed in greater detail.

The essential facts involved in this case may be outlined as follows:

On February 1, 1914, James E. Brown and Thomas O'Brien entered into a contract of lease whereby Brown leased to O'Brien certain lands in Imperial county, fully described in the pleadings herein, consisting of 320 acres. The term of the lease was from January 1, 1914, to December 31, 1917. O'Brien agreed to build, construct, and dig upon said land canals or head ditches; to level, border, seed the same to some useful crop not less than 40 acres within 60 days from date of the lease; in default of doing the work within time in such manner as to comply with the rules and regulations of the Department of the Interior for making final proof of desert land entries. O'Brien was to pay all damages occasioned to Brown for loss of land or for delay or inconvenience in obtaining a patent from the government to said land. O'Brien agreed to fill in all arroyos, or natural ditches, to the level of contiguous surrounding land, except a certain large arroyo near the center. Certain percentages of said improvements were definitely indicated for each year of the term of the lease. In case it was found impracticable to fill the large arroyo mentioned near the center to the proper level, OBrien agreed to terrace it and to border the terrace in the manner specifically stated. This lease was introduced in evidence as Defendant's Exhibit B. O'Brien did not complete the improvements as the agreement required, and on December 4, 1917, the defendant Brown Bros. Incorporation, which had acquired the interests of James E. Brown, the original lessor of said land, made another lease contract with O'Brien. This second lease is Defendant's Exhibit A. This lease recited the making of the first lease, which was about to expire, O'Brien's failure to complete the improvements, his desire to secure a lease for the year, beginning January 1, 1918, to and including December 31, 1918, his promise within said extended term to complete the improvements, expressing his willingness to furnish security for the making and completing said improvements within said last-mentioned term.

There was a provision also for a crop rental and one providing for the deposit with defendant of certain notes and mortgages particularly described in Exhibit A attached to the agreement. This last-mentioned proviso contains the following, to wit: "And in the event said party shall (referring to O'Brien) fail to complete and pay for all of said improvements prior to the first day of August, 1918, then said first party is authorized to complete said improvements and to pay therefor and to collect upon said securities."

Time was made of the essence of this lease. There are other terms and provisions as to maintenance charges, nonremoval of improvements, which need not here be further noticed. The notes and mortgages described in Exhibit A are the securities, the conversion of which is the basis of the present action.

Defendant alleges in its answer that O'Brien's agreements as to the completion of the improvements on time were not completed under this lease on or about the 1st day of August, 1918, and, accordingly, on July 30, 1918, the parties made and executed in writing a third instrument of lease, which again recited all of the preliminary matters contained in the two former leases, the second of which was to expire a few months later; O'Brien's failure to complete the improvements in accordance with these two leases; his desire to obtain a further lease for the term of three years from October 1, 1918, to September 30, 1921, inclusive; and his wish to secure an extension for completing the improvements on or about December 31, 1918; his willingness to furnish security that the improvements would be completed on time. It contains with respect to the improvements and the time for their completion the following:

"Said party of the second part further agrees that he will, on or before the 31st day of December, 1918, complete all of the improvements on the said premises as specified in said lease contract of February 1st, 1914, to which reference is hereby made for further particulars, and as security for the faithful completion of said improvements within said time, and at his own expense, said party of the second part does hereby deposit with said first party certain mortgage notes and mortgages described in Exhibit 'A' attached hereto and made a part hereof, together with appropriate assignments thereof, to said first party, upon the understanding and agreement that it being exceedingly impracticable and difficult to estimate or ascertain the damages which would be sustained by said first party in the event said second party failed to complete said improvements as herein provided, that therefore, in the event said second party shall fail to complete said improvements as herein provided then said first party shall retain said mortgage notes and mortgages as liquidated damages for such breach and shall thereafter hold title thereto and be the owner thereof free from any claim or interest of said second party or any other person, it being expressly represented by said second party that he is the owner of the said notes and mortgages free and clear of any incumbrances whatsoever. * * *

"Time is of the essence of this contract and in the event said party of the second part shall fail to perform any of the terms, covenants and conditions, and acts of agreements by him to be performed, as herein specified, at the time or in the manner specified then said party of the first part may, at his option, elect to declare all of the rights of the said second party of the second part herein, at an end and said party of the second part agrees that he will upon receipt of notice of such election, surrender said premises to said party of the first part and pay all damages which said party of the first part may sustain, or may have sustained by reason of said default, including reasonable attorneys fees and it is agreed that notice, in writing, of such election deposited in the United States mail addressed to said party of the second part, at Brawley, Imperial County, California, shall upon the expiration of fifteen (15) days thereafter be conclusive notice of said election to said party of the second part.

"All of the terms, covenants and conditions herein contained shall run to, bind and inure to the benefit of the heirs, executors, administrators and assigns of the respective parties hereto."

On December 8, 1919, the last-mentioned contract was modified by the extension of the term to September 30, 1922, inclusive, with the election reserved to the lessor to terminate it as of December 31, 1921; said election, if made, was to be evidenced by written notice; O'Brien was required to pay certain additional rentals, was released from certain obligations to plant and cultivate alfalfa; and contained other provisions unnecessary to be set out.

It may be observed that in this agreement of December 8th no mention is made of any prior failure on O'Brien's part to make required improvements on time under the terms of the preceding agreements, nor is any mention made of any damages sustained by defendant, nor of any appropriation, conversion, or forfeiture of the said notes and mortgages theretofore assigned by O'Brien to defendant as security.

Defendant, in its answer, pleads that it came into the possession of said notes and securities on or about December 4, 1917, in accordance with the contract of that date, which contained a provision for liquidated damages hereinbefore set out.

The answer describes the land as rough desert land, traversed by deep gullies requiring large quantities of material to fill; alleges that the value, rentability, and salability of such land in Imperial Valley fluctuated greatly from time to time, and it therefore was extremely difficult to fix damages which defendant would sustain by reason of delay in the completion of said improvements. Defendant further alleges that on or about October 31, 1919, he gave said O'Brien the right to acquire the said notes and mortgages by completing the improvements on or about July 30, 1920, as claimed to be shown in a letter written to O'Brien by defendant's counsel on October 31, 1919; that O'Brien did not reply to the letter and did not, prior to August 1, 1920, complete or substantially make any of said improvements; and thereafter and prior to November 1, 1920, the defendant notified O'Brien that the said right and option had expired, that the improvements had not been completed, and that defendant was and at all times subsequent to December 31, 1918, had been absolute owner of said securities, and that O'Brien had no interest therein or right thereto. The answer then sets out in three separate counts, as further and separate defenses, that on November 8, 1929, in the superior court of Imperial county, and on January 14, 1921, in the same court, and on November 7, 1921, in the same court, it had commenced actions at law against O'Brien for the recovery of rent due under the lease contract of July 30, 1918; these actions being numbered 6444, 7137 and 7474. In addition to rent, action No. 7474 was also brought to recover payment for failure to improve the premises with a good stand of alfalfa, as provided in the said contract and extensions thereof. O'Brien in each case was duly served with summons, but failed to defend by answer, and judgment was given against him therein, and in the action at bar it is claimed that, by his failure to set up a counterclaim upon the cross-complaint for unlawful conversion sued for herein, he is barred from maintaining this action and is estopped from asserting any claim or right to any of the securities, or from recovering or asking to recover anything from the defendant.

The findings of fact and conclusions of law of the trial court were in favor of the plaintiff on all the issues presented by the pleadings. It was found, in addition to necessary preliminary matters, that on the 8th day of December, 1917, the notes and mortgages described in the pleadings and agreement were the property of Thomas O'Brien; that on that day they came into the possession of defendant their actual market value was found to be $7,500; that on December 31, 1921, O'Brien was the owner and entitled to the possession of said securities, but that on that date defendant without right converted them to its own use, and thereafter on March 22d disposed of them, converted them into cash and retained the proceeds to the total of $7,500 and interest at 7 per cent. from December 31, 1921. The court also found that defendant was in possession of the said securities in accordance with the lease contract of December 4, 1917, which was thereafter on July 30, 1918, modified, not at O'Brien's request, but by the mutual consent of the parties, and that the contract of July 30, 1918, not at the request of O'Brien, but by mutual consent, was further modified by written contract, dated December 8, 1918; that at all times mentioned in the action defendant was represented by attorneys and counsel, but O'Brien was not represented; found that prior to August 1, 1918, O'Brien had made substantial improvements under said contracts and extensions and modifications, but that all were not completed prior to August 1, 1918; that O'Brien, prior to January 1, 1918, had made substantial improvements, but had not completed all of them, as required by contract.

The court further found it is not true that at any time mentioned in the answer, because of the nature of the case, or otherwise, it was impracticable or extremely difficult to fix actual damages sustained by defendant by reason of O'Brien's failure to complete the improvements on time, as required in said contracts, but, on the contrary, found it to be true that at all times any and all actual damages, which would have been sustained by reason of said failure to complete the improvements, readily could have been ascertained and determined; found as to the kind and description of the land as of the time of the making of the original contract, and that soon thereafter O'Brien commenced and continued to make substantial improvements in leveling, grading, bordering, ditching, and cropping the land, thereby reclaiming all of said land from its original nonimproved state into well-improved productive agricultural land, so that agricultural crops could be and are successfully grown upon the whole area thereof; that O'Brien within the time specified in the extensions of the original contract graded the large gully and ravine so that the whole area thereof was made irrigable and suitable for farming and production of crops, and that land immediately adjacent to said gully was left well graded and suitable for farming and irrigation without depressed area; found that the rental value of the land depended upon its improvement and that the rental and sale value fluctuated considerably from time to time, but that damages, because of the failure of O'Brien to complete said improvements within the time limit provided in the said contracts, could readily have been ascertained and determined; found that the letter of October 31, 1919, set out in paragraph VIII of the answer, was not in final settlement and compromise of the controversy between O'Brien and the defendant concerning the making of the improvements and the ownership of the securities, and that defendant did not by said letter grant to O'Brien the right to acquire said securities from defendant, or any thereof, by completing the improvement in the contract of February 1, 1914, but that O'Brien did not answer said letter, nor accept, nor express acceptance or ratification of the terms thereof, nor assent to or comply with its terms.

The court further found that prior to August 1, 1920, O'Brien had made substantial improvements, but that the same were not completed; that prior to November 1, 1920, defendant notified O'Brien that the option to O'Brien had expired, and it claimed to be the absolute owner of the securities and that O'Brien had no further interest or claim therein, or right thereto.

The court found as to the other defenses based upon the three rental suits instituted against O'Brien by the defendant that the claim of plaintiff for damages, as set out herein, did not exist at the time of the commencement of said actions respectively; that the claim sued upon in this case did not arise out of the same transaction, which was the foundation of the several rental claims sued for by the defendant herein, plaintiff therein; that O'Brien's failure to set up his counterclaim for conversion as a counterclaim in each of said rental suits did not bar the maintenance of this action against defendant.

The court concluded that Brown Bros. Incorporation, on the 31st day of December, 1921, unlawfully and without right converted all of said promissory notes and mortgages to its own use and benefit and during the month of March, 1922, sold and disposed of all of the same and retained all of the proceeds from the sale thereof to its own use, and that the value of said personal property during all the said time and at the conversion thereof was the sum of $7,500; concluded plaintiff to be entitled to judgment for that amount, together with interest at the rate of 7 per cent. per annum from December 31, 1921; concluded that the provisions of the written contract between Thomas O'Brien and defendant, with the written extensions and modifications thereof, inasmuch as it or they related to or provided for the forfeiture of the securities, were at the time of the making thereof, and are void and in violation of sections 1670 and 1671 of the Civil Code of the state of California; that the said letter of the attorneys for the defendant to O'Brien, dated October 31, 1919, does not and did not constitute or form any part of the estate or any contract between said parties.

The remaining conclusions were in accordance with the findings of fact as to the said actions numbered 6444, 7137, and 7474, namely, that the plaintiff's counterclaim in this suit was not passed upon or founded upon any of the contracts, upon which the cause of action in either of said numbered suits is predicated; that defendant is not lawfully entitled to set up or claim as offset or counterclaim the judgment or amount of the judgment in either of said actions; that plaintiff in this case could not lawfully have set up the asserted claim in this action as against the claim of said Brown Bros. Incorporation in either of said actions.

Appellant in a very elaborate and voluminous argument specifies twelve points, as to which he argues that the court erred. It will not be necessary to consider each of these twelve points seriatim, for all the essential issues may be reduced to four points:

(1) Was the provision for liquidated damages in the contract of July 30, 1918, and extensions thereof, void under the provisions of section 1670, Civil Code, or was it within the exception provided by section 1671, Civil Code?

(2) If the provision for liquidated damages was invalid, was the defendant authorized to retain possession of said securities under the terms of the prior lease, dated December 4, 1917, and at all times thereafter until the completion of the improvements by O'Brien?

(3) Did O'Brien ever substantially complete the said improvements as required?

(4) If the defendant at any time prior to the institution of its suits for rent under the contract of September 30, 1918, unlawfully converted the said securities, is O'Brien barred from maintaining this action, because of his failure to counterclaim?

[1] It is apparent from an examination of the liquidated damage provision that, notwithstanding the recital that it was exceedingly impracticable and difficult to ascertain the damages at the time of entering into said contract, the essential character of that provision is that of a penalty. The securities were agreed to be given for the performance of certain labor of a kind not difficult to estimate. Any one familiar with that class of work, especially practical engineers or contractors engaged in estimating and doing such work, readily could ascertain in advance the approximate cost, and, of course, that cost would be the measure of the approximate damage. There is nothing in the nature of the case or the work to be performed, notwithstanding the recital to the contrary, that would seem to make it impracticable or extremely difficult to fix the actual damage. At any rate, upon that issue, a question of fact was to be determined by the trial court upon the evidence. There was little, if any, evidence adduced upon the part of the defendant at the trial upon the question, but, on the part of the plaintiff, it was shown by the testimony of P. W. Knights, an engineer, that the cost of that kind of work could be determined. He stated that he had made estimates of leveling lands in their desert state, and in partially reclaimed states, for irrigation purposes and for raising agricultural crops of various kinds. His testimony was that it would not be difficult, though tedious, to do the work of reclamation upon this land, and that it would be entirely practicable to make such estimates and to ascertain the cost.

The letter of October 31st of defendant's counsel, which defendant claims in its answer and in the argument, to be a modification of the contract of July 30, 1918, as well as notice to O'Brien on its claim that Brown Bros. Incorporation was the owner of the securities, by reason of his default in making said improvements, demonstrates that the securities were appropriated as a penalty and not as compensation for any damage actually sustained. This letter does not state that any actual damage had been sustained, but merely that the securities "are now the property of Brown Brothers by reason of your default in making said improvements in the manner and within the time limited."

Furthermore in this particular, the testimony of Mr. J. E. Brown, secretary of defendant corporation, is as follows:

"By Mr. Brown (Attorney for Plaintiff): Q. Mr. Brown, you have already testified that these notes and mortgages were delivered to the defendant corporation on or about the 8th day of December, 1917. They were delivered to the defendant corporation by Thomas O'Brien, were they not? A. Yes sir.

"Q. Did the defendant corporation pay Thomas O'Brien anything for the notes and mortgages? A. No, not in cash. They were held as security.

"Q. They were not held as security on any other note? A. It was to secure the performance of a certain contract he had entered into with us for the improvement of 320 acres of land that we owned.

"Q. They were simply put up, as I understand it, as a penalty in the event he didn't complete the contract, is that right?

"Mr. Clark: Objected to as calling for the opinion or conclusion of the witness, and, therefore, incompetent, irrelevant and immaterial.

"The Court: Overruled.

"A. Yes sir.

"Mr. Clark: Did you understand the question that he asked you it was put up as a penalty for not improving the land? A. I don't think I understand that question, then.

"By Mr. Brown: Read the question to him again. (Question read by reporter.) A. They were put up as security.

"Q. Put up as security that he would complete the contract? A. Yes sir, that is it, in the time mentioned in the contract.

"Q. I see. In other words, you were not going to pay him anything for these notes and mortgages, but would keep them if he didn't comply with the contract within the time mentioned. A. That is the idea.

"Mr. Clark: May the answer be stricken out until I can object to it?

"The Court: Make your objection.

"Mr. Clark: Was it under the contract? A. Yes sir.

"Q. By Mr. Clark: Was that contract in writing? A. Yes sir.

"Mr. Clark: Then we object to the question on the ground it is incompetent, irrelevant and immaterial and not the best evidence. The contract speaks for itself.

"The Court: Will you read the question to which that objection is made? (Question read by reporter.) In other words, you were not going to pay him anything for these notes and mortgages, but would keep them if he didn't comply with the contract within the time mentioned.

"The Court: Objection overruled.

"Mr. Brown: That is all."

When the construction put upon the liquidated damage provision by the parties to the lease and the attorneys for the defendant corporation is examined, it is beyond doubt that that provision was a penalty exacted for the mere lapse of time in making the improvements and not for liquidated damages for any damage, actual or prospective, but, if intended as indicated by the recital in the provision that it was, in effect, intended to be for liquidated damages, the testimony of the two civil engineers, Mr. Rice and Mr. Knights, witnesses at the trial, demonstrate that it was at the time of the making of the contract neither impracticable nor extremely difficult to determine the cost of completing the improvements, which cost would be the only possible measure of damages to the defendant, if any, resulting.

Many authorities are cited by appellant upon the law as to liquidated damages and the case of Wright v. Rodgers, 198 Cal. 137, 243 P. 866, is relied upon to establish the point that, in the agreement under review, "the parties have clearly manifested their intention that the sum fixed therein as damages should be liquidated damages, and in the absence of any ambiguity or uncertainty in its terms this declared intention should control in so far as the intention of the parties is concerned." But that case was one for the breach of a contract for the exchange of real property, and it holds that under section 3387, Civil Code, in such an action, a provision for liquidated damages is presumed to be valid, citing Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. It clearly is distinguishable from this case.

The law of California respecting liquidated damages under section 1670, Civil Code, and section 1671, Civil Code, is well settled. Sherman v. Gray, 11 Cal. App. 348 to 353, 104 P. 1004; Dyer Bros. v. Central Iron Works, 182 Cal. 588, 189 P. 445; Green v. Frahm, 176 Cal. 259, 168 P. 114; Long Beach City School Dist. v. Dodge, 135 Cal. 401, 67 P. 499; Patent Brick Co. v. Moore, 75 Cal. 205, 16 P. 890. In the case of Nakagawa v. Okamoto, 164 Cal. 718, 130 P. 707, the rule is stated as follows: "In determining whether a provision in a contract is for liquidated damage or for a penalty, 'the fundamental rule * * * is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made.'"

The case of Sherman v. Gray, supra, in many respects on its facts similar to the case at bar, says: "It is clearly incumbent upon the party seeking to recover upon such agreement (liquidated damage clause) to show by averment and proof that his case is within the exception." It holds that whether such a clause is valid or not is a question of fact, and further holds, "from the testimony of these witnesses it appears that it was not an impracticable, but on the contrary a simple, matter to ascertain plaintiff's actual damages."

We hold, therefore, that the findings of the trial court that the clause in the contract of July 30, 1918, was invalid to be correct.

[2] The second and third questions may be considered together. James Leslie, the plaintiff, when called as a witness, testified quite fully as to the improvement work done and accomplished by O'Brien over a long period, extending to December 31, 1921. Without setting it forth in detail, it may be said it shows O'Brien had complied in a substantial manner with the requirements for improvements. The land was reclaimed; it was being successfully cultivated, irrigated, and farmed for various crops, such as rice, barley and alfalfa; it was graded, leveled, and in condition for farming operations.

"It is well settled that substantial performance of a contract by one party coupled with retention of the benefits thereof by the other will authorize an action by the former to recover the contract compensation; that in such case recovery may be had upon an averment of full performance though the proof falls short of showing it; and that the remedy of the latter is by counterclaim for his damages or by an independent action before he is sued." Omaha Water Co. v. Omaha, 156 F. 922, 85 C. C. A. 54.

The answer does not set up by averment any claim of actual damages. The defense seems to rest entirely upon the claimed validity of the liquidated damage provision. If defendant suffered any damage, he should have set it up. In attempting to justify the liquidated damage provision, the defendant points out that, as to the rental values and salability, there were two elements of damage which could not be estimated at the time the contract was made. Such elements seem to us to be somewhat remote and speculative. Section 3301, Civ. Code. All of the evidence shows that in no respect did the defendant sustain even the slightest damage, even though it be admitted that O'Brien defaulted in the performance on time stated in the several contracts. He was permitted, however, to remain undisturbed in his possession. Rents were collected or judgments for rent obtained against him. There was no evidence that any written notice of an election to terminate his tenancy at the expiration of the year 1921 was ever exercised, except that there was evidence of a new lease to a Mr. Butters in 1922. It may be conceded that defendant may have had a right, under the contract of December 4, 1917, to retain possession of said securities until it had received notice of the substantial completion of the improvements. Up to that time it might have taken advantage of the damage clause therein, but, as a matter of fact, it did not do so. We regard as immaterial, therefore, the findings of the court that defendant was not entitled to possession of the securities any time after July 30, 1918.

[3] The claim for unlawful conversion in this action was not, in any legal sense, a counterclaim to any of the three actions for rent, under sections 437, 438, and 422, Code of Civil Procedure, and is not barred by the provisions of section 439, Code of Civil procedure. This view is upheld by a long line of decisions in this state. Bandy v. Westover, 200 Cal. 222, 252 P. 593; Heilbron v. Kings River, etc., Co., 76 Cal. 11, 17 P. 933; Earl v. Times-Mirror Co., 185 Cal. 165, 196 P. 57; Glide v. Kayser, 142 Cal. 419, 421, 76 P. 50; Waugenheim v. Graham, 39 Cal. 169; 34 Cyc. 706–710, on the subject of counterclaim; Clark v. Kelley, 163 Cal. 207, 124 P. 846.

It is unnecessary to notice other arguments of counsel as to whether or not O'Brien was caused to believe by several letters written by defendant's counsel that his time for completing the improvements had been extended.

Under the authorities cited, we hold that the findings of the court as to the counterclaim are correct.

[4] There is an additional contention of counsel for appellant we deem worthy of notice, which is that by counsel's letter of October 31, 1919 (Defendant's Exhibit H), O'Brien confirmed his previous assignment of the deposited securities to appellant so as to pass title thereto, and that the only interest he had left was an option to acquire said securities by the completion of the improvements on or before July 1, 1920; and, inasmuch as the work was not completed within the option period, the option expired and appellant's ownership of the securities was forfeited absolutely.

O'Brien did not reply to nor in any manner manifest acceptance of the terms stated in said letter. His silence, unaccompanied by any act, was not sufficient to indicate that the question of the possession and ownership of said securities was a closed incident in appellant's favor. We quote from 13 Corpus Juris, 276: "An offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance." See, also, Niles v. Hancock, 140 Cal. 157–162, 73 P. 840; Williston on Contracts, p. 168, § 91, and page 172, § 91a, and sections 1580 and 1581, Civ. Code.

We hold, therefore, that this letter did not modify any contract, nor in any manner, or at all, any agreement with O'Brien affecting the possession or ownership of the securities.

To recapitulate, we determine that the findings of the court upon all material issues involved herein must be upheld, namely, that the liquidated damage clause was invalid under section 1670, Civil Code, and not within the exception of section 1671, Civil Code; that defendant unlawfully converted the said securities on the 31st day of December, 1921; that O'Brien on that date had substantially completed the improvements and was entitled to the return of his securities; that defendant failed to establish that it had suffered any damage by reason of O'Brien's failure to comply with the time provisions of the several contracts; that this action is not barred by reason of the alleged failure of O'Brien to file counterclaims against Brown Bros. Incorporation in the rental suits specified.

It appears from a general view of all the evidence in the case that the defendant received and retained the benefits of all improvements made by O'Brien in the years of his tenancy, and by its answer, without right seeks to retain the full value of the securities which were converted to its own use. The trial court's conclusions of law were correct.

The judgment is affirmed.

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208 Cal. 644

CANTLAY et al. v. OLDS & STOLLER INTER-EXCHANGE. (No. L. A. 11637.)

Supreme Court of California. Jan. 9, 1930.

Appeal and error ⚷799—Appeal will not be dismissed, where evidence was conflicting whether notice of entry of judgment was served on certain date (Code Civ. Proc. § 953d).

Where issue of whether or not, on certain date, respondents served on appellant a notice in writing of entry of judgment, under Code Civ. Proc. § 953d, rested on sharp conflict in evidence, and was between reputable attorneys, motion to dismiss appeal must be denied.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Wallace, Judge.

Action by Richard Cantlay and another, copartners doing business under the firm name and style of Cantlay & Tanzola, against the Olds & Stoller Inter-Exchange. From the judgment, defendant appeals. On motion to dismiss the appeal. Motion denied.

J. E. Reardon, Wm. M. Abbott, and K. W. Cannon, all of San Francisco, and Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

J. B. Irsfeld and Douglas Fawcett, both of Los Angeles, for respondents.

PRESTON, J. Motion to dismiss appeal. The issue turns upon whether or not on the 19th day of November, 1928, respondents served upon appellant a notice in writing of entry of judgment. Section 953d, Code Civ. Proc. This issue is presented to us by affidavits and counter affidavits of the respective attorneys, aided by the affidavit of a clerk in the office of one of the attorneys, and also by certain notations upon the register of the clerk of the court. No benefit would result from a detailed recital of the claims of the parties. We feel that it is only necessary to say that the issue made rests upon a very sharp conflict of evidence and is between reputable attorneys. To our mind, it is clouded with grave doubt.

This being true, our duty requires a denial of the motion; and it is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

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208 Cal. 645

LIERLY et al. v. McEWEN et al.
(L. A. 11812.)

Supreme Court of California. Jan. 9, 1930.

1. Appeal and error ⚷1126—Judgment fully complying with Court of Appeals writ of mandate must be affirmed on ground that appeal is frivolous.

In absence of contention that superior court did not fully and accurately follow Court of Appeals writ of mandate to enter judgment ordered on reversal of previous judgment, no issues were left for further litigation, and judgment so entered must be affirmed on ground that appeal therefrom is frivolous; right of appeal being at most a mere naked one.

2. Appeal and error ⚷1126—Motion to dismiss appeal from judgment complying with appellate court's writ of mandate held sufficient as motion to affirm on ground of frivolous appeal.

Motion to dismiss appeal from judgment complying with Court of Appeals writ of mandate to enter judgment ordered on reversal of previous judgment *held* sufficient as motion to affirm judgment on ground that appeal is frivolous.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by W. S. Lierly and others against D. H. McEwen and others. From the judgment rendered, plaintiffs appeal. On motion to dismiss the appeal. Judgment affirmed.

W. W. Kaye, of Los Angeles, and Siemon & Garber, of Bakersfield, for appellants.

Byron Coleman, of San Francisco, and James Donovan, of Los Angeles, for respondents.

PRESTON, J. Motion to dismiss appeal. This action involves the construction of a contract. It is to determine thereunder the respective rights of the parties to oil produced from certain properties and for royalties therefrom.

The cause was tried and judgment entered on February 1, 1924, but upon appeal, on December 21, 1927, it was reversed, with direction that judgment be entered in accord with the opinion filed. Lierly v. McEwen, 87 Cal. App. 711, 262 P. 457. Apparently this was not done, but a different judgment was entered. Thereafter a proceeding in mandamus was filed in the District Court of Appeal, which heard the appeal, to compel the entry of the judgment ordered. On April 2, 1929, upon the hearing a peremptory writ was ordered and duly issued. Lamb v. Owen (Cal. App.) 276 P. 628. On June 20, 1929, the former judgment was set aside and a new judgment was entered in said cause, which fully and accurately met the demands of said writ. From this last judgment, appellants now prosecute an appeal, supported alone by the judgment roll in the action.

[1] It is not contended that the court did not fully and accurately follow the writ of mandate. Under such a situation no issues can be left for further litigation. Heinlen v. Beans, 73 Cal. 240, 14 P. 855; Shank v. Blackburn, 61 Cal. App. 577, 579, 215 P. 559. The most that can be said is that the right of appeal left appellants is a mere naked one. Every issue that can now be made either was or could have been determined upon previous hearings of this cause. Price v. Sixth District, 201 Cal. 502, 258 P. 387.

[2] While the motion is one to dismiss the appeal, it is also sufficient as a motion to affirm the judgment upon the ground that the appeal is frivolous. Tobias v. Adams, 201 Cal. 689, 258 P. 588.

Under the latter head, we have entertained the motion, and, for the reasons above expressed, the judgment is hereby affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; SHENK, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

103 Cal. App. 54

PACIFIC FRUIT EXCHANGE v. F. E. BOOTH CO. (Civ. 7080.)

District Court of Appeal, First District, Division 2, California. Jan. 2, 1930.

1. Assumpsit, action of ⇨7—Recovery in assumpsit did not require proof of express promise.

Plaintiff, in order to recover judgment in assumpsit, was not required, to prove an express promise on part of defendant.

2. Chattel mortgages ⇨155—Holder of crop mortgage was not estopped to assert mortgage as against purchaser with actual notice of mortgage.

Holder of crop mortgage was not estopped from asserting mortgage as to crop delivered to purchaser having actual notice of mortgage before earliest time that any interest in crop was attempted to be passed.

3. Chattel mortgages ⇨89—One appropriating property covered by mortgage within 30 days after removal from county was guilty of conversion (Civ. Code, § 2965).

Appropriation of property covered by chattel mortgage within 30-day period after removal from county in which mortgage was recorded constituted a conversion within Civ. Code, § 2965, allowing 30-day period of grace for recording of mortgage after removal.

4. Chattel mortgages ⇨136—Tortious severance of mortgaged crops does not destroy lien.

Severance of mortgaged crops, if done tortiously, does not destroy the mortgage lien.

Appeal from Superior Court, City and County of San Francisco; Percy S. King, Judge.

Action by the Pacific Fruit Exchange against the F. E. Booth Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. H. Morris, of San Francisco, for appellant.

Athearn, Chandler & Farmer and Frank R. Devlin and Walter Hoffman, all of San Francisco, for respondent.

KOFORD, P. J. Plaintiff holds a crop mortgage on the crops of the seasons of 1925 to 1932, inclusive, grown on the ranch of W. J. Smith and wife in Sacramento county. In 1927, defendant, in consideration of money previously advanced, purchased and received from said Smith a part of the pear crop grown on said ranch that year. By this action plaintiff recovered judgment against defendant for the value of the said mortgaged pears after deducting the share tenant's part for maturing the same. Defendant appeals.

[1] The complaint was in three counts. The first sets forth the facts in detail, stating a cause of action in conversion, either upon the theory of a violation of the crop mortgagee's rights or of a violation of a special agreement alleged to have been made between all parties concerned that appellant would hold the pears only for the use and benefit of respondent. The second and third causes of action were common counts in assumpsit. It was not necessary for respondent to prove an express promise on the part of appellant in order to recover judgment in assumpsit. The law implies a promise to pay for the conversion. The evidence therefore supports the findings in favor of respondent upon the common counts. Lehmann v. Schmidt, 87 Cal. 15, 25 P. 161; Chittenden v. Pratt, 89 Cal. 178, 26 P. 626; Corey v. Struve, 170 Cal. 170, 149 P. 48; Fountain v. City of Sacramento, 1 Cal. App. 461, 82 P. 637.

[2] The main contention of appellant upon this appeal is that the respondent is estopped from asserting its mortgage on the pears delivered to defendant in 1927 because of respondent's conduct in permitting the mortgagor, Smith, to sell them in previous years during the existence of the mortgage. The appellant's answer does not plead such an estoppel, but pleads as an affirmative defense that Smith was the ostensible agent of respondent in 1927 and that respondent had for two years prior thereto held out and represented said Smith and wife to be its lawful agents with actual and ostensible authority to sell the pears and receive payment therefor. The court found this defense untrue. The exact nature of the estoppel now claimed by appellant, regardless of what is pleaded in the answer, is not made clear. Assuming that the record before us makes available to appellant all its claims in this respect, the evidence by no means compels the decision that respondent was estopped, either from asserting its mortgage or from disputing Smith's authority to make a valid sale on its behalf. Respondent did allow Smith to sell and retain for his own use the proceeds of some local shipments in 1925 and 1926, but there was no evidence to show any conduct by respondent indicating that such arrangement would be continued throughout the life of the mortgage. In April, 1927, respondent told Smith that this would no longer be permitted. On June 7, 1927, before any of the pear crop had been removed, respondent wrote appellant formally notifying it of the existence of the mortgage and wrote again to the same effect on July 30, 1927. On June 10, 1927, a general conversation about the mortgage was held between the parties, but it resulted in no agreement. The amount in value of pears for which appellant was made responsible to respondent by the judgment appealed from was $2,249.13. Appellant had in previous years advanced Smith more money than the value of fruit delivered

by him to it in those years. The excess was carried on its books from year to year as a debt, and was evidenced by unsecured interest-bearing promissory notes. The amount carried over from 1923 was $1,450.42. This was before the date of the present mortgage. The balance carried over from 1926 was $1,937.72. From January 5, 1927, to June 5, 1927, appellant advanced Smith seven further payments of $100 each. Respondent is not charged by the evidence with knowledge of any advances made by appellant to Smith. There appears to have been no agreement of sale, sale, or delivery of the 1927 pear crop to appellant before the time actual notice of the mortgage had been received by appellant. Appellant therefore was only a general unsecured creditor, relying for payment upon the general solvency and credit of Smith. Appellant had nothing for protection against Smith's selling or mortgaging to others the pear crop or any other crop of 1927. Even if the advance of money had given appellant an interest in the crop, appellant would have had more reason to fear that some crop mortgagee would claim an estoppel against it than to claim an estoppel against the owner of a recorded crop mortgage, past or future. Substantially no better reason existed in this case to apply an estoppel for the protection of appellant than to apply one in favor of any other general creditor. While it no doubt is possible for a mortgagee to so conduct himself or to become estopped from asserting his mortgage, it certainly will not be contended that the owner of a valid recorded crop mortgage must occupy himself with giving actual notice thereof to potential or actual general creditors of his mortgagor. This case presents no better reasons for an estoppel than Chittenden v. Pratt, supra, where an estoppel was denied. Actual notice of the recorded mortgage was not necessary to its validity, but it may be considered as rebutting any showing in the direction of estoppel. As the evidence indisputably shows actual notice of the mortgage before the earliest time that any interest in the crop was attempted to be passed to appellant, no claim of estoppel by failure to assert the mortgage can be made.

The appellant's present claim, that respondent, by its conduct in previously allowing Smith to sell pears and keep the money, is estopped from asserting an interest in the crop, is inconsistent with appellant's other claim that Smith was the ostensible agent of respondent. To assert an interest in the crop acquired through Smith as the agent of the mortgagee is to acknowledge the mortgage and mortgagee as the source of title. If appellant claims Smith to be the agent of the respondent, it cannot complain if made to pay that agent's principal for the fruit purchased. The previous advances of money to Smith personally, evidenced by his personal notes, do not constitute payment for fruit purchased from respondent through its alleged agent, Smith.

[3, 4] The mortgage did not become void under Civil Code, § 2965, because it was not recorded in Alameda county before the pears were received there by appellant and put through its cannery. This occurred before the expiration of the 30-day period of grace allowed by Civil Code, § 2965, for the recording of a mortgage in the county to which mortgaged personal property is removed. A chattel mortgage remains good and subsisting for the period of 30 days after removal of the property from the county where the mortgage was recorded. One who purchases such property within such period in the county to which it has been removed is guilty of conversion in appropriating the same. Hammels v. Sentous, 151 Cal. 520, 91 P. 327, 12 Ann. Cas. 945. Appellant states that Civil Code, § 2965, does not apply where the goods have been tortiously removed. The severance of mortgaged crops if done tortiously does not destroy the mortgage lien. Bank of Woodland v. Duncan, 117 Cal. 412, 49 P. 414; Campodonico v. Santa Maria Bean & Grain Co., 86 Cal. App. 339, 260 P. 830. We need make no nice decision, therefore, as to whether the pears were converted in Sacramento county or Alameda county. According to the decisions, appellant tortiously severed and converted the pears as against respondent when it purchased them from Smith, received them from Smith, and canned them, even though it may not have manually severed them from the trees and transported them from the ranch. Dodge v. Meyer, 61 Cal. 405; Chittenden v. Pratt, supra.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

103 Cal. App. 103

LIVERIEDES v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

(Civ. 7281.)

District Court of Appeal, First District, Division 1, California. Jan. 8, 1930.

Justices of the peace 🔑140—In perfecting appeal from justice court, it was not necessary to conform to statute, which was neither effective or retrospective in operation (Code Civ. Proc. §§ 988a–988h).

Where appeal was fully perfected before Code Civ. Proc. §§ 988a–988h, inclusive, relating to appeals from municipal courts, became effective, it was not necessary to conform to its requirements, as its operation was not retrospective.

Application for writ of mandate by Tenerios Liveriedes to be directed to the Superior

Court in and for Alameda county and another, to compel respondent court and the presiding judge of Department 1 thereof to hear and determine a justice court appeal. Writ granted.

Henri Burkard, of San Francisco, for petitioner.

PER CURIAM. This is a proceeding in mandamus to compel the respondent court and the presiding judge of department 1 thereof to hear and determine a justice's court appeal.

The allegations of the petition are not denied, and are to the following effect: In April, 1929, the justice's court of Brooklyn township, in and for the county of Alameda, rendered a money judgment against petitioner in an action for damages arising out of an automobile collision, and thereafter petitioner took an appeal therefrom to the respondent court upon questions of both law and fact. The notice of appeal and undertaking conformed to the requirements of and were served and filed within the time prescribed by the statute; and the fees of the justice's court were paid. Thereupon and in May, 1929, the justice's court transmitted to and filed with the county clerk of said county a copy of the docket and all of the files and documents necessary to confer jurisdiction upon the respondent court; and the fees of the county clerk for filing the same and placing the cause upon the calendar were paid. But, the petition alleges, the respondent judge refused, on several occasions, to set the cause for trial or to hear or determine the same, and now has under submission a motion made by the plaintiff in the action to dismiss the appeal, which motion, petitioner alleges, the court threatens to and will grant unless prevented as herein prayed.

There has been no appearance on behalf of the respondents in the present proceeding, and consequently the reason for the refusal to entertain jurisdiction of said appeal is not disclosed by the record. Counsel for petitioner has assumed, however, that such refusal is based upon the fact that the record on appeal does not conform to the requirements of the new Code sections enacted at the last session of the Legislature, relating to appeals from municipal courts (Code Civ. Proc. §§ 988a–988h, inclusive). If such be the ground of refusal, it is not tenable, because the appeal was fully perfected and filed in the superior court nearly two months prior to the date on which the new Code sections became operative; and, as held in the case of Blade v. Superior Court (Cal. App.) 283 P. 81, which was decided on December 6, 1929, a few days prior to the filing of the petition herein, said Code sections are not to be given a retrospective effect.

In any event, according to the uncontradicted facts set forth in the petition, petitioner is entitled to a trial anew in the superior court. Code Civ. Proc. § 976.

It is therefore ordered that a peremptory writ of mandate issue as prayed, commanding that respondents hear and determine said cause in the manner provided in chapter III, title XIII, part II, Code of Civil Procedure, relating to appeals from justice's courts.

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103 Cal. App. 32

MILLER et al. v. GUSTA et al. (KELLAM et al., Interveners). (Civ. 7116.)

District Court of Appeal, First District, Division 2, California. Dec. 31, 1929.

1. Pleading 🔑8(4)—Allegation that there was adequate consideration for contract for exchange of properties held insufficient, being mere conclusion.

In action for specific performance of contract for exchange of properties, allegation that contract was fair and equitable and that consideration moving from plaintiffs to defendants was adequate consideration for the contract for conveyance *held* mere conclusion of law and insufficient, since complaint to be sufficient must allege facts which show that contract is fair and consideration adequate.

2. Pleading 🔑433(2)—Insufficiency of allegation of consideration for contract for exchange of properties held not cured by finding that consideration was adequate.

In action for specific performance of contract for exchange of properties, insufficiency of allegation of consideration *held* not cured by finding that contract was fair and equitable and that consideration was adequate consideration.

3. Trial 🔑395(5)—Findings to be sufficient must state ultimate facts, mere conclusions being insufficient.

Findings of court to be sufficient must state ultimate facts, and conclusions of law cannot take their place.

4. Specific performance 🔑123—In action for specific performance of contract for exchange of realty, furniture, and furnishings, finding that consideration was adequate for conveyance of realty held insufficient to support judgment for plaintiffs (Civ. Code, § 3391).

In action for specific performance of contract to exchange real estate, furniture, and furnishings, finding that consideration was adequate for conveyance of real estate *held* not sufficient to support judgment for plaintiffs because of failure to find that consideration was adequate for conveyance of furniture as well as realty, since under Civ. Code, § 3391, consideration must be adequate for the whole contract.

5. Appeal and error 🔑1011(1)—Finding of trial court must be accepted, where issue was decided on conflicting evidence.

Appellate court must accept finding of trial court, where issue was decided on conflicting evidence.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Erastus Miller and others against May Gusta and Walter Gusta and others, in which defendants filed a cross-complaint, and Anna J. Kellam and others intervened. Judgment for plaintiffs and the interveners, and named defendants appeal. Affirmed in part, and reversed in part with directions.

Paul Friedman and Arthur Goodrick, both of Los Angeles, and Thomas J. Pitts, of Ontario, for appellants.

William M. Morse, Jr., O'Melveny, Tuller & Myers, and Kent Allen, all of Los Angeles, for respondents.

DOOLING, Justice pro tem. This was an action for specific performance of an agreement for the exchange of properties. Plaintiff and respondent Erastus Miller was the owner of a leasehold interest in an apartment house building in the city of Los Angeles, known as the Monroe apartments, and the owner of the furniture and furnishings therein. Defendants and appellants, Gusta, who are husband and wife, were the owners of a lot of land, improved with a building, in the city of Los Angeles, and of the furniture and furnishings therein. The parties agreed to an exchange of these properties, the furniture and furnishings in the Monroe apartments subject to a chattel mortgage for $1,200 and another chattel mortgage to secure the payment of the rent reserved in the lease of the Monroe apartments and the real property of the Gustas subject to a mortgage for approximately $7,500. Pursuant to this agreement, an escrow was opened for the exchange of the documents of title and appellants went into possession of the Monroe apartments. A few days later the appellants repudiated the agreement and notified the escrow holder not to deliver their deed and bill of sale to respondent Miller, and to return to him all documents that Miller had deposited in escrow for delivery to them, and shortly thereafter appellants vacated the Monroe apartments.

The respondents, Miller and wife, brought this suit for specific performance against appellants. Appellants by cross-complaint sought a rescission of the contract charging certain alleged false and fraudulent representations. Interveners and respondents, who were the owners in fee and lessors of the Monroe apartments, by complaint in intervention, sought and secured the appointment of a receiver to operate the Monroe apartments pending the litigation, asking also to recover one month's rent amounting to $850 from appellant May Gusta, or respondent Erastus Miller, as the court might determine.

After a trial judgment was entered to compel specific performance of the contract to exchange the properties, and against appellants and in favor of interveners for the sum of $850 to be paid by the escrow holder; that amount having been deposited with the escrow holder by appellants for that purpose prior to the repudiation of the contract by them. From that judgment appellants prosecute this appeal.

[1] The serious question on this appeal is concerned with the allegation of the amended complaint, evidence and finding of the court on the subject of the justness and reasonableness of the contract, and the adequacy of the consideration. The only allegation of the complaint on this subject is in the following language: "That said contract is fair and equitable and that the consideration moving from the plaintiffs herein to the defendant May Gusta is an adequate consideration for the contract for the conveyance to the plaintiffs herein of said East Forty (40) feet of Lot 18, Block 10, of El Centro Tract as hereinabove described."

Appellants interposed a general demurrer and a special demurrer directed to this allegation of the complaint, which was overruled by the court. This action of the court is assigned as error. The demurrer should have been sustained. For this there is an abundance of unbroken authority in this state. The general rule is thus stated in 23 California Jurisprudence, p. 495: "It is not sufficient to allege generally that the contract sought to be enforced is just and reasonable and the consideration adequate; such allegations are regarded as mere conclusions of law; to be sufficient the complaint must allege facts which show that the contract is fair and the consideration adequate, and that it would not be inequitable to enforce it."

In Joyce v. Tomasini, 168 Cal. 234, at pages 237, 238, 142 P. 67, the Supreme Court used the following language:

"The defendant demurred to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and this is assigned as error. We think the demurrer should have been sustained. The contract is sued on as an executory agreement to execute a lease, in substance an agreement to grant an estate for years in the parcel of land. The object of the action is to enforce specific performance of this executory agreement. The Civil Code, following the settled doctrine of equity jurisprudence, declares that specific performance of an executory contract cannot be enforced against a party, if he has not received an adequate consideration therefor, or if it is not, as to him, just and reasonable. Section 3391. It is well established as a rule of pleading in such cases that the plaintiff, in order to allege a good cause of action, must set forth facts which show that the consideration provided for in the contract sought to be enforced is adequate, and that the contract is just and reasonable to the defendant. A complaint which fails to state such facts does not state a cause of action to enforce such contract. 'This does not mean that it must be alleged in hæc verba that the contract was supported by an adequate consideration, and is, as to the defendant, fair and just. These might be held insufficient, but the fact that the contract is such as will satisfy the conscience of the chancellor in the respects mentioned must appear from a proper statement of facts.' (Citing cases.)

"The complaint does not purport to set forth any facts whatever on the subject. The only allegation concerning it is the bald statement 'that said agreement, and the terms and conditions thereof, aforesaid, were and are, in all respects, just, fair, and reasonable between the parties thereto.' This is in the precise form which was condemned as insufficient in the passage above quoted. Doubtless the appellate courts should give the language of a complaint on this subject liberal construction in favor of the action of the court below, where it shows an attempt by the pleader to comply with this requirement. But here we have no attempt to state any facts at all—nothing more than the general language of the statute—a mere conclusion of law without facts to support it."

This rule of pleading has never been departed from and is reaffirmed in Salisbury v. Yawger, 184 Cal. 783, 795, 195 P. 682, and Walker v. Clark, 80 Cal. App. 520, 252 P. 334. In the latter case this court said at page 525 of 80 Cal. App., 252 P. 337: "There has been no departure from the rule that it is necessary to plead sufficient facts to show that the consideration for the contract was adequate."

Measured by this rule of pleading, the allegation of the complaint under attack stated mere conclusions of law and was vulnerable to appellant's demurrer.

[2] Respondents, however, contend that by the introduction of evidence on the subject of the justness and reasonableness of the contract and the adequacy of the consideration without objection appellants are now estopped to raise the question of the sufficiency of the complaint in that regard. We are not unmindful of the doctrine of aider by findings under which the finding of a fact which is litigated without objection has been held to cure a lack of, or defect in, the allegation in the complaint of the fact so found. It is a wholesome rule of law that a party should not be allowed to try a question as if it were properly at issue, and in the event of an adverse decision raise anew the defect in his opponent's pleading which he had chosen to ignore at the time of trial. But the trouble with respondents' argument in this regard is that the finding is open to the same attack which has been made upon the complaint.

The evidence on the question of the value of the leasehold interest in the Monroe apartments was sharply in conflict. Respondents produced evidence which, if believed, gave it a value in excess of the value of appellants' property which was to be exchanged for it. Appellants' evidence was to the effect that the leasehold was worse than valueless because it was impossible to operate the apartments at a profit and pay the agreed rental of $850 per month. In this appellants were considerably corroborated by the first report of the receiver appointed by the court, filed before the trial, which showed that the total gross receipts from the operation of the apartments during July, August, and September, 1926, before paying any expenses, did not aggregate quite enough to pay the rent for those three months and after deducting other running expenses for the period from June 18 to October 5 covered by the report the receiver had on hand $704.39, less than enough to pay a single month's rental. While it is undoubtedly true, as suggested by counsel, that operation through a receiver is ordinarily more costly and less profitable than the same operation would otherwise be, these figures are none the less startling. Even in the face of them, however, we would feel compelled to accept the finding of the trial court upon this conflicting evidence if that finding was sufficient. But, as suggested above, the finding is subject to the same vice as the pleading, in that it follows the identical language of the complaint above set out. In other words, the trial court, instead of finding the facts from which the justness and reasonableness of the contract and the adequacy of the consideration would follow as a conclusion of law, simply found "that said contract is fair, and equitable and that the consideration * * * is an adequate consideration." Under the authorities above quoted this is a bald conclusion of law. It is impossible from this finding for this court to know on appeal what value the court put on any of the properties involved in the exchange. Nor can we even conjecture in view of the sharp conflict in the testimony what values the trial court may have had in mind, or what sort of contract in the trial judge's opinion would be fair and equitable or what consideration adequate. The values might, if they had been found by the trial court, be so disproportionate as to lead this court to disagree with the trial court's conclusion as to the fairness of the contract and the adequacy of the consideration. As to that we are left in the dark.

[3] Findings should be tested by the same rules as pleadings: they should state the ultimate facts and conclusions of law cannot take their place. 24 Cal. Jur. p. 969. In McCarthy v. Brown, 113 Cal. 15, at pages 17, 18, 45 P. 14, the court, quoting with approval from Hihn v. Peck, 30 Cal. 286, said: "It has been uniformly held that it is not necessary for the court, in its findings, to present the results of last analysis; but, on the contrary, that it would be sufficient if the court found the facts entering as terms into the legal proposition

upon which the prevailing party based his right of recovery. The 'facts' which the court is to find, and the 'facts' which a pleader is to state, lie, according to the decisions in this state, in the same plane; that is, in both connections, facts are to be stated according to their legal effect."

And the court in the McCarthy Case added: "Therefore, to determine the sufficiency of a finding * * * it is only necessary to ascertain what statement of that fact is required in the pleading."

In County of San Luis Obispo v. Gage, 139 Cal. 398, 409, 73 P. 174, 178, the court said of a finding in the same language as an allegation of the complaint: "We are of the opinion that this is a mere conclusion of law, and presented no issue for the consideration of the court below, and that the finding is of no more force than the allegation."

[4] There is another defect in both finding and complaint which, in our opinion, is equally fatal. The complaint alleges and the court found in the language above set out that "the consideration * * * is an adequate consideration for the contract for the conveyance * * * of said east forty feet of Lot 18, Block 10, of El Centro Tract."

Nothing is said about the furniture and furnishings which were also to be transferred by appellants and which the judgment appealed from requires appellants to transfer by bill of sale. Under Civil Code, § 3391, the consideration must be adequate for the whole contract to be performed by the defendant, not for a part of it only. The finding, even if otherwise sufficient, would still not support the judgment, because of the failure to find that the consideration is adequate for the conveyance of the furniture and furnishings as well as the real property involved.

[5] The issue of fraud raised by the cross-complaint was decided against appellants on conflicting evidence, and under the settled rule this court must accept the finding of the trial court on that issue.

The complaint in intervention prayed in the alternative, as above noted, for relief against appellant May Gusta, or respondent Erastus Miller. Since we have determined that so much of the judgment as grants relief to plaintiffs on their amended complaint must be reversed, the portion of the judgment granting relief to interveners against appellant May Gusta should also be reversed to await the final judgment of the court on the issue of specific performance.

It is accordingly ordered that that portion of the judgment denying relief to appellants under their cross-complaint is affirmed, and those portions of the judgment granting relief to plaintiffs and respondents on their amended complaint and to interveners and respondents on their complaint in intervention are reversed, with directions to the trial court to sustain appellants' demurrer to the amended complaint of plaintiffs. Appellants to recover their costs on appeal against plaintiffs and respondents, Erastus Miller and Lee Miller, his wife.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

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103 Cal. App. 38

UNIVERSITY OF SOUTHERN CALIFORNIA v. BRYSON. (Civ. 3952.)★

District Court of Appeal, Third District, California. Dec. 31, 1929.

Rehearing Denied Jan. 30, 1930. Hearing Denied by Supreme Court Feb. 27, 1930.

1. Subscriptions ⟹10—Where last paragraph of note was executed simultaneously as part of original instrument, entire document must be construed together (Civ. Code, § 1641).

Where last paragraph of subscription note to university endowment fund was executed at same time as, and as part of, original instrument, entire document must, under Civ. Code, § 1641, be construed together in determining its character and effect.

2. Contracts ⟹163—Written portion of document controls printed portion only when written and printed portions are repugnant (Civ. Code §§ 1641, 1651, 1652; Code Civ. Proc. § 1862).

Only when written and printed portions of same document are repugnant does former control latter, under Civ. Code, § 1651, and Code Civ. Proc. § 1862, and, when these separate portions are not absolutely inconsistent, they should, under Civ. Code, §§ 1641, 1652, be reconciled, if reasonably possible, so as to give effect to entire instrument.

3. Subscriptions ⟹5—Written and printed portions of subscription note to endowment fund held not to show note was intended as mere "gift"; "donation" (Civ. Code, § 1146).

Printed portion of note subscribing to university endowment fund stating that it was executed and delivered with express reciprocal condition that other subscribers would execute similar notes with object of raising large fund for equipment and endowment, and written portion stating that amount is donated to be used as endowment fund to further work of foreign missions, *held* to show note was not intended as mere "gift" without consideration, as defined in Civ. Code, § 1146, since gift is voluntary transfer of property without consideration, but a donation may be founded on consideration (citing Words and Phrases, Third Series, "Donate"; "Donation").

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Gift.]

4. Gifts ⟹1—Use of term "donation" is not conclusive evidence of no consideration, where contrary is evident from instrument.

While a donation is usually a gratuitous transfer of property without consideration, it

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★Rehearing denied. Hearing denied by Supreme Court.

may be construed to mean more than a mere gift, and where intent of parties to contrary is evident from instrument, mere use of term "donation" will not be accepted as conclusive evidence of absence of consideration (citing Words and Phrases, First Series, "Donate"; "Donation").

5. Subscriptions 🔑9—Indorsement on subscription note to endowment fund that donation was made to further work of foreign missions held not to designate purpose beyond scope of charter.

Indorsement on subscription note to university endowment fund that amount was donated to be used as an endowment fund to further work of foreign missions in preaching gospel to people in heathen countries *held* not to designate purpose beyond scope of university charter authorizing it to engage in education and training for ministry and maintain department of religious education.

6. Subscriptions 🔑10—Limitation of subscription to endowment fund to use in furtherance of foreign missions held not in conflict with general purpose for endowment and equipment, where religious training was among regular curricula.

Fact that income from subscription note to university endowment fund was limited to furtherance of foreign missions, or that it may have been restricted to maintenance of department of religious training, *held* not in conflict with general purpose of endowment fund as expressed in note to be for endowment and equipment of university, where regular curricula of university provided for course of religious training.

7. Bills and notes 🔑31—Note may be valid as nonnegotiable instrument, though not containing all provisions necessary to make it negotiable.

Note may be valid as a nonnegotiable instrument, although it does not contain all provisions necessary to make it negotiable.

8. Bills and notes 🔑45—Note subscribing to university endowment fund held not invalid because made payable out of estate of maker one day after her death.

Note subscribing to university endowment fund *held* not invalid because made payable out of estate of maker thereof one day after her death.

9. Bills and notes 🔑155—Wills 🔑89—Note subscribing to university endowment fund negotiable in form is not testamentary or nonnegotiable merely because not maturing until after maker's death.

Note subscribing to university endowment fund negotiable in form is not testamentary or nonnegotiable merely because it does not mature until after maker's death.

10. Subscriptions 🔑4, 18—Absent consideration, promise to pay subscription is generally mere offer, withdrawable any time before acceptance, and promisor's death revokes pledge.

Promise to pay a subscription is ordinarily mere offer, which, in absence of consideration therefor, may be withdrawn at any time before acceptance, and promisor's death revokes pledge.

11. Subscriptions 🔑5—Mere individual promise to subscribe to cause, not usually being supported by consideration, is unenforceable.

Mere individual promise to subscribe to cause is not usually supported by consideration, and is therefore nudum pactum and unenforceable.

12. Subscriptions 🔑5—Note subscribing to university endowment fund given in consideration of reciprocal promises by others, and conditioned on fulfillment of pledges, held supported by consideration.

Note subscribing to university endowment fund given in consideration of reciprocal promises by others subscribing to $1,000,000 endowment fund for equipment of university, each note being conditioned on fulfillment of pledges by others to raise full amount, *held* supported by consideration.

13. Subscriptions 🔑5—Mutual promise concurred in by several for payment of aggregate sum for benefit of charitable, religious, or educational institution is generally supported by consideration (Civ. Code, § 1605).

Mutual promise concurred in by several individuals to contribute to payment of aggregate sum for benefit of charitable, religious, or educational institution, in which all are interested, is generally supported by adequate consideration, authorizing its enforcement by promisee, in view of Civ. Code, § 1605, defining consideration as any benefit conferred on promisor or any prejudice suffered by promisee.

14. Subscriptions 🔑5—University relying on promise to pay, and thereby induced to expend money, perform labor, or incur obligation, held to suffer prejudice constituting consideration for promise (Civ. Code, § 1605).

Where university, relying on promise to pay specific sum for particular purpose, is induced thereby and does expend money, perform labor, or incur obligations incident to purpose for which money was pledged, it necessarily suffers prejudice constituting a consideration for promises to pay, under Civ. Code § 1605, since acts performed and obligations incurred by promisee in reliance on payment of subscription note renders agreement enforceable, and estops promisor from refuting its validity.

15. Subscriptions 🔑5—Fact that subscriber's note to endowment fund was not solely relied on when university incurred obligations held not to affect its right to claim estoppel against maker.

Fact that university constructing building and incurring obligations did not rely solely in anticipation of payment of particular subscription note to university endowment fund, but partially relied on payment of other pledges, *held* not to affect university's right to contend maker was estopped to deny consideration for note, since it is sufficient to create an estoppel, if pledge is substantial cause inducing activity by payee, or if particular pledge, in conjunction with others, induces promisee to perform labor or expend money in carrying out enterprise for which money was pledged.

16. Executors and administrators 🔑227(1)—Creditor's claim against estate containing copy of subscription note to endowment fund and stating conditions were fulfilled held sufficient to support action thereon (Code Civ. Proc. § 1494).

Creditor's claim containing complete copy of note subscribing to university endowment fund, together with statement that subscription note was delivered to and accepted on terms and for purposes therein set forth, and that entire sum was pledged in fulfillment of conditions, *held* sufficient under Code Civ. Proc. § 1494, relating to filing of creditors' claims against estate, to support action thereon.

17. Subscriptions 🔑21(4)—In action on subscription note to university endowment fund, allegations of complaint held to warrant admission of evidence showing obligations incurred in reliance thereon.

In action on subscription note to university endowment fund, allegations of complaint setting out note in full and nonpayment thereof that, on faith of subscription, together with other subscriptions, plaintiff erected building, purchased equipment, employed teachers, and equipped specific department, *held* sufficient to warrant admission of evidence regarding performance of work, incurring of obligations in reliance on promise, so as to furnish consideration therefor and to create an estoppel to deny its validity.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the University of Southern California against Frank Bryson, as administrator with the will annexed of the estate of Sarah P. Livingston, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Everett W. Mattoon, County Counsel, and Gordon Boller, Deputy County Counsel, both of Los Angeles (Merriam, Rinehart & Merriam, of Pasadena, of counsel), for appellant.

Scarborough & Bowen, of Los Angeles, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment for plaintiff on a note representing a $200,000 subscription to an endowment fund for the University of Southern California.

Sarah P. Livingston executed and delivered to the university the following note:

"Estate Note Sarah P. Livingston.

"University of Southern California Million Dollar Jubilee Campaign.

"Los Angeles, May 24th, 1918.

"In consideration of my interest in Christian education and in consideration of others subscribing toward raising of a Million Dollars for endowment and equipment for the University, I hereby subscribe and will pay to the University of Southern California, at Los Angeles, California, the sum of Two Hundred Thousand Dollars ($200,000.) on the following terms and conditions:

"1. The entire sum of One Million Dollars asked, shall be pledged on or before June 12, 1918.

"2. This subscription shall be due and payable one (1) day after my death, and out of my estate. Name: Sarah P. Livingston, 1245 Stevenson Ave. Address: Redondo Beach District: Pasadena, Cal. Charge: California.

"Witness: John Hedley."

Indorsement in writing on reverse side:

"The sum of Two Hundred Thousand Dollars ($200,000) is donated to the Board of Trustees, University of Southern California, with the distinct provision that the full amount shall be used as an endowment fund to further the work of Foreign Missions, in the preaching of the Gospel to people in heathen countries, as may be hereafter determined by the Board of Trustees, University of Southern California.

"[Signed] Sarah P. Livingston.

"May 24th, 1918.

"Witness: John Hedley."

The entire fund of $1,000,000 was subscribed before June 12, 1918. Notice of an acceptance of the Livingston subscription was sent to her. Relying upon the payment of these notes, an administration building was commenced, college courses enlarged, and obligations incurred by the university. Mrs. Livingston died May 25, 1923. Upon proceedings duly had, an administrator of her estate was duly appointed and qualified. June 3, 1924, a verified claim for her note, which was fully described therein, was presented for payment June 11, 1924, and disallowed. This action was then commenced, and upon trial the court rendered judgment against the defendant for $200,000 and 7 per cent. interest thereon from June 11, 1924, from which judgment this appeal was perfected.

The appellant contends that (1) the subscription note was without consideration, and is therefore nudum pactum; (2) the condition of the notes to secure pledges for the aggregate sum of $1,000,000 was not fulfilled; (3) the doctrine of estoppel may not apply, since the payee did not perform any acts or incur obligations in anticipation of the fulfillment of the specific purpose for which the particular subscription was made; (4) the purpose for which the pledge was made is not within the authorization of the university charter; and (5) the creditor's claim upon which the action is founded will not support a plea of estoppel.

[1] The last paragraph of the foregoing copy of the subscription note or agreement was written at the request and in the presence of Mrs. Livingston by a minister of the Methodist church, and was executed at the same time and as a part of the original instrument. The entire document must there-

fore be construed together in determining its character and effect. Section 1641, Civ. Code; McAuliff v. McFadden, 42 Cal. App. 505, 511, 183 P. 870; 8 C. J. 191, § 323.

It is asserted that the written portion of the subscription note in the present case is repugnant to the purpose for which the general university fund was raised, as appears from the printed portion of this and other notes uniform in that respect which were executed by the subscribers, and that the indorsement on this note specifically designates the nature of the transaction as a "donation," which means a gift, and precludes the possibility of contending that it was founded upon a consideration. Noe v. Card, 14 Cal. 576, 598.

[2-4] Where a contract is partly written and partly printed, and the written matter is repugnant to the printed portion, the former will control. Section 1651, Civ. Code; section 1862, Code Civ. Proc. It is only when written and printed portions of the same document are repugnant, however, that the former controls. When these separate portions are not absolutely inconsistent, they should be reconciled, if reasonably possible, so as to give effect to the entire instrument. Sections 1641 and 1652, Civ. Code; 13 C. J. 536, § 498; 6 Cal. Jur. 280, § 172; Flinn v. Mowry, 131 Cal. 481, 484, 63 P. 724, 1006. Construing the entire instrument in this manner, it is quite apparent the note was not intended as a mere gift without a consideration, as that term is defined in section 1146 of the Civil Code. It was executed and delivered with the express reciprocal condition that other subscribers would execute similar notes with the object of raising a million-dollar fund for the "endowment and equipment" of the University of Southern California. This would furnish a consideration for the note. A gift is a voluntary transfer of property without consideration (section 1146, Civ. Code; 12 R. C. L. 923, § 1), but a donation may be founded on a consideration. (28 C. J, 621, § 2; 3 Words and Phrases, Third Series, 19; Spiers v. Woodhill, 71 Mo. App. 373; International & G. N. Ry. Co. v. Anderson County (Tex. Civ. App.) 174 S. W. 305, 315). A donation is not necessarily a mere gift. While it is true that a donation is usually a gratuitous transfer of property without consideration (1 Bouv. Law Dict. 924; 3 Words and Phrases, First Series, 2181), yet it may be construed to mean more than a mere gift. Where the intent of the parties to the contrary is evident from the instrument, the mere use of the term "donation" will not be accepted as conclusive evidence of an absence of consideration.

[5] We think that the language of the written indorsement on the note in this case neither destroys its validity on the ground that it requires an application of its funds to a purpose different from that which was designated in the pledges for the balance of the general jubilee endowment fund, nor for the reason that it designates a purpose beyond the scope of authority which is conferred upon the university by its charter. The University of Southern California was organized as a denominational institution "under the control and management * * * of the Southern California Conference of the Methodist Episcopal Church." It was empowered to receive and hold property "for educational purposes * * * or for the endowment of the corporation or the institutions under its control." It was authorized to "establish separate colleges or departments or institutions for the study of every and all learned and liberal professions * * * and for any scientific or other educational purposes." The express purposes for which the university was incorporated included education and training for the ministry. A department of religious education was maintained prior to the raising of the $1,000,000 jubilee fund. The first printed line of the note which was signed by each of the contributors reads, "In consideration of my interest in Christian education, * * * I hereby subscribe," etc. The indorsement provides that the "amount (of $200,000) shall be used as an endowment fund to further the work of Foreign Missions. * * *" It is unreasonable to hold that this subscription was limited to the actual "preaching of the Gospel in heathen countries." The university had no such authority, and it was not its practice to send out or maintain ministers to preach the gospel. Mrs. Livingston must be deemed to have known this and to have understood the clear printed language of the note which she signed. In this note she declared "I subscribe" $200,000 to the University of Southern California "for endowment and equipment" of that institution. With these circumstances in view we are convinced the language of that indorsement should be construed to mean "the full amount (of the $200,000 contribution) shall be used as an endowment fund to further the work of Foreign Missions (in their service), in the preaching of the Gospel to people in heathen countries." This construction is in accord with good reason, and tends to uphold, rather than destroy, the validity of the instrument. The work of foreign missions would be furthered by the education and training of not only ministers through the maintenance of a department of religion, but also by the training of secretaries, medical missionaries, and the teaching of foreign languages and customs of the people in the fields in which the students plan to work. This purpose is strictly within the express powers which are conferred upon the university by its charter. Any other construction of this instrument would disregard the plain language of the face of the note and destroy the entire $1,000,000 endowment fund, for each separate contribution was conditioned upon the raising of the maximum sum.

[6] The fact that the income from the $200,-

000 subscription was limited to the furtherance of foreign missions, or that it may have been restricted to the maintenance of a department of religious training, is not fatal to the validity of the instrument or in conflict with the general purpose of the entire jubilee fund. That fund was for the "endowment and equipment" of the university. Among the regular curricula of this educational institution was the course for religious training. The designated use of this particular subscription was therefore included in the purpose for which the general fund was raised, and for which the university was maintained.

In anticipation of the payment of these subscription notes into the general jubilee fund, of which the Livingston contribution was a substantial part, a new administration building was commenced in 1919, and completed in 1921, at an expense of $620,000. In this building a classroom was assigned for teaching religion and preparing students for missionary work. In anticipation of the payment of the Livingston contribution in particular the work in the department of the school of religion was greatly enlarged. Classes for the study of the aims and needs of foreign missions were added, together with instruction in the languages and customs which prevail in such fields. The plan for education in this department was reorganized under the title of "The Church and Its Program." Dr. von KleinSmid, the president of the university, testified that these courses were intended "for the preparation of young men and young women for service in foreign missions." The board of trustees approved this plan. The missionary course included study under Dr. Fisher of "Heroes of the Mission Fields; their history and times; their consecration, preparation, problems, methods, work and achievement." A library, equipment, and several instructors were added to this department. The increased cost of this entire change in the religious department could not be paid from the Livingston subscription alone. But these changes were made and the increased cost of the department incurred in anticipation of, and in reliance upon, the substantial aid of her contribution. The president of the university said: "The entire program (affecting the church and missions) was in part relying on the Livingston donation." It was unnecessary that the obligations should be incurred and the changes adopted in reliance solely upon the Livingston portion of the fund.

The activities of the university above mentioned were in furtherance of the work of foreign missions; they were in compliance with the conditions of the Livingston note, and not in conflict with the purpose for which the general endowment fund was raised, or the authorized powers of the educational institution.

It is contended that the instrument in question is testamentary in character; that it is a mere executory promise, without consideration, to give a sum of money to the university, which was revocable at the option of the promisor at any time before acceptance, and which was canceled by her death.

[7] A note may be valid as a nonnegotiable instrument, although it does not contain all the provisions necessary to make it negotiable. 8 C. J. 41, subd. 20. A written instrument is presumptive evidence of consideration. Section 1614, Civ. Code. The burden of showing a want of consideration sufficient to support the instrument lies with the party seeking to invalidate or avoid it. Section 1615, Civ. Code.

[8, 9] The note was not invalid because it was made payable out of the estate of the maker thereof, one day after her death. A negotiable instrument is deemed prima facie to have been issued for a valuable consideration. Section 3105, Civ. Code. An instrument which is negotiable in form is not rendered testamentary or nonnegotiable merely because it does not mature until after the death of the maker. 19 Cal. Jur. 814, § 17; 1 Daniel on Negotiable Inst. (5th Ed.) 53, § 46; Buchtel College v. Chamberloix, 3 Cal. App. 246, 84 P. 1000; Nassano v. Tuolumne County Bank, 20 Cal. App. 603, 130 P. 29; 3 R. C. L. 907, § 94.

[10-12] A promise to pay a subscription is ordinarily a mere offer which, in the absence of a consideration therefor, may be withdrawn at any time before acceptance. Under such circumstances the death of the promisor revokes the pledge. A mere individual promise to subscribe to a cause is not usually supported by a consideration, and is therefore nudum pactum and unenforceable. 23 Cal. Jur. 954, § 2; 25 R. C. L. 1399, § 6; Grand Lodge I. O. G. T. v. Farnham, 70 Cal. 158, 11 P. 592. In the present case, however, the subscription note of Mrs. Livingston is not void. It was founded upon a well-recognized consideration, which was the reciprocal promises of each of the contributors to the general jubilee fund to participate to the extent of their respective pledges in the raising of a definite sum of $1,000,000. This condition was so specified in the several notes. The note of each subscriber was conditioned upon the fulfillment of the pledges of the others to raise the full amount of $1,000,000.

[13] A mutual promise concurred in by several individuals to contribute to the payment of an aggregate sum for the benefit of a charitable, religious, or educational institution, in which they are all interested, is generally held to support an adequate consideration authorizing its enforcement by the promisee. Christian College v. Hendley, 49 Cal. 347; 37 Cyc. 488; 6 R. C. L. 676, § 84; 38 A. L. R. 906, note VI. This doctrine, which is termed "a promise for a promise," is criticized by certain text-writers, but it is evidently approved by the California courts. The Christian College Case, supra, has been favorably

cited on this point in West v. Crawford, 80 Cal. 19, 32, 21 P. 1123, and in Matzen v. Morton Building Co., 28 Cal. App. 330, 152 P. 317. The principle is also supported by a large number of authorities which are cited in support of the text in Ruling Case Law, supra, and in the Permanent Supplement thereto.

Appellant claims this is not the law in California; that the case of Grand Lodge I. O. G. T. v. Farnham, 70 Cal. 158, 11 P. 592, overrules the Christian College Case. We cannot agree with this assertion. The Grand Lodge Case is clearly distinguishable from both the Christian College Case and the present action. The facts which appear in the Grand Lodge Case indicate that Farnham signed a mere subscription paper agreeing to pay $1,000 toward building a Good Templars' Home for Orphans. Other subscribers at the same time signed similar papers. There is nothing in the record to show that the document which he signed had any reference to other subscription papers, or was conditioned upon the raising of any specific fund, or upon other subscribers participating therein. No mutual or reciprocal obligation is mentioned. Unlike the present case, no reference was made to the execution of other pledges, or to the purpose for which the fund was being raised. Nor does it appear that any work was commenced on the building or obligations incurred before the death of Farnham. In that case no promise for a promise appears; no obligations were incurred; and no acts in reliance upon the fulfillment of the pledge were performed. Under such circumstances, clearly the promise was without consideration and void. After declaring that "a promise to pay a subscription like that declared on here is a mere offer, which may be revoked at any time before it is accepted by the promisee," the court said: "The rule is otherwise when subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others," and that "an acceptance can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money is expended on the faith of the promise."

While American authorities are not in entire harmony as to the validity of these subscription agreements, the modern trend and the weight of authorities support the theory that the reciprocal agreements of the several subscribers or the subsequent performance of labor or incurring of obligations on the part of the promisee in reliance upon the pledge to pay furnishes a sufficient consideration therefor, or an estoppel to deny the validity thereof. Upon the contrary, English cases regard subscriptions to charity and similar causes as mere promises without consideration which may be withdrawn at any time before acceptance, and which are therefore nudum pactum. Re Hudson, 54 L. J. Ch. (N. S.) 811. The earlier American cases follow this rule. The trend of modern authorities holds the contrary. Later authorities tend to uphold these subscription agreements for the benefit of charitable and educational institutions. In 38 A. L. R. 869, note, it is said: "The tendency now is to uphold subscriptions as valid and enforceable, whenever that can be done without overstepping entirely established rules requiring consideration to uphold executory contracts. * * * Consideration is supplied where upon faith of the subscriptions moneys have been expended, liabilities incurred, or work performed. * * * Other courts have found consideration in the mutual promises of the subscribers." Some cases distinguish between a mere promise to pay a specified sum regardless of the aggregate fund to be raised and a promise to participate in the raising of a specific amount where each separate pledge becomes an inducement for others to subscribe.

Section 1605 of the Civil Code defines the term "consideration" as any benefit conferred on the promisor or any prejudice suffered by the promisee.

[14] When the subscription of an individual aids the organization, endowment, or maintenance of a local charitable, religious, or educational institution in which he is interested, it may be said he receives an indirect benefit therefrom. These are semipublic organizations which are recognized as beneficial to society. Nebraska Wesleyan University v. Griswold, 113 Neb. 256, 202 N. W. 609, 38 A. L. R. 858; Amherst Academy v. Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387. So also it may be said that, when an institution relying upon a promise to pay a specific sum for a particular purpose is induced thereby, and does expend money, perform labor, or incur obligations incident to the purpose for which the money was pledged, it necessarily suffers prejudice in so doing. This detriment is deemed by section 1605 of the Civil Code to constitute an adequate consideration upon which to enforce the agreement.

Acts performed and obligations incurred by a promisee in reliance upon the payment of a subscription note renders the agreement enforceable, and estops the promisor from refuting its validity. 25 R. C. L. 1401, § 8; 37 Cyc. 486-B; Lasar v. Johnson, 125 Cal. 549, 58 P. 161; Buchtel College v. Chamberloix, 3 Cal. App. 246, 84 P. 1000; 38 A. L. R. 881, note; Furman University v. Waller, 124 S. C. 68, 117 S. E. 356, 33 A. L. R. 615, note 625.

[15] The appellant contends that the changes in the religious program of the university, the labor performed, and the obligations incurred in the construction of the administration building and otherwise were not solely in anticipation of the payment of the Livingston note, but were partially in reliance upon the payment of other pledges and therefore furnished no ground for estoppel.

It is true that this performance was only partially in reliance upon the payment of the Livingston note. It is, however, not necessary that a particular subscriber's promise should be the sole inducement for the performance of work or the incurring of obligations. It is sufficient to create an estoppel if it is a substantial cause inducing the activity on the part of the payee, or if the particular pledge in conjunction with others induces the promisee to perform labor or expend money in carrying out the enterprise for which the money is pledged. Furman University v. Waller, 124 S. C. 68, 117 S. E. 356, 33 L. R. A. 615.

It is asserted that the condition of the note that $1,000,000 should be pledged for the endowment and equipment fund of the university was not complied with. We cannot agree with this. The aggregate sum of $1,148,834 was subscribed. This sum included the $200,000 note in question, which was primarily a contribution to the endowment and equipment fund from which the obligations for maintaining a department for religious training and for furthering the work of foreign missions were paid. This note was therefore properly included in the general fund. The aggregate amount also included a note of $100,000 signed by W. T. Watts, which is challenged. In January, 1919, after the fund had been completed, Mr. Watts and the university entered into a written agreement by the terms of which real property was conveyed to the university, apparently in satisfaction of this note, conditioned upon the grantor retaining the rents and income therefrom during his lifetime. There is evidence that this property was worth "much more than $100,000 to the University." This was not denied, for, when plaintiff called a witness to establish its value, this colloquy occurred between counsel: "Mr. Scarborough: We have testimony here that the value of the property was over $100,000. Mr. Holbrook (attorney for defendant): * * * If it makes any difference, it amounted to more; it does not make any difference whether it amounted to less." It should therefore be assumed that the defendant accepted this property as of a valuation in excess of $100,000. Two other items are challenged, to wit, $57,464 in notes, for which the university was obligated to extend scholarship privileges under which it waived the usual tuition charges. There were also subscriptions amounting to $32,800, to which obligations on the part of the university were imposed to pay annuities to the makers thereof in the form of interest. The last two items aggregated $90,264. While the principal represented by the last two classes of notes became a part of the general endowment fund, it may be said the income therefrom was not presently available, and there may be merit in saying these notes, because of their conditions, did not comply with the purpose of raising a $1,000,000 fund as declared by the notes. However, deducting these sums, there would still remain a fund of $1,058,570. Considering the evidence as a whole, we are of the opinion that the findings of the court that $1,000,000 endowment and equipment fund was subscribed before June 12, 1918, is adequately supported by the evidence. The note merely required the fund to be pledged.

[16, 17] Finally, it is contended the form of the creditor's claim was insufficient upon which to maintain this action, and that there was a fatal variance between the allegations of the complaint and the evidence adduced, in that the complaint failed to adequately set out the particulars upon which the claimant relied, to wit, the doctrine of estoppel which would be raised by the proof of the performance of labor or the incurring of obligations by the payee in reliance upon the payment of the note.

The creditor's claim contained a complete copy of the note upon which the action was founded, together with the statement that the subscription note "was delivered to and accepted by the University * * * upon the terms and for the purposes therein set forth, and that the entire sum of $1,000,000 asked was pledged on or before June 12, 1918, in fulfillment of the conditions thereof. * * *" This was a sufficient compliance with section 1494, Code of Civil Procedure. 11 Cal. Jur. 704, § 411; Crocker-Woolworth National Bank v. Carle, 133 Cal. 409, 65 P. 951; Pollitz v. Wickersham, 150 Cal. 238, 249, 88 P. 911. The consideration of the note was presumed. Nor was there a variance in the proof of the allegations of the complaint which set out the note in full and the nonpayment thereof and recited that, "upon the faith of and relying upon the said subscription, with other subscriptions to said fund, the plaintiff * * * erected a building and purchased equipment for the same * * * and employed teachers, and equipped a department to further the work of foreign missions in the preaching of the Gospel to people in heathen countries." These allegations were sufficient upon which to admit evidence of the performance of work and the incurring of obligations in reliance upon the promise to pay the note so as to furnish consideration therefor and estop the denial of its validity.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 79

MOLEMA v. MOLEMA. (Civ. 7050.)

District Court of Appeal, First District, Division 2, California. Jan. 7, 1930.

1. Judgment 🔑405—Order or judgment cannot be annulled, except on legal grounds, and statute authorizing modification is measure of court's jurisdiction.

An order or judgment, solemnly entered after hearing, cannot be annulled, either expressly or by indirection, except on legal grounds, and, when statute authorizes a modification on specified grounds, statute is the measure of the court's jurisdiction.

2. Divorce 🔑245(2)—Authority to modify allowance for alimony does not include right to alter award on state of case existing when decision was entered.

Authority of court to modify allowance for alimony does not include the right to alter award on state of case existing when decision was entered, or to review action of chancellor therein, in that parties had their day in court, with the right of appeal, and it cannot be supposed that it was intended that court should sit in review of its own decisions

3. Divorce 🔑245(3)—Order modifying decree, so as to eliminate provision for alimony, held erroneous, in view of evidence.

Order modifying decree in respect to alimony in divorce action, so as to render order involving alimony ineffective, *held* erroneous, in view of evidence failing to establish any ground for modification by reason of change in conditions existing at time decree was entered.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Divorce action by Hulda S. Molema against Herman G. Molema. Decree of divorce, and from an order annulling portions of the decree, awarding alimony, plaintiff appeals. Reversed.

Corbet & Selby, of San Francisco, for appellant.

Samuel D. Hamburg, of San Francisco, for respondent.

NOURSE, J. Plaintiff appeals from an order annulling portions of decrees of divorce awarding her alimony.

On May 28, 1914, the plaintiff was awarded an interlocutory decree of divorce from the defendant upon grounds of cruelty. The complaint for divorce pleaded the ownership of two parcels of property, one of which was alleged to be community property, and the other was alleged to be the separate property of the wife, and also alleged defendant's ability to pay alimony. The decree made no disposition of the community property, but cleared plaintiff's title to the parcel claimed as her separate property, and awarded her alimony in the sum of $25 a month. This sum was paid more or less irregularly until August, 1927, when, defendant being $225 in arrears, he was cited to appear in contempt proceedings. He thereupon gave notice of motion to strike from the decrees the provisions relating to alimony. This motion was based upon three grounds: Inadvertence; that defendant was then unable to make the payments; and that plaintiff does not require the same. The motion was heard at the same time as the order to show cause.

The trial court found that defendant was delinquent to the extent of $200. This finding was manifestly a clerical error, because it was stipulated in open court that the amount in arrears was $225. The trial court then entered its judgment reading as follows: "It is ordered, adjudged and decreed that the motion of said defendant to eliminate from said decrees so much thereof as requires him to pay plaintiff the sum of $25 per month be, and the same is hereby granted, and said interlocutory and final decrees are hereby amended by striking therefrom such requirement." The appeal is from this order.

Appellant claims the order was beyond the jurisdiction of the court, because it in terms undertook to change the wording of the original interlocutory and final decrees of divorce, instead of making and ordering a proper modification as of the date of the motion. Soule v. Soule, 4 Cal. App. 106, 87 P. 205; Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am. St. Rep. 70; Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520. This point, if well taken, would only require a modification of the order appealed from, as was done in the Soule Case.

[1, 2] But we do not need to draw any nice line of distinction between the expressions "modification," "suspension," and "annulment," because the order appealed from, though denominated a modification of the interlocutory and final decrees, is, in legal effect, an annulment of the portions of those decrees relating to alimony. The case here is to be decided on general principles. The rule is uniform that an order or judgment, solemnly entered after hearing, cannot be annulled, either expressly or by indirection, except upon legal grounds, and, when the statute authorizes a modification on specified grounds, the statute is the measure of the court's jurisdiction. 15 R. C. L. pp. 720, 721.

But authority to modify the allowance for alimony "does not include the right to alter the award upon the state of case existing when the decree was entered, or to review the action of the chancellor therein. The parties had their day in court, with the right of appeal, if the decree was deemed erroneous, and it cannot be supposed that it was intended that the court should sit in review of its own decrees, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter, or modify a decree for alimony upon the facts existing at the time of its entry." 1 R. C. L. p. 948.

[3] Here the motion was noticed on three separate grounds, and not a word of evidence was offered or received which supports any one of them. No inadvertence was attempted to be shown. The undisputed evidence upon the ground of respondent's ability to pay showed that his earnings had greatly increased and that his burdens were less. Upon the ground of appellant's need the evidence was without conflict that she was unable to earn a salary adequate for her support, that she had no property or income, and that because of sickness and a capital operation, which she had to undergo, she had been unable to work at all for a period of six months preceding the hearing. There is no evidence of any character which even remotely supports any ground for a "modification" of the decrees, and, when this is so, it is error to so modify the decrees as to render the order involving alimony ineffective. The principle of law involved is that, when a court has once acted after hearing the merits of a controversy, the action cannot be set aside or modified in matters of substance, except upon legal grounds, and that, when the Code section authorizes the court to modify its orders for alimony, it contemplates a legal showing, "having regard to the circumstances of the parties respectively."

The order is reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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103 Cal. App. 74

DAUM v. WEBER SHOWCASE & FIXTURE CO. (Civ. No. 3911.)

District Court of Appeal, Third District, California. Jan. 4, 1930.

1. Brokers 🔑82(4)—Identity and validity of instrument set forth in complaint was required to be proven after answer denying execution of particular instrument.

Where complaint in action to recover broker's commission sets forth in legal effect the agreement sued upon, and answer of corporation denies that it executed particular instrument set forth, it was thereupon essential to plaintiff's cause of action to prove identity and validity of instrument.

2. Corporations 🔑285—Corporation can confer authority upon agent to sign agreement only by proper resolution (Civ. Code, § 2309).

Corporation can confer authority upon an agent to sign the name of corporation to an agreement in accordance with Civ. Code, § 2309, only through its board of directors acting as such by resolution duly passed and recorded.

3. Corporations 🔑426(6)—Ratification of agent's act in signing name of corporation to agreement can be made only by proper resolution.

Ratification of an act of agent in signing name of corporation to agreement can only be made by board of directors acting as such by resolution duly passed and recorded.

4. Corporations 🔑285—Recovery could not be had on agreement signed by agent for corporation without authority by resolution (Civ. Code, §§ 1624, 2309).

Recovery could not be had on agreement for broker's commission signed by agent for corporation without authority pursuant to resolution in accordance with requirements of Civ. Code, §§ 1624, 2309.

Appeal from Superior Court, Los Angeles County; H. M. Willis, Judge.

Action by W. H. Daum against the Weber Showcase & Fixture Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Spencer Thorpe and Roane Thorpe, both of Los Angeles, for appellant.

Lowenthal, Collins & Lowenthal and Victor Ford Collins, all of Los Angeles, for respondent.

PULLEN, Justice pro tem. This is an action for the recovery of a broker's commission claimed to be due under the terms of a written instrument. Judgment was rendered against the plaintiff, who appeals. The instrument in question was signed by W. H. Daum, appellant herein, and Weber Showcase & Fixture Company, by Fred Weber, wherein appellant was appointed exclusive representative to sell certain real property, and the Weber Showcase & Fixture Company, a Delaware Corporation, agreed to refer all inquiries regarding sale of the property, to Daum, for negotiations, and that if sale, lease, or disposition of the property were made and accepted by the corporation during the term or continuance of the agreement, the corporation agreed to pay a specified commission therefor. It was further stipulated that the agreement was to remain in full force until February 1, 1923, and thereafter until canceled by either party giving 30 days' notice in writing. It is admitted that notice of termination was given by the corporation on February 27, 1923, and became effective 30 days thereafter. Appellant urges as a ground for reversal that the agreement was binding upon the parties, and that the corporation, during the life of the agreement, failed to refer to him for negotiations all inquiries received by it, but that the respondent negotiated a lease itself, and is therefore liable to appellant for the commissions provided. The court found: "That no sale, lease or disposal of the property was made or accepted by the defendant during the term or continuation of the agreement of July 24, 1922; that when the lease of October 30, 1923, was made, the agreement of July 24, 1922, was in all respects terminated and canceled, and of no force and effect." And also: "The court finds that there was no fraud upon the part of the defendant in negotiating with the said C. W. Nibley; that no agreement as to the matter of leasing said property was reached between the said C. W. Nibley and the said defendant until after the termination of the agreement between the defendant and the plaintiff." Appellant directs a portion of his argument, and considerable testimony was taken, to show that negotiations were had during the life of the agreement, but determinative of the question here raised is that the agreement in question is not the instrument of Weber Showcase & Fixture Company, a corporation.

[1] The complaint sets forth, in legal effect, the agreement sued upon, and the answer of the corporation denies that it executed the particular instrument set forth, and it thereupon became essential to plaintiff's cause of action to prove the identity and validity of the instrument so relied upon.

[2, 3] At the time of the execution of said agreement there was no written agreement, memorandum, or minutes of the corporation authorizing Fred Weber to execute said agreement or to sign the name of the corporation, Weber Showcase & Fixture Company, thereto (section 2309, Civ. Code), and a corporation can confer authority upon an agent for that purpose only through its board of directors acting as such by resolution duly passed and recorded, and a ratification of such an act by an agent can be made only in like manner. Salfield v. Sutter, etc., Land Co., 94 Cal. 546, 29 P. 1105.

[4] It appearing that the power and authority to be conferred by the agreement falls within the inhibitions of section 1624, Civil Code, and section 2309, Civil Code, plaintiff cannot maintain his position, and the judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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103 Cal. App. 124

BUZBY v. LEWIS et al. (Civ. 56.)

District Court of Appeal, Fourth District, California. Jan. 8, 1930.

1. Automobiles ⚷238(3)—Allegation that, at time of collision, defendant's truck was traveling on left-hand side of road, did not of itself charge negligence (California Vehicle Act, §§ 122, 124, 125).

Allegation that, at time of collision with plaintiff's automobile, defendant's truck was traveling on its left-hand side of road, did not of itself charge negligence, since it is lawful to so drive motor vehicle under some circumstances under California Vehicle Act (St. 1923, p. 517) §§ 122, 124, 125.

2. Automobiles ⚷238(5)—Allegation defendant's truck was traveling approximately 40 miles per hour did not charge negligence under law regulating speed according to weight (California Vehicle Act, § 118).

Allegation that defendant's truck colliding with plaintiff's automobile was traveling at negligent rate of speed of approximately 40 miles per hour did not charge negligence under California Vehicle Act (St. 1923, p. 517) § 118, providing speeds at which trucks of given weight may be driven, where it did not appear that truck with its load was of weight equal to, or in excess of, minimum provided.

3. Automobiles ⚷238(5)—Allegation defendant's truck striking plaintiff's automobile was traveling 40 miles per hour charged negligence per se (California Vehicle Act, § 113).

Complaint alleging that defendant's truck striking plaintiff's automobile was traveling at speed of approximately 40 miles per hour alleged prima facie violation of California Vehicle Act (St. 1923, p. 517) § 113, in force at time of accident, and therefore charged defendant with negligence per se in operation of truck so that complaint was sufficient to support judgment for plaintiff.

Appeal from Superior Court, Imperial County; J. S. Larew, Judge.

Action by Thos. A. Buzby against William Lewis, also sometimes known as A. J. Lewis, and another, doing business under the name of the Desert Express, and others, for personal injuries and property damages arising out of an automobile accident. From a judgment for plaintiff, defendants appeal. Affirmed.

M. W. Conkling, of San Diego, and Kendall B. Perkins, of El Centro, for appellants.

Frank Birkhauser, of El Centro, for respondent.

MARKS, J. In this action respondent sought judgment for personal injuries and property damages alleged to have resulted from a collision between his automobile and a truck belonging to appellants. Judgment was rendered for respondent against William Lewis only. The case comes up on the judgment roll, and the only question presented for our consideration is the sufficiency of the complaint to sustain the judgment, appellants maintaining that it does not state facts sufficient to constitute a cause of action.

It is alleged by respondent that on or about the 23d day of September, 1925, he was riding in his automobile driven and operated by his son with due care and caution along a public highway running in an easterly and westerly direction between the city of Holtville and the town of Winterhaven in Imperial county, Cal.; that appellants "carelessly and negligently caused a Moreland automobile truck propelled by a gasoline engine, said truck being then and there owned and controlled by them, and being driven, run and operated along said public highway and thoroughfare at said plaintiff aforesaid, and while traveling in an easterly direction on the north side of said public highway and thoroughfare, at a great and negligent rate of speed, to-wit: Approximately forty miles per hour, so that by reason of the negligent operation of said Moreland automobile truck, said truck did strike and hit the automobile in which said plaintiff was so riding. That by reason of said carelessness and negligence in the handling and operation of said Moreland automobile truck by defendants and each of them, as aforesaid, said Moreland automobile truck collided with and sideswiped said automobile in which said plaintiff was so riding."

Respondent seeks to support his pleading upon two grounds, namely, first, because it is alleged therein that the truck of appellants "was traveling in an easterly direction on the north side of the public highway"; and, second, that the truck was traveling "at a great and negligent rate of speed, to-wit, approximately forty miles per hour." In support of his first contention he relies upon section 124, California Vehicle Act (St. 1923, p. 517). In support of his second contention he relies upon sections 113 and 118 of the same act.

[1] It will be observed that the complaint does not allege the direction in which respondent's automobile was traveling at the time of the accident. It also fails to allege its position on the highway, and it does not attempt to describe the position of other vehicles, if any, upon the road at the time and place of the accident. The bare allegation that, at the time of the collision, appellants' truck was traveling on its left-hand side of the road, does not of itself charge negligence, for, under some circumstances, it is lawful to so drive a motor vehicle. Sections 122, 124, 125, California Vehicle Act, supra.

[2] Section 118 of the same act does not assist respondent. This section provides the speed at which trucks of given weights may be driven. It does not appear that the truck with its load was of a weight equal to or in excess of the minimum provided, and therefore, under the condition of the record, this section can have no application to this case.

[3] The only allegation of the complaint that can possibly support a cause of action is the one in which the pleader alleges that the truck was traveling "at a great and negligent rate of speed, to-wit, approximately forty miles per hour."

Section 113 of the California Vehicle Act, supra, in force at the time of this accident, provided, in part, as follows: "Restrictions as to speed. (a) Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person. (b) Subject to the provisions of subdivision (a) of this section and except in those instances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following: * * * 7. Thirty-five miles an hour under all other conditions. (c) In all charges for a violation of this section, speeds in excess of those set forth in subdivision (b) of this section shall be taken as prima facie but not as conclusive evidence of a violation of this section, and every notice to appear and every complaint charging a violation of this section shall specify approximately the speed at which the defendant is alleged to have driven and exactly the lawful speed at the time and place of the alleged offense."

In the recent case of Benjamin v. Noonan, 277 P. 1045, 1046, the Supreme Court, in construing this section, used the following language: "Appellants complain of an instruction given by the court at its own instance which first stated the provisions of the Motor Vehicle Act (Stats. 1923, p. 517) to the effect that vehicles shall be driven on the public highways at a careful, prudent, reasonable, and proper speed, so as not to endanger the life, limb, or property of any person and that it shall be lawful to drive at a speed not exceeding 15 miles an hour in traversing an intersection of highways where the view is obstructed, etc., and then charged that a violation thereof constituted negligence as a matter of law. They contend for the distinction that an infraction of said provisions would constitute not negligence per se, but mere evidence of negligence which might or might not amount to proof of negligence. We find no error in said instruction. As said in Scragg v. Sallee, 24 Cal. App. 133, 144, 140 P. 706, 710: 'While it is undoubtedly correct to say that the act of driving a vehicle over a street or public highway beyond the speed limit established by a municipal ordinance or a statute merely constitutes evidence of negligence in cases where damage has followed the infraction of such an ordinance or law, the rule in this state is, however, that it is conclusive evidence of negligence (citing cases). Therefore, the statement that such an act is "of itself negligence," or "negligence as a matter of law" or "negligence per se" (equivalent expressions) is, in this state, strictly correct.' See, also, Baillargeon v. Myers, 180 Cal. 507, 508, 182 P. 37; Flynn v. Bledsoe Co., 92 Cal. App. 145, 267 P. 887; Towne v. Godeou, 70 Cal. App. 148, 232 P. 1010; Greeneich v. Knoll, 73 Cal. App. 1, 238 P. 163. We find nothing in the cases cited by appellants at variance with the rule above set forth."

Under the authority of this case we must hold that the complaint in alleging that appellants' truck was traveling at a speed of approximately 40 miles per hour, 5 miles per hour in excess of the maximum speed specified in the section of the California Vehicle Act in force at the time of the accident, alleged a prima facie violation of the act, and therefore charged appellants with negligence per se in the operation of their truck at the time and place of the collision involved in this action. The complaint, therefore, is sufficient to support the judgment.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

103 Cal. App. 130

SMITH et al. v. STAR PETROLEUM CO.

(Civ. 6267.)

District Court of Appeal, Second District, Division 2, California. Jan. 9, 1930.

1. Mines and minerals 🔑58—Escrow instructions to deliver oil leases on showing of title, "subject to" current taxes held unconditional acceptance of offer in lessee's instructions.

Escrow instructions given by plaintiff lessors that oil leases should be delivered to defendant lessee on showing of title to land in plaintiffs, "subject to" current taxes, *held* to constitute unconditional acceptance of offer in defendant lessee's instructions that escrow holder should pay money which it received from defendant if within 30 days escrow holder received lease free from incumbrances except current taxes, and free from any conditions, reservations, or restrictions which would prevent drilling of oil well on property; phrase "subject to" being read as "subject only to," and valid contract therefore arose from such instructions.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Subject To.]

2. Escrows 🔑8(1)—Escrow holder held lessee's agent to receive lease, with reasonable time to issue title guaranty, where lease was delivered to escrow holder within period prescribed by instructions.

Where defendant as proposed lessee gave escrow instructions that money was to be delivered to plaintiff lessors of oil land, if escrow holder should receive lease from plaintiffs within 30 days, and which lease escrow holder should record for defendant, and show in its guaranty of title, when it could write the same, that title was in lessors free from incumbrances except current taxes, *held* that escrow holder was to receive lease as defendant's agent, and had reasonable time to issue guaranty of title, and, lease having been delivered to escrow holder within 30 days, condition of contract was fulfilled, notwithstanding lease was not recorded nor guaranty of title issued within the 30 days.

3. Escrows 🔑5—Escrow instructions are construable as favorably to other party as uncertainties therein permit.

Escrow instructions are to be construed as favorably to party not preparing them as any uncertainties in them may permit.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Isaiah H. Smith and others against the Star Petroleum Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for appellant.

Clement L. Shinn, of Los Angeles, for respondents.

IRA F. THOMPSON, J. This is an appeal from a judgment for plaintiffs in an action brought to recover from the defendant the sum of $4,500 agreed by defendant to be put in escrow to be delivered to plaintiffs for an oil lease upon property belonging to the latter. While stated in different ways, the appellant urges two reasons why the judgment should be reversed: First, that there was no written contract between the parties; and, second, assuming a sufficient contract, that there was a failure to perform by the respondents within the time provided.

[1] The points raised necessitate a brief statement of the facts. On April 16, 1925, the appellant gave to the California Title Insurance Company its instructions, the material portions of which are as follows:

"We hand you herewith our check for the sum of five hundred dollars ($500.00) and we will hereafter hand you the sum of four thousand dollars ($4,000.00) which you are authorized to pay to the order of Isaiah H. Smith, Maude L. Patrick, Cora Hillerman and Alvira Daisley, jointly or to divide the same between them as they may agree upon, provided that within thirty (30) days from the date hereof, you receive for us an oil lease upon the property hereinafter described" (here follows certain terms of the lease not in dispute in this action) "which said oil lease you will record for us and show in your guarantee of title when you can write the same showing title in said lessors, free and clear of encumbrance except current year's taxes and showing said title to be free from any conditions, reservations or restrictions which would prevent the drilling of an oil well on said property.

"Upon recording said lease, you will deliver a duplicate copy thereof executed by the said lessors and the undersigned to the said lessors.

"Your guarantee of title shall be written with a maximum liability of $1,000.00. The undersigned will pay one-half (½) of the cost of escrow charges, for recording lease, and the said lessors will pay the balance of your charges." (Here follows description of property.)

On April 20th the respondents each signed instructions as follows:

"In your escrow No. 284804

"I hand you herewith in duplicate oil lease in favor of Star Petroleum Company covering lots 1, 2, 3 and 4 of Tract 3244, in the county of Los Angeles, state of California, as per map recorded in book 37 of maps at page 22, records of said county.

"Please deliver one of these leases to the lessee and one to Clement L. Shinn when you have written your guarantee of title with liability of $1,000 showing title to the land in said lease described vested in lessors subject to 1925-26 taxes.

"Receive for me," etc. (Here follows sum of money designated by each of the respondents aggregating $4,500.)

The argument of appellant to support its claim that no contract was entered into is in effect that the respondents did not unconditionally accept its offer as contained in the instructions which we have quoted. In particular it is said that the respondents called for a guarantee of title showing the property to be free from incumbrances except taxes for the current year, and free also from any conditions, reservations, or restrictions which would prevent the drilling of an oil well upon the property, while the instructions of the respondents provided for a guarantee showing title vested in them subject to taxes of 1925–26. Suppose the instructions of the respondents had contained the word "only" after the word "subject," making it read "subject only to 1925–26 taxes," could it then be argued that the respondents had not accepted the offer of the appellant? We think not. For in the assumed situation the respondents would have agreed to evidence a title in themselves, free from all and every kind of incumbrance except the taxes. That the language actually employed is, under all the circumstances, subject to the construction already suggested in the question, cannot be seriously doubted. And that the trial court deemed such construction to be proper is made manifest by a finding to the effect that the parties entered into a contract which called for the respondents to produce "a guarantee of title by the California Title Insurance Company at Los Angeles, California, covering the real property described in said lease, and showing title in the plaintiffs free and clear of encumbrances, except current year's taxes, and showing said title to be free of any conditions, reservations, or restrictions which would prevent the drilling of an oil well on said property, and subject only to exceptions set forth in said lease." Counsel for appellant asserts that Tuso v. Green, 194 Cal. 574, 229 P. 327, and Neher v. Kauffman, 197 Cal. 683, 242 P. 713, are not in point upon the question whether the escrow instructions constitute a contract in the present instance, for the reason that in the two cases mentioned the parties were all present, whereas in the present case the respondents' instructions were not executed or delivered the same day as the appellant's. There is no merit in this contention. The respective writings of the parties in a single escrow contain all of the necessary constituent elements of a contract, and it is immaterial that the acceptance was not deposited therein at the identical time as the offer.

[2] A more serious question is presented by the second attack upon the judgment. Reverting for the moment to the language of appellant's instructions, we find this wording, "provided that within thirty (30) days from the date hereof you receive for us an oil lease upon the property hereinafter described." Counsel say that the words "receive for us" indicate that the escrow holder must have been able to close the escrow and record the lease within the 30-day period, otherwise it could not "receive for" appellant the lease. This argument proceeds upon the premise that, according to Shreeves v. Pearson, 194 Cal. 699, 230 P. 448, 451, the escrow holder is the agent of both parties prior to the performance of the terms of the escrow, and only becomes the agent of each upon its close. In other words, appellant asserts that the title company could not receive a lease for it until it had ceased to act for both parties and its dual agency had changed to an agency for each of the parties. While conceding the ingenious nature of the argument, we must deny it the persuasive force claimed for it by counsel. In the very case upon which he relies a typical example of a deed being deposited to be delivered to the grantee upon payment by the latter of a certain sum of money is discussed. The court says: "The escrow holder is, as to such deed and money, the agent of both parties until such time as the said satisfactory certificate of title is produced." The opinion does not say, and this is the important feature to be noted, that the escrow holder is the agent of the grantor as to the deed and of the grantee as to the money until the satisfactory title is produced but that it holds the deed and the money for *both* during the interim between opening and completion. It follows, therefore, that, when the lease was deposited in the escrow, the escrow holder represented the appellant for the purpose of asserting and protecting appellant's claim thereto in accordance with its instructions until the escrow should be closed, and, when closed, to deliver it over to the appellant (or record, as in the present case). We are accordingly bound to look further to the instructions of the appellant for the proper construction. We observe that, while it was

perfectly convenient for appellant to have provided that the lease was to be recorded within the 30-day period if it so desired, it said: "Which said lease you will record for us and show in your guarantee of title *when* you can write the same showing," etc.

[3] It is apparent from an analysis of the entire document that the 30-day period had reference to the receipt in escrow of the lease, and the time for recordation was fixed upon the fulfillment by the title company of a condition, that of being able to write their guarantee of title—which, in the absence of a time certain, would necessarily have to be within a reasonable time after deposit of the lease. We are the more persuaded to this conclusion by the fact that the instructions given by the appellant were separate from those of the respondents. They were presumably prepared by it, and must therefore, in accordance with a well-settled rule of law, receive a construction as favorable to the respondents as any uncertainties in it may permit. It is not claimed that the escrow was not closed within a reasonable time, but only that the guarantee of title was not written within the period of 30 days.

Judgment affirmed.

We concur: WORKS, P. J.; BURNELL, Justice pro tem.

103 Cal. App. 76

DARRAH, District Attorney, v. SAN JOAQUIN COUNTY. (Civ. 3840.)★

District Court of Appeal, Third District, California. Jan. 6, 1930.

Rehearing Denied Feb. 5, 1930. Hearing Denied by Supreme Court March 3, 1930.

1. District and prosecuting attorneys ⟹5(4)—Reasonable compensation of district attorney for investigating qualifications of prospective jurors in important criminal cases is proper county charge (Pol. Code, § 4307).

Legitimate preliminary investigation of qualifications and fitness of prospective jurors in important pending criminal cases is proper exercise of district attorney's official duty, and reasonable compensation for such services is a proper county charge under Pol. Code, § 4307.

2. District and prosecuting attorneys ⟹5(3)—Expense of employing detectives to investigate qualifications of prospective jurors in criminal cases is proper county charge, recoverable by district attorney in his own name (Pol. Code, §§ 4237, 4307).

Employment of detectives or operatives by district attorney, when necessary for detection of crime or prosecution of criminal cases, as for investigating qualifications and fitness of prospective jurors, is authorized, and expense thus incurred is a proper county charge under Pol. Code, § 4307, and recoverable by district attorney in his own name under section 4237.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Guard C. Darrah, as District Attorney of the County of San Joaquin, against such county. Judgment for plaintiff, and defendant appeals. Affirmed.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for appellant.

Tom H. Louttit, of Stockton, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment against the defendant which was entered for failure to answer after a demurrer to the complaint had been overruled. The problem for solution is whether a district attorney may maintain an action in his own name for necessary expenses incurred and paid by him for the services of detectives employed in the course of the prosecution of criminal cases.

The complaint alleges that the plaintiff as district attorney of San Joaquin county had expended from his private funds the sum of $454.95 as reasonable compensation for the services of several detectives, who are termed "operatives," employed by him to investigate and report to him the qualifications and desirability of accepting prospective jurymen who were summoned on a venire for the trial of criminal cases then pending in the county; that this service was necessary; that the claims of these agents had not been assigned to the plaintiff; that the plaintiff regularly presented to the board of supervisors his individual claim for payment of these expenses duly itemized and verified, which were disallowed. This suit was then commenced.

The defendant county of San Joaquin demurred to this complaint on the ground of uncertainty, misjoinder of parties plaintiff, and that it failed to state a valid cause of action. The demurrer was overruled. The defendant refused to answer, and judgment was thereupon entered against it, from which this appeal was perfected.

The appellant contends that: (1) The employing of detectives or agents to investigate and report the qualifications and desirability of accepting prospective jurors is not a necessary or proper expense incurred by the district attorney in the prosecution of criminal cases; (2) the district attorney is precluded by law from presenting for payment any claim except for his own personal service; (3) the claims of the detectives who performed the services were not assigned to the plaintiff, and the action is therefore not brought in the names of the real parties in interest; and (4) section 4237 of the Political Code, which is the County Government Act of San Joaquin County, is unconstitutional as class legislation in so far as it assumes to authorize the district attorney to personally present a claim for expenses incurred in the

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★Rehearing denied. Hearing denied by Supreme Court.

prosecution of criminal cases except such as are in compensation for or incident to his own personal services.

[1] Section 4307 of the Political Code, after allowing traveling and other personal expenses of the district attorney, provides in part: "The following are county charges: * * * All other expenses necessarily incurred by him [the district attorney] in the detection of crime and prosecution of criminal cases. * * *"

It is not unreasonable to hold that a legitimate preliminary investigation in behalf of the district attorney regarding the qualifications and fitness of prospective jurors who have been drawn on a venire for service in important pending criminal cases is a wise and proper exercise of his official duty, and might greatly tend to prevent a miscarriage of justice. Reasonable compensation for such services is therefore a proper county charge.

[2] The employment of detectives or operatives by district attorneys, when it becomes necessary for the detection of crime or the prosecution of criminal cases, is authorized. Langdon v. Koster, 157 Cal. 39, 106 P. 209. The expense thus incurred is a proper county charge and may be recovered by the district attorney in his own name. Langdon v. Koster, supra; Fulkerth v. Stanislaus County, 67 Cal. 334, 7 P. 754. The case of Langdon v. Koster, above cited, is conclusive of this appeal. That was a petition for a writ of mandate, which was issued, requiring the auditor of the city and county of San Francisco to draw a warrant in favor of the district attorney in payment of expenses incurred in employing a detective for the investigation of crime.

The judgment is affirmed.

We concur: FINCH, P. J.; JAMISON, Justice pro tem.

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103 Cal. App. 1

PACIFIC READY-CUT HOMES, Inc., v. TITLE GUARANTEE & TRUST CO. (Civ. 7101.)

District Court of Appeal, First District, Division 2, California. Dec. 30, 1929.

1. Mortgages ⚷363—Plaintiff claiming to be highest bidder could not compel sale, where he did not allege trustee made public announcement that sale was without reserve (Civ. Code, § 1796).

Plaintiff claiming to be highest bidder at trustee's sale under deed of trust *held* not entitled to compel sale, where he did not allege that trustee made any public announcement that sale would be without reserve and that trustee had authority to make such announcement under Civ. Code, § 1796, relating to auction sales.

2. Mortgages ⚷361—Advertisement of trustee's sale to be at public auction to highest bidder was not equivalent to announcement sale was "without reserve" (Civ. Code, § 1796).

Advertisement of trustee's sale under trust deed to be at public auction to highest bidder for cash was not equivalent to announcement that sale was without reserve within meaning of Civ. Code, § 1796, relating to auction sales.

3. Mortgages ⚷363—Where debt was $101,324.98, and highest bid at trustee's sale was $13,000, trustee could continue sale even after receiving bids.

Where debt under trust deed amounted to $101,324.98, and highest bid at trustee's sale was $13,000, trustee was justified and had power to continue sale even after bids had been received.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by the Pacific Ready-Cut Homes, Incorporated, against the Title Guarantee & Trust Company, to compel a sale to plaintiff upon his bid under a trustee's sale. From a judgment for defendant, plaintiff appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Hyams & Himrod, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem. The court sustained a demurrer to the plaintiff's complaint. The plaintiff declined to amend and judgment was thereupon entered in favor of the defendant. From said judgment plaintiff appeals. The only question involved is whether or not the complaint states a cause of action. So far as material for the purpose of this decision, the complaint alleges: That the defendant is the trustee named in a deed of trust given by the owners and lessees of certain real property to secure the payment of promissory notes in the aggregate sum of $90,000. That the makers of said notes had defaulted in the payments due thereon, and the bona fide holder of said notes had demanded that the trustee sell the trust property to satisfy the debt, then amounting to the sum of $101,324.98. That the defendant, as such trustee, had taken all the preliminary steps necessary to sell the property and had given notice that it would sell at public auction to the highest bidder for cash in gold coin, "on the 26th day of February, 1927, at the hour of 11 o'clock a. m. of said day, at the western front entrance of the Court House in the City and County of Los Angeles, State of California, all the interest conveyed to it by said deed of trust." It is further alleged that at the time so fixed, the defendant continued said sale to the 9th day of March, 1927, at the same hour and place, and that in pursuance of said continuance the defendant, as trustee, offered

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for sale and sold the property described in said deed of trust to the highest bidder. That there were three bids made: The plaintiff herein bid $10,000, followed by a second bid of one L. A. Rose of $12,000, and the third bid by the plaintiff of $13,000. It is then alleged that the trustee thereupon called for other or additional bids, but there were no other bids, although full opportunity was given therefor. It further alleged that the sale was fairly conducted and that the plaintiff's bid of $13,000 was the highest and best bid, and plaintiff thereupon tendered said sum to the defendant and demanded that it execute to him a deed for the said property; but the defendant refused to accept the money or execute the deed, and that over the protests and objections of the plaintiff, then and there publicly announced the postponement of the sale to Monday, March 14, 1927, at the same hour and place. That the defendant has announced the intention of again offering the property for sale on the sole ground that the bid made by plaintiff was inadequate and for the purpose of obtaining a better price for said property. It is further alleged that the price offered by plaintiff was a fair and adequate price for the equity in said real property. The prayer was for equitable relief compelling a sale to plaintiff upon its bid.

[1, 2] Appellant urges that the sale having been advertised as a sale by public auction to the highest bidder, and having been offered for sale and bids received and the highest bid ascertained, it was therefore a sale without reserve, and plaintiff is entitled to a specific performance of its right to a conveyance of the property. In support of this point, counsel quotes from Warlow v. Harrison, 1 El. and El. 309, 28 L. J. Q. B. (N. S.) 18, 29 L. J. Q. B. (N. S.) 14, the following definition of an auction sale without reserve: "Neither vendor nor any person on his behalf may bid and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not." Counsel further cites sections 1792 to 1796 of the Civil Code of this state, both sections inclusive, which in their respective order defines a sale at public auction, as one made by public outcry to the highest bidder on the spot; that such a sale is completed when the auctioneer publicly announces it by the fall of his hammer, or in any other customary manner that the thing is sold; that until such announcement is made by the auctioneer the bidder may withdraw his bid; that when a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit; the last section above cited provides that: "If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and, upon such a sale, bids by the seller, or any agent for him, are void." Conceding for the purpose of a decision of this question that a trustee selling real property by virtue of the power vested in him by a trust deed is an auctioneer within the meaning of the law, we are of the opinion that the complaint is fatally defective because the pleader has not alleged that the trustee made any public announcement that the sale would be without reserve, or if there had been an allegation of such a character it is essential to the cause of action that there be a further allegation that the trustee had authority to announce that the sale would be without reserve. In England and Canada, although there seems to be some doubt on the subject, the rule seems to be, as stated by counsel for appellant, that where property is offered for sale at public auction and bids are received, in the absence of some declaration to the contrary, the sale is one without reserve and the highest bidder is entitled to a specific performance of a right to a conveyance of the property offered. Warlow v. Harrison, supra; McAlpine v. Young (Ont.) 2 C. H. Champ. Rep. 85. In a footnote to Tillman v. Dunman (Ga.) 57 L. R. A. 784, it is said that, "In the United States the rule is even less clearly defined than in England and Canada," and in the same footnote it is also stated that while other states have statutes regulating auctions, Dakota is the only one having a statute similar to section 1796 of our Civil Code. We are of the opinion that whatever the rule may be in other jurisdictions, what constitutes a sale without reserve in California must be based upon a construction of said section. This Code provision says: "If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale. * * *" There is no allegation in the complaint that at the auction sale there was any announcement, public or otherwise, that the sale would be without reserve, nor was there any completion of the sale by the fall of the hammer or otherwise; nor do we believe that because the sale was advertised to be at public auction to the highest bidder for cash, it is the equivalent to an announcement that the sale was without reserve within the meaning of section 1796 of the Civil Code. In Anderson v. Wis. Central Ry. Co., 107 Minn. 296, 120 N. W. 39, 46, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379, it is held that an announcement or advertisement that certain property would be sold at auction to the highest bidder was a mere declaration of intention to hold an auction at which bids would be received. It is not an offer to sell which becomes binding, even conditionally, on the owner when the bid is made. On this subject the court says: "On principle and authority the correct rule is that an announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received." We are satisfied from the foregoing that the sale was not a sale without reserve, and therefore appellant is not entitled to a specific performance of his alleged contract.

[3] The foregoing contention of the appellant has been decided upon the theory that a trustee selling property in accordance with the terms of a trust deed, is governed by the above-cited sections of the Civil Code relating to public sales made by auctioneers. It is claimed by respondent that such sections do not apply to sales by a trustee, and irrespective thereof, it is a duty of the trustee, in the fulfillment of his trusteeship, to adjourn a sale when in his opinion the best interests of the parties require it. In 41 Corpus Juris, p. 965, it is said: "The mortgagee exercising his power of sale, or the trustee proceeding to sell under the deed of trust, has power and authority to postpone the sale beyond the day fixed in the notice. * * * It is the duty of the mortgagee or trustee to postpone or adjourn the sale when the interest of the parties will be promoted thereby, but the exercise of his discretion in determining whether circumstances demanding a postponement or adjournment exist will ordinarily be binding." At page 969 of the same volume it is said: "The mortgagee or trustee must exercise good faith in protecting the rights of the mortgagor and others having an interest in the premises, using all reasonable efforts to make the sale beneficial to such parties by obtaining the full value of the property or the best price possible." In Jones on Mortgages (7th Ed.) § 1873, the rule of law applicable to the power of a trustee or mortgagee to sell by public auction is to the effect that in the exercise of a sound discretion a sale may be adjourned by him, in order to obtain a fair price for the property; without such power the property might be sacrificed to the detriment of both the creditor and debtor. In Beetem v. Garrison, 129 Md. 664, 99 A. 897, the action was to foreclose a mortgage containing a power of sale. The property described in the mortgage was offered for sale by public auction and the sale commenced. The highest bid at that time was $1,000. The attorney making the sale deemed the bid too small and withdrew the property from sale, and it was held he had authority to do so. In Meyer v. Jefferson Insurance Co., 5 Mo. App. 245, where a trustee sold real property of at least the value of $15,000 to the creditor for $3,000, the trustee, knowing that the creditor was intending to bid, if necessary as high as $15,000, but bid only $3,000 because there were no other bidders, it was held that the trustee had the power to adjourn the sale and abused his discretion in not doing so, and the sale was set aside. In the case at bar the complaint alleges that the debt amounted to the sum of $101,324.98, and the highest bid was $13,000. We think that under the facts alleged in the complaint and the authorities above cited, the trustee was justified and had the power to continue the sale even after bids had been received. Other cases tending to support this view are Odell v. Cox, 151 Cal. 70, 90 P. 194; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. 775, and Ainsa v. Mercantile Trust Co., 174 Cal. 504, 163 P. 898.

We are satisfied that the complaint does not state facts sufficient to constitute a cause of action, that the ruling of the court sustaining the demurrer thereto was correct, and the judgment should be affirmed. It is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

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102 Cal. App. 733

In re LINCOLN. (Civ. 5416.) ★

District Court of Appeal, Second District, Division 2, California. Dec. 24, 1929.

Rehearing Denied Jan. 23, 1930. Hearing Denied by Supreme Court Feb. 20, 1930.

1. Attorney and client ⟹57—Questions presented by appeal from judgment suspending attorney did not become moot because of expiration of period of suspension.

Questions presented by appeal from judgment suspending attorney from practice of law did not become moot on expiration of period of suspension before appeal was determined.

2. Attorney and client ⟹52—Accusation that attorney advised client to sign affidavit that money deposited in court had never been accepted, knowing otherwise, held to charge violation of duty (Code Civ. Proc. §§ 282, subd. 4, 287, subd. 2).

Accusation that attorney advised and permitted his client to sign affidavit to effect that money deposited in court in certain foreclosure action had not been accepted, knowing of oral decision of trial judge that foreclosure should be denied because of such deposit, *held* to charge violation of duty as an attorney at law, under Code Civ. Proc. § 282, subd. 4, which would justify disbarment under section 287, subd. 2.

3. Attorney and client ⟹46—Acquittal on charge of obtaining money by false pretenses did not deprive court of jurisdiction to try disbarment proceeding for unprofessional conduct.

That accused had been acquitted on charge of obtaining money on false pretenses did not deprive court of jurisdiction to try proceeding for disbarment of accused as attorney at law, on accusation charging that accused advised and permitted client to sign affidavit to effect that deposit in court had never been accepted, knowing of oral decision of trial judge that foreclosure should be denied because of such deposit.

★Rehearing denied. Hearing denied by Supreme Court.

4. Attorney and client 🔑53(2)—Attorney's testimony held sufficient confession of dereliction of duty to warrant entry of judgment suspending attorney.

In proceeding for disbarment of attorney on accusation that attorney had advised and permitted his client to sign affidavit to effect that deposit in court in foreclosure action had not been accepted, knowing oral decision of judge that foreclosure should be denied because of such deposit, testimony of attorney *held* sufficient confession of his dereliction of duty to warrant court, in conjunction with documentary evidence, to enter judgment suspending attorney from practice of law.

5. Attorney and client 🔑53(1)—Judge's testimony that he would not have permitted withdrawal of deposit, had attorney informed him of oral decision disposing of deposit, held not objectionable as opinion of witness.

In proceedings to disbar an attorney on accusation that he advised and permitted his client to sign affidavit to effect that deposit in court in foreclosure action had not been accepted, knowing of oral decision of trial judge that foreclosure should be denied because such deposit had been made, testimony of judge that he would not have permitted withdrawal of deposit, had he known of such oral decision, *held* not objectionable as being an opinion and conclusion of witness.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Walter Gould Lincoln was suspended from the practice of law, and he appeals. Affirmed.

Walter Gould Lincoln, of Los Angeles, in pro. per.

Paul Vallee and Ovila N. Normandin, both of Los Angeles, for respondent Los Angeles Bar Association.

IRA F. THOMPSON, J. [1] The appeal herein is from a judgment suspending the accused attorney from membership in the legal fraternity for the period of one year, commencing December 24, 1924. The first question with which we are confronted is: Have the questions presented by the appeal become moot by the expiration of the period of suspension? (There is no doubt but that the suspension period has expired on account of the self-executing character of the judgment. See In re Graves, 62 Cal. App. 168, 216 P. 386, and Lincoln v. Superior Court [Cal. App.] 271 P. 1107.)

The respondent Bar Association relies upon the authority of Goldsmith v. Board of Education, 63 Cal. App. 141, 218 P. 296, and two cases therein cited, to support their assertion that the questions raised by the appeal are now of only academic interest. The cited case was one wherein the plaintiff and appellant, Goldsmith, had been suspended as a schoolteacher for unprofessional conduct, after a hearing by the board of education. He instituted a proceeding in mandamus by which he sought to be restored to his position. Judgment in the superior court went in favor of the board of education, and the petitioner appealed. Before the appeal was determined, the period of suspension expired, and petitioner was reinstated. The court held, upon the motion for dismissal, that petitioner's right to a salary during the period of suspension was involved, in addition to the question of reinstatement, and therefore, the appeal should not be dismissed. The reasoning upon the other question of whether the court should entertain an appeal upon the question of reinstatement is obviously dicta. Aside from this fact is another element which distinguishes it from the present situation in this: That there the appeal was not from the order finding the petitioner guilty and suspending him, but an appeal in the mandate proceeding, which could only result in an order directing the board to reinstate. Weaver v. Reddy, 135 Cal. 430, 67 P. 683, is to be distinguished on the same ground. The third case, Bradley v. Voorsanger, 143 Cal. 214, 76 P. 1031, is very patently not in point. There the plaintiff brought action to enjoin the holding of an election. The trial court denied the injunction. Before the appeal could be heard the election had been held.

Manifestly this case is of no assistance to us, because it illustrates a very obvious instance of the question having become moot. No judgment which could have been entered could possibly have afforded the plaintiff appellant any relief. It cannot be gainsaid that courts should not attempt to determine mere academic questions, or render judgments which are ineffective. But is that the instant situation? Assuming that an attorney who has been found guilty of unethical conduct, and for that reason suspended, is not strictly comparable to a judgment debtor or one convicted of a criminal offense, our attention has not been directed to a case directly in point, nor have we been able to discover any. In civil matters, the law, at least in California, is settled. The party against whom a judgment is rendered does not lose his right of appeal by payment of the judgment, unless the payment is made, by way of compromise. Warner Bros. v. Freud, 131 Cal. 639, 63 P. 1017, 82 Am. St. Rep. 400. Nor can the judgment debtor be deprived of his right of appeal by execution of the judgment and its satisfaction. Kenney v. Parks, 120 Cal. 22, 52 P. 40. We think it is apparent that in the instances covered by the authorities cited it could not be seriously argued that the questions had become moot. Yet these adjudications do point to a distinction made in some of the subsequent criminal cases involving fines, wherein it is said that, if the payment of the fine be voluntary, the right of appeal is lost, whereas, if its payment be considered involuntary, the right of appeal is not lost. And at this juncture it is well to note that in the present proceeding the satisfaction of the judgment was entirely without the acquiescence of the appellant.

There has been a considerable divergence of opinion in criminal cases. We were at first inclined to set most of them down for the purpose of comparing the logic upon which they are premised. But it seems sufficient, inasmuch as we have concluded that the proper rule is announced in the jurisdictions of Massachusetts, Wisconsin, New York, Washington, and Alabama, to call attention to some of the authorities there. In the well-reasoned case of State v. Winthrop, 148 Wash. 526, 269 P. 793, 796, 59 A. L. R. 1265, the court says:

"Notwithstanding these views of the courts touching the question of waiver of right of appeal by payment of a civil money judgment, there seems to be a very decided conflict in the decisions touching the appealable effect of satisfying a criminal or criminal contempt judgment by payment of a fine or suffering imprisonment thereby adjudged against the accused, even when such submission to the judgment is clearly the result of coercion. The reasoning of the courts which hold to the view that such satisfying of a criminal or criminal contempt judgment constitutes a waiver of the right of appeal seems for the most part to be rested upon the theory that nothing can be restored to the accused if the judgment against him be reversed, and that therefore the question of the correction of the judgment of conviction * * * becomes merely moot. Those decisions, it seems to us, lose sight of or purposely ignore that damaging effect of such a judgment which everybody knows reaches far beyond its satisfaction by payment of a fine or serving a term of imprisonment. The Alabama court, in Johnson v. State, 172 Ala. 424, 55 So. 226, Ann. Cas. 1913E, 296, learnedly reviewed the question of waiver of appeal by Johnson by his payment of a fine adjudged against him for selling intoxicating liquor. Justice Somerville, speaking for the court, holding that such satisfaction of the judgment did not constitute a waiver by Johnson of his right of appeal, very pertinently observed:

"'Although there are a few cases to the contrary, the rule is nearly universal in civil cases that mere payment of a judgment, or obedience to the mandate of the court, works no waiver of the right of appeal. * * * We can discover no valid reason for a different result in criminal cases. The assumption in State v. Westfall, 37 Iowa, 575, and other cases, that a convicted defendant, who is ordered to be committed to jail, unless the fine and costs be paid or secured, and, under that threat from a valid judgment, pays the penalty assessed, does so voluntarily, is but a grim form of jesting, and, utterly at war with the generally accepted notion of the meaning of that term. * * * Nor do we conceive that the supposed inability of the defendant to recover, after reversal of the judgment, the sum paid by him for its satisfaction, as is predicated in some of the cases under criticism, is a matter of vital importance. Whether or not the defendant in this case might, by order or restitution, or by any other legal remedy, recover the money he has paid is a question which is not before us, and which we need not now consider. The right to appeal and reverse an erroneous judgment in a criminal case cannot, we are satisfied, be grounded solely on that consideration, and we concur in the opinion of Cowen, J., in Barthelemy v. People, 2 Hill (N. Y.) 248, 255, where he says, in discussing this very question, in relation to a conviction for criminal libel: "But the payment or satisfaction of an erroneous judgment against a party can never be allowed as a bar to a writ of error, even in a case where we must see that no restitution could follow the reversal as a legal consequence, and no costs be recovered. An erroneous judgment against him is an injury per se, from which the law will intend he is or will be damnified by its continuing against him unreversed. * * * A judgment on the merits is conclusive between the parties, and, if not by direct, it may be followed by remote, consequences actually injurious." And this view has been quoted and approved by the Supreme Court of Illinois. Page v. People, 99 Ill. 418, 425. The motion to dismiss the appeal must therefore be overruled.'

"In Roby v. State, 96 Wis. 667, 71 N. W. 1046, holding to this same view of the law, Justice Winslow, speaking for the court, said: 'It appears by the record that the plaintiff in error was sentenced to one year's imprisonment in May, 1896, and consequently that his term must now have expired. This fact, however, makes no difference with the disposition of the case. A person convicted of crime may prosecute his writ of error while serving his sentence, and the fact that he may serve out his entire sentence before the decision of his case does not affect his right to a reversal of the judgment if it be erroneous. The mere payment of a judgment in a civil cause does not operate to bar or waive the right to appeal therefrom (Sloane v. Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21), and for stronger reasons the compulsory working out of a judgment in a criminal case does not debar a man from obtaining a reversal of an erroneous conviction, and thus removing the stigma which wrongly rests on his name and reputation.'"

To the quotation we deem it proper to add the following from People v. Marks, 64 Misc. Rep. 679, 120 N. Y. S. 1106, 1109: "But I do not agree with the learned counsel that the question is purely academic. I am of opinion that, if the defendant had been unjustly compelled to pay a fine, his money should be returned to him. Of far more importance, however, is the defendant's right to be relieved of the odium and disgrace of a conviction. To a citizen of good reputation, this is of more serious consequence, and the pecuniary damage he has sustained is of trifling import." And also we quote from Commonwealth v. Fleckner, 167 Mass. 13, 44 N. E. 1053, as follows: "We should be slow to suppose that the legislature meant to take away the right to undo the disgrace and legal discredit of a conviction (Pub. St. c. 169, § 19) merely because a wrongly convicted person has paid his fine or served his term. The fact that no indemnity is provided by this act is far from enough to lead us to that conclusion. Of course, the payment of the fine in accordance with the sentence was not a consent to the sentence, but a payment under duress." A notation of the principal authorities to the contrary will be found in State v. Winthrop, supra.

If it be true that one who has been found guilty of a criminal offense and has satisfied the judgment by payment of the fine or suffering a term of imprisonment may yet be entitled to be relieved of the odium and disgrace of the wrongful conviction, it must be equally, if not more, just to remove from the name of a member of the ancient and honorable profession of the law the stain of a judgment which brands him as unfaithful to the trust reposed in him. There is no asset to be possessed by the lawyer so dear or so valuable as his known character, or reputation for honesty, integrity, and sincerity of purpose. When it is wrongfully assailed, he is damaged, not only in the finer sensibilities, but also in a financial measure impossible to accurately estimate. We hold to the opinion that the appellant should not be foreclosed of his right to remove this blot upon his record, if in fact he was wrongfully convicted, by the situation forced upon litigants by the congested condition of the calendar, thus rendering it impossible to determine the appeal until after the period of suspension had expired.

[2] We therefore pass to a consideration of the merits of the appeal. The first point urged by the appellant is that the accusation does not state a ground for disbarment. The accusation in effect charges that the appellant was counsel for Estelle R. Spaulding, for whom he filed an action on September 20, 1922, wherein it was sought to rescind a contract between Estelle R. Spaulding and C. N. Legge, and to cancel a chattel mortgage given by appellant's client to C. N. Legge; that on October 4, 1922, Estelle Spaulding deposited in court the sum of $75, being the amount of the monthly installment due and payable on that date according to the terms of the mortgage; that thereafter similar deposits were made monthly until a total sum of $1,500 had been paid in; that of said amount $1,000 was by stipulation of both parties paid to the owners of the property as rental; that on October 13, 1922, C. N. Legge commenced an action against Spaulding for the foreclosure of the chattel mortgage; that both actions went to trial on May 16, 1923; that two days later the trial judge, Hon. L. H. Valentine, orally announced his decision to the effect that, although the defendant in the rescission action had made certain false and fraudulent representations, yet the plaintiff had waived and lost her right of rescission, and that in the foreclosure action the deposits in court of the monthly sums of $75 having been made for the use and benefit of the plaintiff, and as payment of all sums falling due according to the terms of the mortgage, the defendant Estelle R. Spaulding was not in default and plaintiff was not entitled to a judgment, but that the sums so on deposit belonged to him. The accusation then sets forth that, although the accused was present when judgment was so announced on May 18, 1923, yet he caused and permitted his client to swear to an affidavit that she had deposited the sum of $500 as a tender in court, and that the tender had not been accepted, and she desired a return of the tender; that, although accused well knew that the tender had in fact been accepted, he presented the affidavit to another judge of the superior court, Hon. Sidney N. Reeve, with the statement that no judgment had been rendered in the action, and that the tender had been rejected, and without disclosing the announcement of Judge Valentine to Judge Reeve, and secured and induced, by his statements and failure to disclose vital facts, Judge Reeve to make an order directing the clerk to turn over to his client the sum then on deposit. The accusation also alleges that Estelle Spaulding did succeed in withdrawing the sum of $481; that accused never advised C. N. Legge, or his counsel, or Judge Valentine, of the withdrawal of said sum, but permitted findings and judgment to be entered in accordance with the oral announcement; that Judge Reeve relied upon the statements of accused and the affidavit when making the order mentioned, and would not have made the order, had he been advised of the announced decision of the trial judge.

Section 287 of the Code of Civil Procedure provides in subdivision 2 thereof that an attorney may be removed or suspended for "any violation of the oath taken by him, or of his duties as such attorney and counselor." Section 282 of the same Code, in defining the duties of an attorney, by subdivision 4 makes it mandatory for the lawyer "to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." In the case of People v. Pearson, 55 Cal. 472, the Supreme Court made quick disposition of a cause involving somewhat similar action. In that case the attorney advised his client to verify a complaint containing allegations which he knew to be untrue, and which he led her to believe had been corrected before she signed it. The court said in its opinion that it was unnecessary "to comment upon the conduct here disclosed." An analysis of the facts in the present case brings us to a similar conclusion. When the appellant advised and permitted his client to sign an affidavit to the effect that the tender had never been accepted, knowing that the oral decision of the trial judge that foreclosure should be denied, because the payments had been made in court for the benefit of plaintiff in the second action, he put himself in a position comparable to the attorney in the case cited. When he withheld from Judge Reeve the information that the trial judge had acted upon the theory that the deposits made were for the benefit of the plaintiff in the foreclosure action, he was guilty of trickery and misleading a judge by artifice. It makes no difference whether the judicial officer was misled by a false statement, an unrighteous silence, or a combination of both. The fact remains that he was betrayed into taking action he would not have taken, had he not relied upon the professional character of the attorney. The accusation in our opinion sets forth a flagrant violation of appellant's duty as an attorney at law and his oath of office as such.

[3] The next assertion of the appellant is that the court had no jurisdiction to try the cause, "since the accused had previously been acquitted before this same court upon a felony charge based upon the same facts." He relies upon Ex parte Tyler, 107 Cal. 78, 40 P. 33, People ex rel. Deneen v. John, 212 Ill. 615, 72 N. E. 789, People v. Comstock, 176 Ill. 192, 52 N. E. 67, In re Z, 89 Mo. App. 426, State v. Gebhardt, 87 Mo. App. 542, and Jones v. Sanderson, 287 Mo. 176, 229 S. W. 1087, as supporting his contention. To make the situation clear, we note that the record discloses that appellant was charged by information with obtaining money by false pretenses, which information alleged the facts set forth in the accusation. The defendant was acquitted by the verdict of the jury. Here the appellant is accused of unprofessional conduct. Assuming that the facts did not constitute the offense of obtaining money by false pretenses, it does not follow that he was not guilty of unethical acts. Had the accusation charged a violation of the laws of the state in a matter distinct from the attorney's professional conduct, committed in his private capacity and not by virtue of his office as an attorney, then the authorities upon which appellant relies would necessarily be conceded great persuasive force. And some of them have a bearing upon the impropriety of proceeding to try the disbarment charge before the criminal complaint, but otherwise they apparently have no application.

[4] There are a number of assignments of error relating to the reception or rejection of testimony and the refusal of the court to dismiss the proceeding. It is unnecessary to comment upon any of them herein, other than one, for the reason that the accused attorney took the stand after all of the pleadings, including the affidavit of Mrs. Spaulding, had been introduced, and gave his own version of his preparation of the affidavit and the interview with Judge Reeve in these words: "I dictated the affidavit to my stenographer; she wrote it, and the next day, Saturday, I took it to the presiding judge, Judge Reeve. There were, no doubt, a number of attorneys waiting; there was no unusual hurry, any more than there is upon any other day of the week, at the presiding judge's bench, but there were other lawyers waiting. I presented the affidavit to Judge Reeve, and I said: 'This case has been tried; the judgment has not yet been rendered. This money was deposited in court some time ago, and has not yet been accepted, and my client wants to withdraw it.' Judge Reeve asked me absolutely nothing further about the case in way, shape, nor form." Here in the words of the appellant is a sufficient confession of his dereliction of duty to warrant the court, in conjunction with the documentary evidence, to enter the judgment complained of. From his own mouth comes the statement that he failed to communicate to the court the true facts concerning the litigation. In view of this testimony and the unprejudicial nature of the assignments, we are not disposed to unduly lengthen an opinion already extended.

[5] We cannot summarily dismiss appellant's contention that it was error to permit Judge Reeve to testify "that, had said facts been disclosed to said Hon. Sidney N. Reeve by said Walter Gould Lincoln at that time, said Hon. Sidney N. Reeve would have refused to sign the order permitting the withdrawal of said funds and the payment thereof to Estelle R. Spaulding." The testimony thus introduced was, on account of the then illness of Judge Reeve, in affidavit form, with the stipulation of all parties that he would testify in accordance with the averments thereof if he were present in court; the defendant reserving the right to object to the portion just quoted, on the ground that it was the opinion and conclusion of the witness.

The objection is not well founded. It is always permissible under a well-known rule of evidence to ask a witness, who claims to have been defrauded by the false representations of another, whether he relied upon the statements and representations of the latter. The testimony given here was of the same import. Furthermore, the trial judge was justified in drawing a like inference from the facts of the case, upon the theory that a judge of one department would not knowingly render the judge who tried the case impotent to carry out his announced decision.

Judgment affirmed.

I concur: CRAIG, Acting P. J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

103 Cal. App. 93

FRANKISH v. FRANKISH CO. et al.

(Civ. 45.)

District Court of Appeal, Fourth District, California. Jan. 7, 1930.

1. **Quieting title 🔑44(1)—Burden was on plaintiff suing to quiet title to show title in herself.**

In action to quiet title, burden was on plaintiff to show title in herself.

2. **Quieting title 🔑10(1)—Right to recover of plaintiff suing to quiet title depends on strength of her own title, not on weakness of defendant's title.**

In action to quiet title, right of plaintiff to recover depends on strength of her own title, and not on weakness of title relied on by defendant.

3. **Deeds 🔑56(3)—In effective delivery of deed, there must be actual or constructive change of possession of instrument with intent by grantor to transfer title to grantee (Civ. Code, § 1054).**

To constitute effective delivery of deed required by Civ. Code, § 1054, to make grant take effect, there must be an actual or constructive change of possession of the instrument, with intention on part of grantor to transfer title from himself to grantee.

4. **Deeds 🔑208(1)—Evidence held to sustain finding that there was no delivery of deed as required to cause title to pass (Civ. Code, § 1054).**

In action to quiet title brought by one of two grantees against grantor, evidence *held* sufficient to sustain trial court's finding that there was no delivery of deed from corporate grantor to grantees, or either of them, as required by Civ. Code, § 1054.

5. **Evidence 🔑207(2)—Grantor's counsel's opening statement held not construable as admission that deed was delivered so as to pass title (Civ. Code, § 1054).**

In action by grantee against grantor to quiet title, grantor's counsel's opening statement admitting that deed was executed, but asserting that deed was thereafter placed in corporate grantor's safe, and never delivered, and was not intended to be delivered until certain prerequisites were consummated, and that such prerequisites were never consummated, and that there was no delivery of deed, *held* not construable into admission that deed was delivered to grantees, as required by Civ. Code, § 1054.

6. **Deeds 🔑200—Proof that grantor received no consideration for deed held admissible to support grantor's defenses of nonexecution and nondelivery of deed, notwithstanding recital therein of valuable consideration.**

In grantee's action against corporate grantor to quiet title, in which grantor set up defenses that deed was neither executed nor authorized by defendant, and was signed without authority by former officer whose term had expired prior to signing of deed, that deed was never delivered to grantees, as required by Civ. Code, § 1054, and was made without consideration, *held* that defendant was entitled to prove that it received no consideration for deed under said defenses, notwithstanding deed itself recited a valuable consideration.

7. **Appeal and error 🔑1009(4)—Weight of evidence in quiet title action held for trial court to determine.**

Weight of evidence in action to quiet title was for trial court to consider and pass on.

8. **Appeal and error 🔑1010(1)—Trial court's finding supported by any competent evidence will not be disturbed on appeal.**

Where there is any competent evidence to support trial court's finding, it will not be disturbed on appeal.

9. **Appeal and error 🔑1170(7)—Trial court's erroneous rulings on admission or rejection of evidence held not prejudicial to plaintiff who failed to prove her case (Const. art. 6, § 4½).**

Trial court's erroneous rulings on admission or rejection of evidence were not prejudicial to plaintiff suing to quiet title, where there was a fatal failure to prove her case by plaintiff, and, under Const. art. 6, § 4½, such errors therefore did not furnish grounds for reversal.

10. **Pleading 🔑236(1)—Application to amend pleading is addressed to trial judge's sound discretion.**

An application to amend a pleading is addressed to the sound discretion of the trial judge, who has considerable latitude in the exercise of such discretion.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Sari B. Frankish against the Frankish Company and another. From an adverse judgment, plaintiff appeals. Affirmed.

Swing & Wilson, of San Bernardino, for appellant.

W. E. Byrne, of San Bernardino, Isaac Jones, of Ontario, and Harry A. Reese, of San Bernardino, for respondents.

MARKS, J. Appellant brought this action to quiet title to a house and six lots in the city of Ontario, county of San Bernardino, state of California. She claimed to deraign her title through a deed dated August 12, 1924, and alleged to have been executed by the Frankish Company, a corporation, one of the respondents to appellant, and Charles Frankish, the other respondent. She alleged that Charles Frankish refused to join with her as plaintiff in the action, and was therefore made a defendant.

The respondent the Frankish Company, which for brevity will be referred to as the corporation, denied title in appellant and Charles Frankish, and asserted title in itself. It alleged that the deed was neither executed nor authorized by the corporation, and was signed without any authority by its president and a former secretary whose term of office had expired prior to his signing the deed; that it was never delivered to the grantees; that it was made without any consideration; and other special defenses that it will not be necessary to notice at this time.

Charles Frankish filed a disclaimer. The court found against appellant and in favor of the corporation on the question of the ownership of the property, as well as on its special defenses, and entered judgment accordingly.

Appellant complains of the findings of the court on the grounds that they are not supported by the evidence, and are contrary to the evidence, and also of many errors in the rulings of the court on the admission and rejection of evidence during the trial.

We will first consider the evidence in support of the finding that the deed under which appellant claims her title was never delivered by the corporation, for, if this finding is supported by the evidence, appellant's action must fail, and the judgment must be affirmed, unless there were errors occurring during the trial that were prejudicial to her substantial rights.

The corporation was organized and existed as a corporation for profit. It acted as a holding company with the title vested in it of property formerly owned by Charles Frankish, who, with his sons, daughter, and son-in-law, were its sole stockholders, and from among whom its board of directors and officers were selected. It was organized in August, 1912. Charles Frankish had been its president from its organization to a date some little time prior to the trial of this action. Hugh Frankish, one of the sons, was secretary of the corporation prior to and on the morning of August 12, 1924. On this morning a new board of directors was elected by the stockholders, and Emil F. Stroth, a son-in-law, was elected secretary. The corporation had its principal office in the city of Ontario. In this office was a large safe in which it kept its books, records, and important papers. It contained a separate compartment in which Charles Frankish kept his personal securities and papers.

About 6 months prior to August 12, 1924, Charles Frankish, who was a widower of the age of about 78 years, met appellant, who was then Mrs. Sari Buffington, a widow of the age of about 43 years. The acquaintance ripened into courtship, and they were first married on August 13, 1924. Seemingly there was some defect in their first ceremony, for they separated in the fall of 1924, and Charles Frankish brought suit for annulment of the marriage. This action was subsequently dismissed, and the two were again married on January 13, 1925, and resumed cohabitation. They lived together for some little time, and then separated, which separation was permanent. This action was commenced by appellant on March 25, 1926.

Some time in June or July, 1924, the stockholders of the corporation commenced discussing the division of its assets among themselves and the winding up of its affairs. The approaching marriage of Charles Frankish was probably a contributing cause to these discussions. He expressed a desire to receive the Ontario property which is the subject of this litigation, as a part of his share in case the division of assets was finally consummated. It had been his home for many years. On August 10, 1924, the discussions reached the point of tentatively estimating the value of the various properties of the corporation, these totaling a sum slightly in excess of $169,000. The proposed division of the assets of the corporation was thereafter abandoned.

The capital stock of the corporation was divided into 750 shares of the par value of $100 each. On August 12, 1924, the ownership of the stock appeared on the books of the corporation as follows: Charles Frankish, trustee, 250 shares; L. J. Frankish, a son, 115 shares; L. J. Frankish, trustee, 10 shares; R. Evelyn Stroth, a daughter, 125 shares; Emil F. Stroth, trustee, a son-in-law, 125 shares; H. Frankish, trustee, a son, 125 shares. On the afternoon of August 12, 1924, after the election and qualification of the new board of directors and the election of Emil F. Stroth as its secretary in the place of Hugh Frankish, who appears as H. Frankish in the list of stockholders, Charles Frankish asked his son Hugh to prepare a deed to the Ontario property from the corporation to Charles Frankish and Sari B. Frankish. This Hugh did, and the deed was then signed by Charles Frankish as president of the corporation and Hugh Frankish as secretary, and the corporate seal attached. Hugh then took the deed to a notary public, who attached an acknowledgment. The only authority given the officers to dispose of corporate property was found in a resolution passed on September 3, 1912, by which the president and secretary were authorized to "sell and convey any of the lands of said company at such price or prices and on such terms as they may deem for the best interests of the company." No other authority was given by the board of directors to execute the deed in question.

Up to this point there is no conflict in the testimony before us. In the balance of the evidence there is not so much a conflict in the evidence as there is a conflict on the construction put upon it and the conclusions to be drawn from it by the parties.

In support of the court's finding that the deed was never delivered to either Charles Frankish or Sari B. Frankish, we have the testimony of two witnesses. Hugh Frankish testified that he signed the deed as secretary of the corporation because his father requested him to do so, and, as he was in the habit of signing conveyances, he did not take into consideration the fact that he was no longer secretary. The reason given for drawing and signing the deed was that, as Charles Frankish was going to be married the next day, and was going away on a wedding trip, he desired to have the deed signed and acknowledged to show that he would receive the property if the assets were finally divided among the stockholders. There was no intention of having the deed delivered nor of vesting title in the grantees unless and until the stockholders should consummate the division of the corporation assets. In case this was finally accomplished, and before delivery, it would be necessary to finally determine and agree upon the value to be placed upon this and each other property of the corporation, which value would be charged against the interest of the stockholder receiving such parcel of corporate property. After the acknowledgment was attached to the deed on August 12, 1924, Hugh returned it to the corporation safe, where he placed it in a compartment containing the corporation papers and not in the compartment used exclusively by his father, after which time he did not again see the deed. The only time that Charles Frankish had physical possession of the instrument, to the knowledge of this witness, was when he attached his signature thereto as president of the corporation.

Charles Frankish corroborated the testimony of Hugh in all particulars. He took up the narrative of the disposition of the deed after it had been placed with the corporation papers in the safe by his son. He testified that, without the knowledge or consent of any other stockholder, officer, or director of the corporation in the late afternoon of August 12th, he took it from among the corporation papers in the safe, "borrowed it," as he described his act, and carried it to the home of Sidney C. Ford, where he met appellant and showed it to her. In reply to questions as to what he said when he showed the deed to her, he replied, "I said the company had agreed to deed the property to me. I could not say the exact words. My recollection is I told her the company had agreed to deed the property to me." On the same evening he returned the deed to the safe and placed it among the papers of the corporation and not in his private compartment. When the witness discovered, in September or October, 1924, that his marriage ceremony was defective, he told one of his sons to destroy the deed, which was not done. Later, appellant and Charles Frankish appeared to have effected a reconciliation, and his action to have the marriage annulled was dismissed. He then took the deed from among the company papers, where it had reposed up to that time, and placed it in his own private compartment, without the knowledge of any other stockholder, director, or officer of the corporation. Some time later, probably in December, 1924, it was removed from the private compartment of Charles Frankish by some one, which, according to the evidence, was the last time its existence appeared. It was not recorded and was not produced at the trial, and there is a strong inference that it was destroyed.

To meet this evidence, appellant produced two witnesses besides herself. As to the purported delivery of the deed she testified that on the afternoon of August 12, 1924, she met Charles Frankish on the lawn of the Ford home, when the following occurred: "He said to me—he put his hand in his pocket and pulled out this deed and said, 'the children have signed over the old home place to you and I as a wedding gift.' He opened it and handed it to me opened, and I took it. * * * I said that was so sweet and kind of the children, and to thank them for me, and I folded it up and handed it back to him and told him to put it in a safe, that I had no place to leave it, as we were leaving in the morning, and he said he would." Sidney C. Ford and Maude L. Ford both were present at this conversation, and described it in practically the same language used by appellant.

Upon their return to Ontario, after the marriage, Mr. and Mrs. Frankish occupied the property involved herein, as their home without paying any rent, for about a year, except for the period that Mr. Frankish was absent during the fall of 1924, when only Mrs. Frankish lived there. They moved to another location in Ontario, which was referred to as the "Almsley Square" home. Title to this property finally found its way into the name of appellant.

Under the date of February 13, 1925, Charles Frankish caused to be served on his children and his son-in-law a written demand for the return of the deed to the Ontario property and other instruments and personal property, stating that the same had been forcibly and illegally abstracted from his possession without his knowledge or consent. This demand was followed in March, 1925, by a suit in the superior court of San Bernardino county, to recover possession of the same personal property to which he asserted ownership. This case was dismissed before trial.

[1, 2] We have detailed the evidence in this case upon the question of the delivery of the deed because it is decisive and controlling on this appeal. In this action to quiet title the burden was on the plaintiff to show title in herself, and her right to recover necessarily depended on the strength of her own title, and not on the weakness of the one relied upon by the defendant. Rockey v. Vieux, 179 Cal. 681, 178 P. 712. "A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor." Section 1054, Civ. Code. "There is no better established legal principle than that the transfer of the ownership of real estate, so far as the transfer is to be made by deed, necessitates a delivery of that deed to effectuate the passing of title from the grantor to the grantee. Delivery is the force that vitalizes the instrument without which, though signed and

acknowledged, it is invalid, and not effective for any purpose. If delivery is wanting, the deed is void ab initio, and is no better than a blank form. Consequently it is recognized that prior to its actual delivery, the grantor named in the instrument may change the character of the delivery originally contemplated, and has the right to destroy and nullify the instrument itself." 9 Cal. Jur. 149, and cases cited.

[3, 4] In an effective delivery of a deed there must be an actual or constructive change of possession of the instrument, coupled with an intention on the part of the grantor to transfer the title from himself to the grantee. "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." Williams v. Kidd, 170 Cal. 631, 151 P. 1, 3, Ann. Cas. 1916E, 703; Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734. We have no trouble in reaching the conclusion in this case that the evidence amply supports the finding of the trial court that there was no delivery of the deed from the corporation to Charles Frankish and Sari B. Frankish or either of them. Proof of an intent on the part of the grantor to divest itself of title is lacking.

[5] Appellant contends that, because of certain admissions in the opening statement of counsel for respondent, it cannot deny the delivery of the deed, and quotes from such statement the following: "It is true the deed was executed. The deed was signed by the company officials on the 12th day of August." Reading further in the same statement we find the following: "It was placed in the company safe and was never delivered to Mr. Frankish and was not to be delivered to him until such time as the arrangement of a settlement of the estate of the company was consummated; that that was never consummated, and our claim is that no delivery was ever made. * * * Our claim is there never was any delivery of the deed." We do not believe that this can be construed into an admission that the deed was delivered to the grantees or either of them. The case was not tried upon any such theory.

[6] Appellant complains of the rulings of the trial court in overruling her objections to questions, the answers to which elicited the information that no consideration had been paid by either Charles Frankish or appellant for the Ontario property, when the deed itself recited a valuable consideration. She invokes the rule that "evidence of this character cannot be allowed, in the case of a deed, 'when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated.'" Winchester v. Winchester, 175 Cal. 391, 165 P. 965, 966. It is not necessary for us to pass upon the applicability of this rule to the case before us as the evidence was admissible under another theory. If the corporation had received and retained an actual valuable consideration for the Ontario property, it might not have been in a position to assert some of the defenses relied upon by it. It was therefore at least entitled to prove it received no consideration for the deed under these defenses.

[7, 8] Appellant contends that the trial court erred in sustaining objections to her offer in evidence of several letters exchanged between Charles Frankish and his children and son-in-law. The greater number of these letters are not in the record. Without the letters or a statement of their contents before us we cannot determine that the rulings of the trial court were erroneous. It is incumbent upon appellant to show prejudicial error in the rulings of the trial court on the admission or rejection of evidence, and a judgment will not be reversed unless such prejudicial error appears. Article 6, § 4½, Const. The letters before us serve only to impeach the testimony of witnesses for the corporation on the question of the delivery of the deed to the Ontario property, and would go to the weight of the evidence before the trial court. This error, if error it be, was not prejudicial to appellant, as the weight of the evidence is something to be considered and passed upon by the trial judge. Where there is any competent evidence to support a finding, it will not be disturbed on appeal. There was such evidence in this case.

[9] Some of the other rulings of the trial court upon objections to the admission of evidence, and motions to strike testimony, were undoubtedly erroneous, but none of them affects the failure of appellant to prove her title to the Ontario property, in that the deed to her was not delivered. This failure in her evidence is fatal to her case, and for this reason the errors of the trial court in its rulings upon the admission or rejection of evidence were not prejudicial to her, and do not furnish sufficient grounds for a reversal of the judgment.

[10] At the close of the trial, over the objection of appellant, the corporation was permitted to file an amendment to its answer to make its pleadings conform to the proof. While the amendment restated in greater particularity some of the defenses set forth in the original answer, it, in reality, pleaded but one new defense, namely, that the execution of the deed was beyond the powers of

the corporation and ultra vires. An application to amend the pleadings is addressed to the sound discretion of the trial judge, and considerable latitude is given him in the exercise of such discretion. The judgment of the trial court is supported by the failure of appellant to establish her title, and this court does not need to go beyond this one question to affirm it. Therefore the filing of the amendment becomes unimportant, as it is not necessary for us to consider its allegations in reaching the conclusions that the judgment of the trial court must be affirmed.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

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103 Cal. App. 27

FRIGIDAIRE CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 7093.)★

District Court of Appeal, First District, Division 1, California. Dec. 31, 1929.

Rehearing Denied Jan. 30, 1930. Hearing Denied by Supreme Court Feb. 27, 1930.

1. Master and servant ⟹372—That injuries to employee were not of kind to be anticipated does not defeat claim to compensation (Workmen's Compensation Act).

That injuries to employee were not of kind to be anticipated nor peculiar to employment in which he is engaged does not defeat claim to compensation under Workmen's Compensation Act (St. 1917, p. 831, as amended).

2. Master and servant ⟹373—Where zone manager in charge of installing refrigerator plants was shot by wild bullet from policeman's pistol while waiting for train, injury "arose out of employment" (Workmen's Compensation Act).

Where zone manager in charge of installation of refrigerator plants, with his headquarters in San Francisco, after finishing his labors in Reno, Nev., proceeded to railroad station, intending to board San Francisco train, and, as he stood on edge of platform adjacent to street identifying his hand luggage, he was struck by wild bullet from policeman's pistol and died, injury arose out of his employment so as to be compensable under Workmen's Compensation Act (St. 1917, p. 831, as amended), since such danger could be classified as street risk or travel hazard.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Arising Out of Employment.]

Proceeding under the Workmen's Compensation Law by Catherine Melke and another, claimants for the death of Elmer Melke, employee, opposed by the Frigidaire Corporation, employer, and the Royal Indemnity Company, insurance carrier. The Industrial Accident Commission awarded compensation, and the employer and the insurance carrier bring certiorari. Affirmed.

R. P. Wisecarver, of San Francisco, for petitioners.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

Bronson, Bronson & Slaven, of San Francisco, for respondent Catherine Melke.

KNIGHT, J. While standing on the open platform of the railroad station at Reno, Nev., awaiting the arrival of a train which he was about to board for San Francisco, Elmer Melke was struck and mortally wounded by a stray bullet fired by a police officer at a suspected criminal whom the officer was pursuing along the public street adjacent to the railroad station; and on account of Melke's death his widow and son were awarded compensation by the Industrial Accident Commission. Thereafter his employer, Frigidaire Corporation, and its insurance carrier, Royal Indemnity Company, instituted this proceeding in certiorari to have the award annulled upon the ground that the injury which resulted in Melke's death did not arise out of his employment.

The deceased was employed by said corporation as zone manager for Northern California and Nevada, his duties consisting in planning, supervising, and inspecting the installation of refrigerator plants within his district. His headquarters were in San Francisco, and he lived in Berkeley. Having finished his labors in Reno, he proceeded to the railroad station intending to board the San Francisco train leaving there at 9 o'clock in the evening; and as he stood on the edge of the station platform adjacent to the street identifying his hand luggage, which had just been deposited there by the hotel bus driver, he was struck by the wild bullet from the policeman's pistol, and died soon afterwards.

[1, 2] The commission's determination that Melke's injury happened in the course of his employment is not questioned; and, in view of the fact that he was required to travel about from place to place and to be in and around public places and upon the public streets, petitioners make no claim that any injuries he might have received as a result of exposure to the ordinary perils of the street and of such public places would not have been compensable; but they contend that the danger of being shot by a police officer in the pursuit of a fleeing criminal cannot be classified as a street risk or a travel hazard; and that, since Melke's injury was received from such source, the same is not compensable under the terms of the Workmen's Compensation Act (St. 1917, p. 831, as amended).

We are of the opinion that the present situation is analagous to the one considered in the case of Katz v. Kadans & Co., 232 N. Y. 420, 134 N. E. 330, 331, 23 A. L. R. 401, and must be governed by the legal principles declared therein. In that case a dairyman's chauffeur,

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★Rehearing denied. Hearing denied by Supreme Court.

while driving his employer's car along the street after having delivered certain dairy products, was stabbed without cause by an insane person who was running amuck upon the street; and it was claimed there, as it is here, that the accident did not arise out of a street risk. In holding to the contrary, the court said: "If the work itself involves exposure to perils of the street, strange, unanticipated, and infrequent though they may be, the employee passes along the streets when on his master's occasions under the protection of the statute. This is the rule unequivocally laid down by the House of Lords in England: 'When a workman is sent into the street on his master's business, * * * his employment necessarily involves exposure to the risks of the streets and injury from such a cause (necessarily) arises out of his employment.' Finlay, L. C., in Dennis v. White (1917) L. R. App. Cas. 479 [Ann. Cas. 1917E, 325, 15 N. C. C. A. 294]. So we have to concern ourselves only with the question whether claimant's accident arose out of a street risk. Cases may arise where one is hurt in the street, but where the risk is of a general nature, not peculiar to the street. Lightning strikes fortuitously in the street; bombs dropped by enemy aircraft do not expose to special danger persons in a street as distinguished from those in houses. Allcock v. Rogers (1918) House of Lords [W. N. 96, 87 L. J. K. B. N. S. 693, 118 L. T. N. S. 386, 34 Times L. R. 324, 62 Sol. Jo. 421] 11 B. W. C. C. 149. The danger must result from the place to make it a street risk, but that is enough if the workman is in the place by reason of his employment, and in the discharge of his duty to his employer. The street becomes a dangerous place when street brawlers, highwaymen, escaping criminals, or violent madmen are afoot therein as they sometimes are. The danger of being struck by them by accident is a street risk because it is incident to passing through or being on the street when dangerous characters are abroad. Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair, and crowds jostle, but mad or biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets which are peculiar to the use of the streets and do not commonly happen indoors."

The same reasoning was applied in a number of other cases. In Greenberg v. Voit, 250 N. Y. 543, 166 N. E. 318, the employee was sweeping the front stoop of a building in the performance of his duties as janitor, and was killed by gangsters who passed through the street in an automobile shooting indiscriminately; and it was held that the injury and death arose out of the employment. In Roberts v. Newcomb & Co., 234 N. Y. 553, 138 N. E. 443, the claimant was employed as outside man for a general printing firm, and, while passing along Wall street in New York in the performance of his duties, he was injured as a result of a bomb explosion; and it was held that the injury arose out of and in the course of his employment, and consequently was compensable. In Mahowald v. Thompson-Starrett Co., 134 Minn. 113, 158 N. W. 913, 915, 159 N. W. 565, a teamster employed by a furniture company was driving along a public street in the discharge of his duties, and, while passing along the street in front of a tall building under construction, was killed by a heavy load of steel beams falling on him as it was being hoisted to the top of said building. It was held that the accident arose out of his employment; the court saying: "Although the risk from the accident in question may be said to be external to the employment, yet the employment caused a special degree of exposure to the risk."

The theory upon which compensation is awarded in the class of accidents above mentioned is that the causal connection between the employment and the injury, which is essential to make it compensable, consists in the fact that the employment requires the presence of the employee upon the street and the fact that the injury was caused by some human or mechanical instrumentality incidental to the use of the street. In other words, as said in Globe Indemnity Co. v. Industrial Acc. Comm., 36 Cal. App. 280, 171 P. 1088, 1089, with respect to the facts of that case, "The causative danger was peculiar to the work, in that, had he [the employee] not been upon the street in the course of his duty, he would not have been injured." And, as held in Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744, the fact that the injuries to the employee are not of a kind to be anticipated nor peculiar to the employment in which he is engaged does not defeat the claim to compensation. To the same effect is General Accident, Fire & Life Assurance Corp. v. Industrial Acc. Comm., 186 Cal. 653, 200 P. 419. And under the modern rule now followed in England and all American jurisdictions except Massachusetts (see note II [d] 51 A. L. R. 514), the situation is not altered by the fact that the risk is one to which everyone else upon the street is also exposed (Globe Indemnity Co. v. Industrial Acc. Comm., supra); the vital question in such cases being "whether the employment exposed the workman to the risk by sending him on to the street, common though such risks were to all on the street." Katz v. Kadans, supra.

In support of their position, petitioners emphasize certain language used argumentatively in the decision in the case of Storm v. Industrial Acc. Comm., 191 Cal. 4, 214 P. 874; but an inspection of the facts of that case discloses that the dictum relied upon has no application here, because that was not a "street risk" case; the employee having been injured while working indoors.

It is our opinion that the authorities hereinabove cited fully sustain the determination of the respondent commission that Melke's injury arose out of his employment. The award is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

103 Cal. App. 135

PEOPLE v. MIDDLETON.★ (Cr. 1104.)

District Court of Appeal, Third District, California. Jan. 9, 1930.

Rehearing Denied Jan. 24, 1930. Hearing Denied by Supreme Court Feb. 6, 1930.

Criminal law ⚿998, 1202(6)—Judgment on pleas of guilty to forgery and prior convictions will not be vacated on ground defendant was not committed by magistrate (Pen. Code §§ 990, 995, 995a, 996).

Judgment entered on plea of guilty of forgery and prior convictions will not be vacated on ground that defendant had never been examined or committed by any magistrate on offense for which judgment was rendered under Pen. Code §§ 990, 995, 996, since reference in section 996 to "last section" must be read as still referring to section 995, notwithstanding enactment of section 995a by St. 1927, p. 1756.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

William W. Middleton was convicted of forgery and prior offenses on a plea of guilty. From an order denying a motion to vacate the judgment, he appeals. Affirmed.

William W. Middleton, in pro. per.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. On the 5th day of January, 1928, an information was filed in the superior court of the county of Plumas, accusing the defendant, William Middleton, of the crime of forgery, in that he forged a certain instrument set out in words and figures in the information; also charging that before the commission of the offense charged in the information the defendant was convicted of a felony in the United States District Court of Utah on or about the 7th day of May, 1921; also accusing the defendant of having been convicted of a felony in the district court of Missoula county, state of Montana, on or about the 25th day of September, 1922; and further accusing the defendant of having been convicted of a felony in the superior court of the county of San Diego, on or about the 20th day of November, 1923. Upon being arraigned upon the information referred to, and being informed, by the superior court, of his right to be represented by counsel, the defendant waived the appointment of counsel, and, upon the information being read, the defendant entered a plea of guilty to the offense charged in the information, and also a like plea of guilty to all the charges of prior felonies alleged against him. Within the time allowed by law, the defendant appeared for judgment, and, upon being informed by the court of the proceedings had and taken against him upon the information referred to, and being further asked if he had any legal cause to show why judgment should not be pronounced against him, the defendant answered that he had none, whereupon the court ordered that the defendant be imprisoned in the state prison of the state of California at Folsom, for the term to be fixed as provided by law. Thereafter the defendant moved the court to enter an order annulling, vacating, and setting aside the judgment just referred to on the ground that the defendant had never been examined or committed by any magistrate upon the offense for which said judgment was rendered, and that said judgment was void upon its face. This order being denied, the defendant appeals therefrom.

Upon this appeal the appellant has presented to the court a voluminous brief collecting practically all the cases touching upon the formality, the sufficiency and insufficiency of the orders of commitment made by different magistrates following the preliminary examinations of persons accused of public offenses. It may be admitted that these cases show that the order made by the committing magistrate in the instant case is defective in form, and possibly insufficient in substance; at least it is somewhat ambiguous and uncertain; but even if such admission be made, the defendant is not in a position now to raise the objections relied upon on this appeal. This is shown by a review of a few sections of the Penal Code. Section 990 of that Code specifies that upon the arraignment of a defendant he may, in answer to the arraignment, move to set aside the demurrer or plead to the indictment or information. Section 995 of that Code, so far as it relates to the information, permits the defendant to file a motion to set aside the information on the ground "that before the filing thereof the defendant had not been legally committed by a magistrate." And section 996 of that same Code reads as follows: "If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section."

At the time of the enactment of sections 995 and 996 of the Penal Code there was no such section as "995a." Therefore section 996 must be read, in its reference to the last section, as it stood prior to the enactment of section 995a of the Penal Code in 1927 (St. 1927, p. 1756). The two sections, 995 and 996 of the Penal Code, were both enacted February 14, 1872, and though subsequently amended in certain particulars, contained the por-

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★Rehearing denied. Hearing denied by Supreme Court.

tions of the section pertaining to these cases, and, as enacted in 1872, down to and until the enactment of section 995a of the Penal Code, 996 immediately followed section 995, and its reference to the preceding section was definite and certain. Not being referred to in section 995a as enacted in 1927, and not containing anything which conflicts with section 996 of the Penal Code, the reference in 996 of the Penal Code to the last section must be read as still referring to section 995 of the Penal Code. A reading of section 996 of the Penal Code would seem of itself to show a lack of merit in the appellant's contention made upon this appeal. However, a few cases may be cited. In People v. Bawden, 90 Cal. 195, 27 P. 204, a situation similar to the facts presented here was considered, and the court there said: "The objection that there was no preliminary examination and commitment of the defendant by a magistrate before the filing of an information is neither a ground of a motion for a new trial nor for a motion in arrest of judgment, and is waived if not taken by a motion to set aside the information upon the arraignment of the defendant."

To the same effect is the case of People v. Ronsse, 26 Cal. App. 100, 146 P. 65, where it was sought to raise the question of the legality of the defendant's commitment after conviction and judgment. It was there held that the defendant, not having made a motion as provided for in section 995 of the Penal Code, was precluded under the provisions of section 996 from urging the objection after conviction and judgment. That the rule likewise applies to indictments and shows that section 995 of the Penal Code must be complied with or the right to make such motions is waived, see the following cases: People v. Johnston, 48 Cal. 549; People v. King, 28 Cal. 265; People v. Stacey, 34 Cal. 307.

It necessarily follows from these citations that the order of the superior court denying the defendant's motion was correct and should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

BROOKS v. CITY OF MONTEREY.★

(Civ. 6885.)

District Court of Appeal, First District, Division 1, California. Dec. 30, 1929.

Rehearing Granted Jan. 29, 1930.

1. Pleading 🔑34(1)—Pleading must be liberally construed for purpose of determining effect with view to substantial justice between parties (Code Civ. Proc. § 452).

In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties, in accordance with Code Civ. Proc. § 452.

2. Negligence 🔑117—Contributory negligence, if relied upon as defense, must be specially pleaded.

Contributory negligence, if relied upon as a defense, must be specially pleaded, and facts constituting such negligence must be alleged and must show causal connection with injury.

3. Negligence 🔑117—Defense of contributory negligence does not require confession of negligence on part of defendant.

Defense of contributory negligence, though in effect a plea in confession and avoidance, does not require confession of negligence of defendant before setting up negligence of plaintiff as a defense.

4. Automobiles 🔑302—Answer alleging that automobile without any fault on part of defendant city and by want of due care was propelled over precipice was sufficient as plea of contributory negligence.

Answer of city, in action against it to recover damages for death of driver of automobile alleged to have been caused by defective condition of street, which alleged that without any fault on part of defendant and by want of due care in management of automobile said automobile was propelled over a precipice, was sufficient to constitute a plea of contributory negligence, in that the averment that defendant was without any fault refers to management of automobile, and not to alleged failure to maintain street in a safe condition.

5. Municipal corporations 🔑796—City's failure to maintain barriers at street terminus or to otherwise guard the same was not "nuisance" (Civ. Code, § 3479).

Failure of city to maintain barriers at terminus of street at precipice reasonably sufficient to prevent accident, or to light or otherwise guard the same, did not constitute a nuisance within Civ. Code, § 3479, as respecting defense of contributory negligence.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Nuisance.]

6. Counties 🔑143—Municipal corporations 🔑802—Schools and school districts 🔑89—Contributory negligence is defense to actions to recover against county, municipality, or school district for injuries resulting from dangerous condition of streets, highways, or property (St. 1923, p. 675).

Liability under St. 1923, p. 675, of a county, municipality, or school district for injuries resulting from dangerous or defective condition of public streets, highways, or property, is based upon negligence of agents or servants, and contributory negligence is defense to actions to recover therefor.

7. Municipal corporations 🔑755(1)—Generally, liability of municipal corporation for injuries from defects or obstructions in streets is for negligence only.

Generally, liability of a municipal corporation for injuries from defects or obstructions in its streets is for negligence only, and it is not

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★Rehearing granted. 290 P. 540.

an insurer of the safety of travelers, but is required to exercise ordinary care to maintain streets in a reasonably safe condition for those using them in a proper manner.

8. Automobiles 🔑305(10)—Evidence of automobile driver's intoxication was relevant to issue of contributory negligence in action against city for death from defective street.

In action to recover against city for death of automobile driver alleged to have been caused by defective condition of streets within municipality, evidence of decedent's physical or mental condition due to intoxication was relevant on issue of contributory negligence, though constituting no excuse for negligence on part of defendant.

9. Negligence 🔑72—Rule requiring person confronted with imminent danger to act only as reasonably prudent person applies only to those using due care.

Rule that one who, without negligence on his part, is suddenly confronted with imminent danger, is required to act only as a reasonably prudent person would act under the same circumstances, can be invoked only by those whose position of peril was not caused by their own want of due care.

10. Trial 🔑312(1)—Trial court has duty, if requested by jury, to give on any day all instructions properly applicable to case whether previously given or not (Code Civ. Proc. §§ 134, 614).

Trial court, under Code Civ. Proc. §§ 134, 614, has duty, if requested by a jury when deliberating on their verdict, to give on any day all instructions properly applicable to case, regardless of whether same have not been previously given.

11. Trial 🔑312(1)—Refusal on jury's request to charge relative to city's liability in case automobile, when plunging over precipice, was partly on private property, held erroneous.

In action against city to recover damages by reason of death of automobile driver alleged to have been caused by defective condition of streets, refusal of court to instruct jury, pursuant to their request, relative to liability of city in case automobile at time of plunging over precipice was partially on private property and partly on property belonging to city, *held* erroneous as being applicable to issues adduced by evidence.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action by Agnes I. Brooks, as administratrix of the estate of Egbert William Brooks, deceased, against the City of Monterey. Judgment for defendant, and plaintiff appeals. Reversed.

W. H. Metson and E. B. Mering, both of San Francisco, for appellant.

Argyll Campbell, of Monterey, and J. A. Bardin, of Salinas, for respondent.

PER CURIAM. An action by the administratrix of the estate of Egbert William Brooks, deceased, against the city of Monterey to recover damages for the death of the decedent alleged to have been caused by the defective condition of a street within the municipality. A jury returned a verdict for the defendant, and from the judgment entered thereon the plaintiff has appealed.

It is contended that contributory negligence, upon which the defendant relied as one of its defenses, was not pleaded, and also that the defense was not available in the present action; further, that the evidence was insufficient to support the verdict, and that the court erred in certain of its instructions to the jury, and by refusing others asked by the plaintiff.

The city of Monterey is a municipal corporation operating under a freeholders' charter. The street on which the accident happened is called Reeside street, its northeasterly terminus being at the edge of a declivity about 13 feet in height above the waters of Monterey bay. From this point the street, which is paved and curbed, extends southwesterly for about 4½ blocks. The complaint alleged that from September 16, 1924, until the day of the accident the terminus of the street was unlighted, unguarded, without barriers, signs, notices, or a watchman, by reason of which the street was in a dangerous and defective condition; that during all of said times the city manager, the street superintendent, and the council of the city had knowledge and notice of the condition described, but failed and neglected to remedy the same within a reasonable time after receiving such notice and knowledge. It was further alleged that at about 3 o'clock a. m. on October 11, 1925, the decedent "was traveling in his automobile on said Reeside street and was wholly unaware of said dangerous and defective condition, and was proceeding with due care for his own safety without fault on his part and while so traveling drove over said precipice into the bay of Monterey by reason of said unlighted and unguarded condition of said street and as a result lost his life. * * * "

The answer, after denying the existence of the conditions described in the complaint or that the officers of the defendant had notice or knowledge thereof, alleges as a further answer "and as and for a separate and distinct plea of contributory negligence" the following: "That the said Egbert William Brooks was at the time and place alleged in said Third Amended Complaint driving the said automobile upon said Reeside Street, a public highway in said city of Monterey, County of Monterey, State of California, while he was then and there under the influence of intoxicating liquor; that he was driving said automobile at an excessive rate of speed and in a reckless manner, and that said Egbert William Brooks failed to use due care or caution under the circumstances for the protection of himself and said automobile and that said Egbert William Brooks was generally negligent and careless in and about the operation and control of said automobile at said time and place, and so carelessly, negligently and improperly managed said automobile that by reason thereof, defendant is informed and believes, and on such information and belief alleges that said automobile was propelled across said Reeside Avenue to the left hand side of the highway of said Reeside Street in the direction in which said Egbert William Brooks was then and there traveling and across the sidewalk on said left hand side of said Reeside Street and that without any fault on the part of the defendant, and by want of due care in the management of said automobile by said Egbert William Brooks, said automobile was propelled over a precipice into the Bay of Monterey at a point northeasterly of said termination of Reeside Street and thereby said Egbert William Brooks lost his life, which said acts of carelessness and negligence on the part of said Egbert William Brooks proximately contributed to the death of said Egbert William Brooks and to the alleged damages, if any, there were."

[1-7] In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties. Section 452, Code Civ. Proc.; Estate of Wickersham, 153 Cal. 603, 96 P. 311. It is the rule that contributory negligence, if relied upon as a defense, must be specially pleaded. The facts constituting such negligence must be alleged and must show a causal connection with the injury (Crabbe v. Mammoth Mining Co., 168 Cal. 500, 143 P. 714), but the defense, while in effect a plea in confession and avoidance (Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376), does not require the defendant to confess negligence before setting up the negligence of the plaintiff as a defense (Hoffman v. Southern Pacific Co., 84 Cal. App. 337, 258 P. 397; 29 Cyc. [Pleading] 582; 1 Thompson on Negligence [2d Ed.] § 390, p. 375; Elliott on Railroads [3d Ed.] § 2085). Appellant insists, however, that in the absence of a confession of negligence by the defendant the above pleading was but a denial of negligence on its part, and insufficient as a plea of contributory negligence. In this connection stress is laid upon the allegation that "without any fault upon the part of the defendant and by want of due care in the management of said automobile * * * said automobile was propelled over a precipice into the Bay of Monterey. * * *" It is plain that the averment that the defendant was "without any fault" refers to the management of the automobile, and not to the alleged failure of the defendant to maintain the street in a safe condition. The pleadings stated facts having a causal connection with the injury and which were sufficient within the rule stated in Crabbe v. Mammoth Mining Co., supra, to constitute a plea of contributory negligence. While it has been held that the defense of contributory negligence is not applicable to an action sounding in nuisance (46 Cor. Jur. [Nuisances] § 29, p. 665; Bowman v. Humphrey, 132 Iowa, 234, 109 N. W. 714, 6 L. R. A. [N. S.] 1111, 11 Ann. Cas. 131), it is not claimed that the defendant owned or controlled the land at the foot of the declivity or was in any way responsible for the dangerous condition existing at the terminus of the street other than that it failed to maintain barriers at that point reasonably sufficient to prevent accidents or to light or otherwise guard the same. The statutory definition of a nuisance is: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any * * * public park, square, street, or highway. * * *" Civ. Code, § 3479. And so far as shown, no condition within the above definition was created or maintained by the defendant, plaintiff's sole ground for complaint being that the defendant, after its officers had notice or knowledge of the condition, neglected to provide barriers or other means reasonably sufficient to prevent injury to those using the street. St. 1923, p. 675. That the liability under the above act of a county, municipality, or school district for injuries resulting from the dangerous or defective condition of the public streets, highways, or property, is based upon the negligence of its agents or servants, and that contributory negligence is a defense to such actions, was in effect held in the following cases: Huff v. Compton City School District, 92 Cal. App. 44, 267 P. 918; Gorman v. County of Sacramento, 92 Cal. App. 656, 268 P. 1083; Dawson v. Tulare Union High School District (Cal. App.) 276 P. 424. Moreover, the rule is general that the liability of a municipal corporation for injuries from defects or obstructions in its streets is for negligence only, that it is not an insurer of the safety of travelers, but is required to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them in a proper manner, and that contributory negligence precludes a recovery. 43 Cor. Jur. (Municipal Corporations) § 1785, pp. 998, 999; Laney v. Chesterfield County, 29 S. C. 140, 7 S. E. 56; Bush v. Wathen, 104 Ky. 548, 47 S. W. 599; Quimby v. Woodbury, 63 N. H. 370; Giffen v. City of Lewiston, 6 Idaho, 231, 55 P. 545; Kelley v. Boston, 180 Mass. 233, 62 N. E. 259; McQuillin, Municipal Corporations (2d Ed.) § 2820; Elliott on Roads and Streets (4th Ed.) § 1153.

[8] Evidence was received tending to show that decedent was intoxicated during the evening previous to the accident, and in this connection the plaintiff proposed an instruction stating in substance that if the jury found that the terminus of the street was in

a dangerous and defective condition, that it was neither lighted nor guarded in a manner sufficient to warn travelers of its condition, and that one driving thereon and using ordinary care for his own safety would be likely to drive over the precipice, then the fact that the decedent was under the influence of intoxicants at the time of the accident could not be considered as contributory negligence. This instruction was refused. While the intoxication of the decedent was no excuse for negligence on the part of the defendant (Robinson v. Pioche et al., 5 Cal. 461), and it has been held that mere abstraction or lack of attention to the dangerous condition of a public way, even by one intoxicated, cannot be assigned as contributory negligence, nevertheless, evidence of the decedent's physical or mental condition due to intoxication was relevant to the issue of contributory negligence (Brkljaca v. Ross, 60 Cal. App. 431, 213 P. 290; Baldwin v. Pacific Auto Stages, Inc., 83 Cal. App. 635, 257 P. 130; 45 Cor. Jur. [Negligence] § 551, p. 997), and the court accordingly gave the following instructions, which clearly stated the rule and fully covered the instructions offered by the plaintiff: "The mere fact that one goes upon the highway in an intoxicated condition and is injured by driving his automobile over an embankment is not of itself proof of negligence of such driver, but such an intoxicated condition may be considered together with all the other facts and circumstances of the accident in order to determine whether or not the person so injured was guilty of negligence." The plaintiff also offered the following instructions, which were refused:

"If you find by a preponderance of evidence that Reeside Street at its termination in the bay was, on the morning of October 11th, 1925, at the time of the accident, in a dangerous and defective condition by reason of a declivity there, and that said dangerous and defective condition was unguarded or unlighted, and you further find by a preponderance of evidence that the governing board or council of the City of Monterey, or R. M. Dorton, the City Manager, or Manual S. Perry, the Street Superintendent of the City of Monterey then and there had knowledge or notice of said dangerous and defective condition, and that at said time said officers of said city, or any of them, had such notice or knowledge or notice of such condition for a reasonable time prior to the happening of said accident, in which to remedy such condition or in which to take such steps as might be reasonably necessary to protect the public against such dangerous and defective condition, and you find by a preponderance of evidence that they or any of them failed or neglected to take such steps as might be reasonably necessary to protect the public against such dangerous and defective condition, and if in addition to them you further find that at said time said deceased was traveling in his automobile upon said street and was at said time using ordinary care for his own protection and ran over said street and said declivity into the bay and thereby lost his life, then I instruct you that the plaintiff is entitled to recover from the defendant. I further instruct that at said time it is presumed that said deceased was using ordinary care, and the burden is on the defendant to prove that the deceased was not using ordinary care."

"I further instruct you that if you find that said deceased suddenly discovered when a few feet from the precipice that he was in danger and, in order to avoid danger, turned his automobile to the left and ran across the sidewalk and then over the precipice and thereby lost his life, and that in so doing, he was making the best endeavor that a reasonable man could make under the circumstances, then I instruct you that the plaintiff is entitled to recover."

[9] The first of the above instructions was fully covered by others given by the court. As to the second, while it is the rule that one who without negligence on his part is suddenly confronted with imminent danger is required to act only as a reasonably prudent person would act under the same circumstances (19 Cal. Jur. [Negligence] § 36, p. 598), the rule can be invoked only by those whose position of peril is not caused by their own want of due care (Neff v. United Railroads, etc., 188 Cal. 723, 207 P. 243; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066), and where, as here, there was evidence tending to show that decedent's perilous position was due to his own negligence, the omission therefrom of this question was sufficient ground for the rejection of the proposed instruction (McRae v. Erickson, 1 Cal. App. 326, 329, 82 P. 209; Vedder v. Birely, 92 Cal. App. 52, 267 P. 724).

[10, 11] The record shows that at 2 o'clock p. m. on Saturday, May 26, 1928, after the cause had been submitted to the jury, they were at their request brought into court, and in the presence of counsel the following occurred: A juror: "Your honor, we want to know if it would make any difference to the city of Monterey's liability—the fact of this car going off the sidewalk, or had it gone off the street. The evidence shows that the car did not go off the street. We are agreed upon that." The Court: "What you want is to know whether it would make any difference that the car, if it did, go off the street before reaching the end of Reeside Avenue?" A juror: "No, we want to know if it would make any difference in the city's liability if it had gone straight off the end of the street, or as it did go, off the sidewalk and on private property." The Court: "I wonder if you gentlemen can agree upon the testimony. * * * I think the testimony upon that point was that it was undisputed that part of the automobile, while traveling after it struck the curb, was on private property, and part was in Reeside Avenue." A juror: "Yes, we are agreed upon that testimony." Upon objection by counsel for respondent that no new instruction might properly be given on a holiday, the court declined to do more than read portions of its previous charge to the jury. Appellant offered an instruction on the question asked by the juror, and upon the above objection being sustained, requested that the trial be continued to the following Monday for reargument, which motion was denied. Section 134 of the Code of Civil Procedure provides that: "No court, other than the supreme court, must be open for the transaction of judicial business on any of the holidays mentioned in section 10, except for the following purposes: 1. To give upon their request, instructions to jury when deliberating on their verdict. * * *" It is clear from the language of the section that it was designed to meet situations of the kind here presented, and there can be no reasonable doubt that a court is empowered if requested by a jury deliberating on their verdict to give on any day all instructions properly applicable to the case (Code Civ. Proc. §§ 134, 614), and it is immaterial that the same have not been previously given.

The evidence established the fact that at a point about 40 feet from the terminus of the street the automobile left the pavement, passed over the curb, to the sidewalk, and proceeded toward the declivity with its left wheels on private property, and the right wheels upon the sidewalk. The inference might reasonably have been drawn from the circumstances shown that decedent, realizing his danger, attempted to turn his automobile to the left in order to avoid the declivity. Had the jury also found, as they might have, that decedent's position of peril was not due to his prevous negligence, the evidence would have supported the conclusion that his acts in attempting to escape the danger were those of a prudent person under similar circumstances. It is clear that the jury was in doubt as to the effect of the above upon the liability of the respondent; and while the court was not bound to give any particular instruction, it was nevertheless its duty to instruct upon all issues upon which evidence had been adduced, and appellant was entitled to proper instructions bearing upon any legitimate inference which might be drawn from the evidence. Thomas v. Visalia Electric R. R. Co., 169 Cal. 658, 147 P. 972. The record discloses no instruction on the question asked by the jury, nor does it set forth the instruction proposed in that connection by appellant, but the court having refused to entertain the offer or give any new instructions, no further action by appellant was required.

After a careful review of the entire record, including the evidence, we are satisfied that the question should have been answered, and are of the opinion that the failure to do so was prejudicial to the substantial rights of appellant, resulting as a reasonable probability in a miscarriage of justice.

The judgment is reversed.

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103 Cal. App. 139

PEOPLE ex rel. STATE BOARD OF CHIROPRACTIC EXAMINERS v. BERKELEY CHIROPRACTIC COLLEGE. (Civ. 7187.)★

District Court of Appeal, First District, Division 1, California. Jan. 10, 1930.

Rehearing Denied Feb. 8, 1930.

Appeal and error ⟹554(2), 627(2)—Appeal must be dismissed after statutory time for filing record, in absence of bill of exceptions or request to prepare transcript (Code Civ. Proc. §§ 650, 953a).

Where no bill of exceptions was proposed or settled, as provided by Code Civ. Proc. § 650, nor any request filed for preparation of transcript under section 953a, and no extensions of time were granted to prepare record, appeal must be dismissed after expiration of statutory period for preparation and filing of record.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action in quo warranto by the People, on the relation of the State Board of Chiropractic Examiners, to dissolve the Berkeley Chiropractic College, a corporation. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal. Appeal dismissed.

Sawyer & Sawyer and Frank W. Sawyer, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Frank V. Kington, of San Francisco, for respondent.

PER CURIAM. The Attorney General moves to dismiss the appeal herein upon the ground of the failure to file a transcript.

The motion is supported by the certificate of the county clerk, and the facts stated therein are not contradicted. It appears therefrom that the only step taken by appellant in furtherance of the appeal was to file a notice of appeal on March 5, 1929. There has been no bill of exceptions proposed or settled as provided in section 650 of the Code of Civil Procedure, nor was any request filed for the preparation of a transcript in accordance with the provisions of section 953a of said code. No extensions of time have been granted to prepare the record on appeal under either method above mentioned, and the statutory period within which such a record may be prepared and filed has long since expired. It follows, therefore, that the appeal must be dismissed. General Motors, etc., Corp. v. Holman, 63 Cal. App. 17, 217 P. 1086; Catania v. Guccione, 60 Cal. App. 717, 214 P. 495; Rule V of the Supreme Court and District Courts of Appeal. It is so ordered.

★Rehearing denied.

103 Cal. App. 108

NELSON v. THOMAS, Marshal, etc.
(Civ. 6651.)

District Court of Appeal, Second District, Division 2, California. Jan. 8, 1930.

1. Appeal and error 🔑32—Whether superior court judgment, on appeal from municipal court, is appealable to District Court of Appeal, depends on whether cause arose outside city limits.

Whether appeal to District Court of Appeal lies from judgment of superior court, affirming, modifying, or reversing judgment of municipal court, depends on whether cause of action arose, as disclosed by record, inside or outside limits of incorporated city where municipal court is situated.

2. Evidence 🔑10(4)—Court judicially knows Beverly Hills township is outside limits of city of Los Angeles.

Court takes judicial notice that township of Beverly Hills is outside of corporate limits of city of Los Angeles.

3. Appeal and error 🔑32—As respects appeal from superior court judgment, affirming municipal court judgment, cause of action for defendant in attachment accrued against marshal, where latter paid to plaintiff in attachment money received to secure release from attachment.

Where defendant, to obtain release of his automobile from attachment writ issued out of municipal court, paid deputy marshal a specified sum in lieu of bond outside corporate limits of city, and thereafter, without defendant's knowledge or order of court, marshal, within city limits, paid over said money to plaintiff in attachment suit and procured dismissal of action with prejudice, marshal's tortious act in paying over said money gave defendant a cause of action against marshal for money had and received, which cause of action accrued within city limits, as respects right to appeal to District Court of Appeal from superior court judgment, affirming judgment of municipal court.

4. Appeal and error 🔑32—Allegation that defendant became indebted to plaintiff within county held not to preclude claim cause arose within city, as respects appellate review.

Allegation in complaint in action for money had and received that defendant became indebted to plaintiff "within the county" of Los Angeles *held* not to preclude plaintiff from asserting that cause of action arose within city of Los Angeles, as respects defendant's right to appeal to District Court of Appeal from judgment of superior court, affirming municipal court judgment for plaintiff; quoted words being used merely by way of pleading that action arose within geographical jurisdiction of municipal court, and not as assertion that cause of action arose somewhere in county outside city limits.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Charles F. Nelson against Charles R. Thomas, as marshal of the Municipal Court, City of Los Angeles. Judgment of the municipal court adverse to defendant was affirmed by the superior court, and defendant appeals. On plaintiff's motion to dismiss the appeal. Appeal dismissed.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for appellant.

C. E. Spencer and Alfred E. Dennis, both of Los Angeles, for respondent

BURNELL, Justice pro tem. This case is before us on respondent's motion to dismiss the appeal, because of lack of jurisdiction in this court. The action was commenced, tried, and determined adversely to the defendant marshal of the municipal court of the city of Los Angeles in the last-named tribunal. From the judgment of that court, awarding the plaintiff $510.90, costs, and interest, the marshal appealed to the superior court, where the judgment of the municipal court was affirmed. From such judgment of affirmance, the defendant marshal has appealed to this court.

[1] "Whether an appeal to this court lies from a judgment of the superior court affirming, modifying, or reversing a judgment of the municipal court, * * * depends upon where the cause of action arose as disclosed by the record—whether inside or outside the limits of the incorporated city where the municipal court is situated." Johnston v. Wolf (Cal. App.) 280 P. 980, 981. If, therefore, the cause of action herein arose in the city of Los Angeles, an appeal does not lie to this court, and the judgment of the superior court was final; if it arose elsewhere within the jurisdiction of the municipal court, this court has jurisdiction to entertain the appeal. The only question presented by the motion therefore is: Where did the cause of action arise?

[2, 3] There is no dispute as to the facts as stated in the affidavit filed in support of the motion and in the findings of the municipal court. They are as follows: The respondent resides in the township of Beverly Hills, which, we take judicial knowledge, is outside of the corporate limits of the city of Los Angeles. Johnston v. Wolf, supra. In the latter part of February, 1927, one of the marshal's deputies called at respondent's residence and attached the latter's automobile pursuant to a writ of attachment issued out of the municipal court in an action brought by a collection agency against him. Respondent, in lieu of a bond on release of attachment, and to prevent the taking of his automobile under the writ, then and there paid to the marshal, through the deputy, the sum of $510.90 in cash. Although the money was received by the marshal in Beverly Hills township, for the sole purpose of securing the release of the attachment, and not in satisfaction or settlement of the claim sued on,

he took the money to his office in the city of Los Angeles, and, after keeping it there for at least three days, without any judgment or order of the court, and without any order from the defendant (respondent here), and without the latter's knowledge, paid it to the plaintiff in the attachment suit and procured from it a dismissal of the action with prejudice. Respondent, on learning what had occurred, made demand upon the marshal, at his office in the city of Los Angeles, for the return of his deposit, and, upon the marshal's refusal to comply with this demand, instituted the present action for money had and received.

It is appellant's contention "that, since the cash bond was taken in Beverly Hills in lieu of property taken in Beverly Hills from a defendant residing in and then in Beverly Hills, the obligation to return it, if there be any such obligation, was to return the money to that defendant in Beverly Hills," and hence that the cause of action arose there, and not in the city of Los Angeles, where the marshal had his office, and where the money was diverted from the purpose for which it had been handed over to the marshal, and by him paid to the plaintiff in the attachment suit in satisfaction of its claim. We are unable to agree with this contention. So long as the marshal retained the money in his possession for the purpose for which it had been handed to him, the respondent could have had no cause of action against him, unless the attachment suit had resulted in a judgment in favor of respondent, and the attachment had therefore been dissolved, and the marshal had then refused to return the cash deposit received in lieu of an undertaking. Nor would there have been a cause of action against the marshal, if he had deposited the money in court in lieu of such undertaking. But when the marshal, to quote appellant's own words as contained in his brief on this motion, "misunderstanding the purpose for which the cash was given to him (no malicious conduct is charged), brought the money into the city of Los Angeles, where he paid it over to the company which was suing Dr. Nelson, and caused them to dismiss the action against Dr. Nelson 'with prejudice,' " he, although acting without any wrongful intention, was in contemplation of law guilty of a misappropriation or conversion of the money. It was this tortious act, committed in the city of Los Angeles, which gave rise to respondent's cause of action. That cause of action arose immediately upon the unauthorized transfer of the money to the plaintiff in the attachment suit, and not prior thereto. Bell v. Bank of California, 153 Cal. 234, 242, 94 P. 889. The fact that respondent had the right to and did waive the tort and sue in assumpsit (see 3 Cal. Jur. 378, and cases cited therein) does not, of course, affect the fact that what created a cause of action in favor of respondent was the misuse of the money by the marshal, which misuse or diversion thereof from the purpose for which he had received it occurred in the city of Los Angeles.

Additional light is thrown on the problem before us by decisions in cases wherein the statute of limitations is discussed; for, although the question of time rather than that of place is involved in most of them, here the two are most closely interrelated. Thus it has been held that the cause of action ordinarily accrues when the obligation or liability matures, so that a suit may be based upon it (California Safe Deposit, etc., Co. v. Sierra, etc., Co., 158 Cal. 690, 112 P. 274, Ann. Cas. 1912A, 729; Merguire v. O'Donnell, 139 Cal. 6, 72 P. 337, 96 Am. St. Rep. 91), and that, if the liability is based upon a tort, the cause of action arises immediately upon the commission of the wrongful act (Lattin v. Gillett, 95 Cal. 320, 30 P. 545, 29 Am. St. Rep. 115), while if it is based upon a contractual relation, express or implied, it arises at the date of the breach and not at the date of the damage caused thereby (Crawford v. Duncan, 61 Cal. App. 647, 215 P. 573). It has also been held that, where a public officer is under obligation to retain personal control or custody of money, a cause of action accrues against him for its recovery from the time that, through his neglect, such control is lost. County of San Diego v. Dauer, 131 Cal. 199, 63 P. 338. Applying these principles to the case in hand, it is evident that the cause of action arose in the city of Los Angeles at the time of the wrongful diversion there of the respondent's money from the purpose for which it had been deposited with the marshal to another and unauthorized purpose.

[4] Appellant makes the additional point that, because respondent alleged in his complaint that the marshal became indebted to him "within the county" of Los Angeles, he thereby assumed a position which precludes him from now asserting that the cause of action arose within the city of Los Angeles. There is no merit to this contention. The words quoted were undoubtedly used merely by way of pleading that the action was within the geographical jurisdiction of the municipal court, and not as an assertion that the cause of action arose somewhere in the county outside of the limits of the city.

The appeal is dismissed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.